# UNAPPROVED

# THE SUPREME COURT

**419/2003**

**Murray C.J.**
**Kearns P.**
**Denham J.**
**Hardiman J.**
**Fennelly J.**

**IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED)**

**IN THE MATTER OF THE IMMIGRATION ACT 1999**

**AND IN THE MATTER OF THE ILLEGAL IMMIGRANTS**

**(TRAFFICKING) ACT 2000**

**BETWEEN**

**ABOSEDE OLUNWATOYIN MEADOWS**

**APPLICANT / APPELLANT**

**AND**

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**JUDGMENT of Murray C.J. delivered on the 21st day of January 2010**

The appellant is a Nigerian national who, on her arrival in Ireland in December 1999 at the age of 17, applied for refugee status so that she would be allowed to remain in the country. Her application was dealt with in accordance with the procedures then in place and culminated, after an unsuccessful appeal against the initial finding that she

should not be recommended for refugee status, in a refusal of that application by the Minister. That decision was communicated to the appellant by letter dated 18th September 2001. In that letter she was informed that the Minister proposed to make a deportation order in respect of her pursuant to section 3 of the Immigration Act 1999. She was also informed that, before such an order was made, that she was entitled to make representations to the Minister setting out any reasons as to why she should be allowed to remain temporarily in the State. In a letter dated 8th October 2001, written on her behalf by her solicitors, such written submissions were made. Subsequently, by letter dated 12th July 2002, the Minister made known that he had decided to make a deportation order in respect of the applicant pursuant to section 3 of the Act of 1999 and a copy of the order dated 8th July 2002 was attached.

Subsequently the appellant sought leave to apply for a judicial review of the Minister's decision to deport her so as to have that order quashed. In order to obtain such leave the appellant had to establish, to the satisfaction of the High Court, that there are substantial grounds for contending that the decision was invalid or ought to be quashed.

The High Court determined that the appellant had not established such grounds and refused to grant leave to bring judicial review proceedings.

Subsection 3(a) of section 5 of the Act of 2000 provides that there should be no appeal to the Supreme Court from the decision of the High Court in such a matter except with leave of the Court which may only be granted if the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.

In this case the High Court granted such a certificate to the appellant.

**The Appeal**

The point of law which was certified in accordance with s. 5 was couched in rhetorical terms as follows:

> *"In determining the reasonableness of an administrative decision which affects or concerns the constitutional rights or fundamental rights, is it correct*

*to apply the standards set out in O'Keeffe v. An Bord Pleanala [1993] 1 I.R. 39?"*

Subsequently the appellant lodged a formal notice of appeal and the grounds of appeal in that notice relate to the point of law certified by the learned trial Judge. A point of law certified pursuant to s. 53(a) of the Act of 2000 falls to be determined, not in the abstract, but within the context and on the basis of the facts and circumstances of the particular case. In this case the administrative decision referred to in the point of law certified by the High Court refers to the Minister's decision to deport the appellant.

In substance that point of law is the only issue which arises for a determination in this appeal.

**Facts and Circumstances of the Case**

For the purpose of her application for refugee status the appellant, as the first step in the process, filled out a questionnaire in the then prescribed form and included a statement of the reasons why she was seeking asylum.

In essence she explained that in Nigeria when a tribal war occurred between the Hausa Tribe and the Yoruba Tribe her family learned that a friend and business partner of her father, who belonged to the Hausa Tribe, was involved, that his first born son was killed and that he avowed to avenge his death. Prior to this occurring her father and that business partner and friend "*were even talking about marrying me [the appellant] to one of his [business partners] sons (against my wishes).*" The appellant stated that her mother and her baby sister had gone to the market on a particular day in the disturbances both of whom were presumed to have been killed since they have not been heard of since. She said that her father's business friend "*is very bitter and is out to get me and he said he wants my father to feel the pain he felt when the Yoruba killed his first born*". She then went on to express the hope that she could continue studying and when older marry whom she pleased. She added "*Because in our culture, when I marry they will circumcise me so that I will not sleep with another man. Every girl hates this and some die because of the pain and infection.*" In a subsequent oral interview she explained that her father had wanted her to get married rather than continue with her studies and that he wished her to be circumcised when she got married.

While it was part of the case made by the appellant in support of her claim for asylum that she would be exposed to a real risk of violence if returned to Nigeria by reason of tensions between the two tribes referred to and between Christians and Muslims in Nigeria the only factual aspect of her case which is relevant to the issue raised in this appeal is her contention that if returned to Nigeria she would be forced into a marriage arranged by her father and as a result would be subjected to "female circumcision" or as it is now generally identified, "female genital mutilation" ("FGM"). Thus the claim that she would be subjected to FGM if returned to Nigeria is central to the issue in this appeal.

The appellant's application for asylum was rejected. She was informed of this decision by a letter written on behalf of the Minister dated 30th June 2000. That letter stated, inter alia, "Your application has been considered on the basis of the information you provided in support of it, both in writing and at interview, and it has been decided that your application is not such to qualify you for refugee status …" It went on to state "You have not demonstrated a well founded fear of persecution for a Convention reason. Accordingly, your claim for asylum is rejected."

**Decision of the Refugee Appeals Tribunal**

The appellant appealed against that decision to the Refugee Appeals Tribunal.

That appeal was also rejected. The decision of the member of the Refugee Appeals Tribunal was provided to the appellant in written form and was dated 12th June 2001.

As regards the appellant's claim that she would be subjected to FGM if returned to Nigeria the findings of the member of the Appeals Tribunal included the following:

> "The second ground given by the applicant as giving rise to a well founded fear of persecution if she were returned to Nigeria related to the issues of a forced marriage and female genital mutilation. I accept without question the evidence of Ms D'Arcy that female genital mutilation is an abhorrent practice and amounts to a form of torture.
>
> It was submitted that the applicant's father was the dominant person in the household and was a rural man who would insist on an arranged marriage and

female genital mutilation of the applicant. The facts are not consistent with this latter submission. The applicant's father was a business man based in Lagos. His daughter received a full education. There is no evidence that the applicant's father at any time referred to the issues of an arranged marriage or female genital mutilation. I do not accept as plausible, given the differences in religious, cultural and tribal beliefs of the Hausa and Yoruba tribes that a marriage would be arranged between a Yoruba Christian and a Hausa Muslim. One of the few clear facts on the record of this case is that there was large scale violence between the Hausa and Yoruba tribes. The applicant's evidence of forced marriage and female genital mutilation rests on a comment made by her mother. The applicant stated that her mother is presumed to be dead. I do not accept that the facts of this case are similar to the cases furnished to me which gave strong and compelling details of family arguments in relation to young girls being subjected to female genital mutilation and a real risk of the practice being inflicted on them if they were returned to their country of origin. It is my view that the applicant has not established a credible connection between her circumstances and forced marriage and female genital mutilation."

The member of the Tribunal also went on to conclude, although she considered it not strictly necessary to do so, that if the appellant were returned to Nigeria it would be open to her to decide to live independently of her father if it were to be accepted, which it was not, that he represented a threat to her.

That decision was communicated to the appellant by letter dated 9th August 2001.

The appellant did not seek to challenge the decision of the Refugee Appeals Tribunal by way of judicial review.

Following the decision of the Refugee Appeals Tribunal a letter dated 18th September 2001 was written on behalf of the Minister to the appellant stating:

(a) The Minister had decided in accordance with s. 17(1)(b) of the Refugee Act 1996 as amended, to refuse to give her a declaration as a refugee for the reasons set out in the recommendation of the Refugee Appeals Tribunal.

(b) That her entitlement to remain temporarily in the State had expired.

(c) That the Minister proposed to make a deportation order in respect of the appellant pursuant to s. 3 of the Immigration Act 1999.

(d) That the appellant was entitled to make written representations to the Minister, in accordance with s. 3 of the Act of 1999, setting out any reasons as to why she should be allowed to remain temporarily in the State.

By letter dated 8th October 2001 the appellant's solicitor submitted to the Minister in accordance with s. 3 of the Act an application for leave to remain in the State. The letter referred to her application as "an application for leave to remain in the State on humanitarian grounds. The reasons advanced in that letter in support of that application included the following statement:

> "May we ask you to know that the applicant has argued as part of her refugee claim that she will be subjected to female genital mutilation shortly after the arranged marriage and further that is part of her decision by the Refugee Appeals Tribunal at appeal stage, the officer of the Tribunal, Ms Monica Lawlor stated after receiving evidence on the practice of FGM in Nigeria that, "I accept without question the evidence of Ms D'Arcy that female genital mutilation is an abhorrent practice and amounts to a form of torture". The letter argued, inter alia, that the force of the return of the appellant to Nigeria would amount to a violation of her fundamental right to "life, liberty and security of the person" under both national and international law.

This was a submission that her case was governed by s. 5 of the Refugee Act 1996 prohibiting refoulement where there is a threat to the freedom of a proposed deportee, within the meaning of that section. It is to be distinguished from the ad misercordiam matters submitted for the purpose of s. 3(6) of the Act of 1999.

**FGM**

Female genital mutilation, also referred to as female circumcision, is a practice which has been condemned by international bodies and national governments and many

NGOs as abhorrent. The material before the Minister suggests that FGM is not a practice which is required by or accords with the precepts of any particular religion but is a practice embedded in many countries or regions by custom or tradition. The memorandum submitted to the Minister and dated 19th June 2002 notes "Although FGM is reputed to take place in Nigeria efforts have been made to stamp out its practice. Governments have publicly opposed FGM and representatives in Parliament have described the practice as "barbaric"… According to country of origin information FGM is considered a 'traditional practice' and there is no support for the practice in Christianity or Islam. However, this does not stop some people from supporting the practice." The wide range of material contained in the file placed before the Minister dealt with the nature and extent of the practice of FGM in Nigeria from many perspectives including the fact that it was prohibited by law and the difficulties of supervising or enforcing the law. The material before the Minister also included the personal circumstances relied upon by the appellant in her claim that she personally ran the risk of being subjected to FGM if returned to Nigeria and the findings of the Refugee Appeals Tribunal rejecting her claim. Since this appeal is not concerned with the merits of the Minister's decision it is not necessary to examine the situation with regard to the practice and prevalence of FGM in detail. Reference is of course made elsewhere in the judgment to the claim made by the appellant herself so far as this is relevant to the nature of the decision which the Minister had to take and the manner in which he was required to address it.

**Decision of the Minister pursuant to Section 3**

On the 12th July 2002 the appellant was informed of the Minister's decision pursuant to s. 3 of the Act of 1999. The Minister's decision was stated in the following terms:

> "I am directed by the Minister for Justice, Equality and Law Reform to refer to your current position in the State and to inform you that the Minister has decided to make a deportation order in respect of you under s. 3 of the Immigration Act, 1999 a copy of the order is enclosed with this letter.
>
> In reaching this decision the Minister has satisfied himself that the provisions of s. 5 (Prohibition of Refoulement) of the Refugee Act 1996 are complied with in your case.

> The reasons for the Minister's decision are that you are a person whose refugee status has been refused and, having had regard to the factors set out in s. 3(6) of the Immigration Act, 1999, including the representations received on your behalf, the Minister is satisfied that the interests of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweigh such features of your case as might tend to support your being granted leave to remain in this State."

In arriving at his decision the Minister had before him a memorandum prepared by an executive officer of the Repatriation Unit of the Department dated 26th June 2002 and headed "Examination of file under Section 3 of the Immigration Act 1999". This was a summary of the appellant's application and the course which it followed from her initial application up to the point when the solicitor made representations to the Minister pursuant to s. 3 of the Act of 1999. It recites the essential facts on foot of which the appellant claimed that if returned to Nigeria she would be required by her father to marry her friend's son against her wishes and subjected to FGM. It also referred to various other matters put forward on her behalf and the finding of the Refugee Appeals Tribunal. All the relevant documentation relating to the various stages at which her application was dealt with were included in the file. The summary notes that:

> "Ms Meadows also claims that within her culture the act of circumcision is performed on females shortly after their marriage … . Her father wished her to undergo this act after her marriage to Mr. Alhaji Salisu's son …. His death scuppered these plans. Ms Meadows claims that she offered to pay her father the sum of money that the dowry would have brought the family if he were to allow her to attend university and marry whomever she chose …. Again the death of Mr. Salisu's son was to prove fortuitous …. However, the cultural nature of the practice in Nigeria determines that the mothers of young daughters are able to veto treatment if they propose it.
>
> Although FGM is reputed to take place in Nigeria efforts have been made to stamp out its practice. The Government have publicly opposed FGM and representatives in Parliament have described the practice as "barbaric". According to the country of origin information FGM is considered a

"traditional practice". There is no support for the practice in Christianity or Islam. However, this does not stop some people from supporting its practice. Muslims, particularly in Northern Nigeria consider the practice pagan and it does not form any part of the marriage process for Muslim girls. Muslim boys are circumcised but mostly from an early age …. Ms Meadows claims that she is a Christian and this act of circumcision was to be performed on her after her marriage to a Muslim man. The act she claimed was part of the Yoruban culture."

The memorandum concludes with the following recommendation to the Minister:

"Ms Aboscde Oluwatoyin Meadows' case was considered under s. 5 of the Refugee Act, 1996 and under s. 3(6) of the Immigration Act 1999. Refoulement was not found to be an issue in this case. Therefore, on the basis of the foregoing, I recommend that the Minister sign the deportation order across." (*emphasis added).*

**Section 3 of the Immigration Act 1999**

The relevant provisions of s. 3 are as follows:

"3. – (1) Subject to the provisions of s. 5 (Prohibition of Refoulement) of the Refugee Act 1996, and the subsequent provisions of this section, the Minister may by order (in this Act referred to as "a deportation order)" require any non national specified in the order to leave the State within such period as may be specified in the order and to remain thereafter out of the State."

Subsection 2 specifies the persons in respect of whom a deportation order may be made and includes at (2)(f) "A person whose application for asylum has been refused by the Minister".

Subsection (3) of s. 3 provides as follows:

"(3)(a) Subject to subsection (5) where the Minister proposes to make a deportation order he or she shall notify the person concerned in writing of his or her proposal and of the reasons for it and, where necessary and possible, the

person shall be given a copy of the notification in a language that he or she understands.

(b) A person who has been notified of a proposal under paragraph (a) may, within 15 working days of the sending of the notification, make representations in writing to the Minister and the Minister shall—

(i) before deciding the matter, take into consideration any representations duly made to him or her under this paragraph in relation to the proposal, and

(ii) notify the person in writing of his or her decision and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language that the person understands.

(6) In determining whether to make a deportation order in relation to a person, the Minister shall have regard to—

(a) the age of the person;

(b) the duration of residence in the State of the person;

(c) the family and domestic circumstances of the person;

(d) the nature of the person's connection with the State, if any;

(e) the employment (including self-employment) record of the person;

(f) the employment (including self-employment) prospects of the person;

(g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);

(h) humanitarian considerations;

(i) any representations duly made by or on behalf of the person;

(j) the common good; and

(k) considerations of national security and public policy,

so far as they appear or are known to the Minister.

**Section 5 of the Refugee Act 1996**

Section 5 of the Act of 1996 prohibits refoulement in the following terms:

"5.- (1) A person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.

> (2) Without prejudice to the generality of subsection (1), a person's freedom shall be regarded as being threatened if, inter alia, in the opinion of the Minister, the person is likely to be subject to a serious assault (including a serious assault of a sexual nature).

It is important to note that it is not in issue in this case that the forcible subjection of a woman to FGM would constitute a serious assault within the meaning of subsection (2) and therefore must be regarded as a threat to a person's freedom within the meaning of subsection (1)

**The Test for Judicial Review**

The issue in this appeal concerns the ambit of the criteria which the Courts should apply when judicially reviewing the validity of administrative decisions.

The primary and contemporary reference points for the approach which the Courts should adopt when judicially reviewing such decisions are the decisions of this Court in *The State (Keegan) v. The Stardust Victims Compensation Tribunal* [1986] I.R. 642 and *O'Keeffe v. An Bord Pleanala & Ors* [1993] 1 I.R. 39. At this point I think it is convenient to first set out the essential conclusions in these two cases before commenting further on them.

**The Keegan Case**

In the Keegan case the claimant sought judicial review of the decision of the Stardust Compensation Tribunal to review the refusal of his claim for damages for nervous shock which he said he had sustained as a result of the tragic death of his two daughters and injuries to a third daughter in the Stardust Club in February 1981. The case made on his behalf was that the Tribunal ought to have decided, on the basis of the medical reports, that the claimant was entitled to an award and that the decision to make no award was arbitrary and capricious.

In his judgment in this particular case Finlay C.J., noted that the prosecutor mainly relied on the principles enunciated in the decision of *The Associated Provincial Ltd v. Wednesbury Corporation* [1948] 1 K.B. 223. That was a decision of the Court of Appeal in England and Finlay C.J., cited a passage from the judgment of Lord Greene M.R. as succinctly stating the principle enunciated in that decision. The passage was as follows:

> "The Court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once the question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the Court can interfere."

Finlay C.J., then went on to state

> "I have had the opportunity of reading the judgment which is about to be delivered in this case by Henchy J., I find myself in complete and precise agreement with him in the definition which he gives of unreasonable conclusions or decisions within the ambit of what has come to be known as the Wednesbury case …. It seems to me that the principle that judicial review is not an appeal from a decision but a review of the manner in which the decision was made as is stated by *Lord Brightman in the Chief Constable of North Wales Police v.* Evans [1982] 1 W.L.R. 1155, is consistent with this concept of judicial review based on the irrationality of the decision."

Later Finlay C.J. observed "…I have come to the conclusion that it would be impossible to say that the decision of the Tribunal which rejected the claim of the prosecutor was irrational, within the meaning of the Wednesbury case … or was of such a nature that this Court would be entitled to review it on certiorari."

He concluded by stated:

> "It is quite clear in all the authorities that this Court has no function to express any view as to whether, presented with the same evidence as the Tribunal was presented with and accepting as the Tribunal did the particular standards and legal propositions in accordance with which they should assess those claims, this Court would have come to the same view as the Tribunal has done. All this Court can or should do is to reach a conclusion as to whether the decision

> reached by the Tribunal was open to it on the evidence before it and having regard to the matters which it is bound to take into consideration."

Henchy J., for his part, and with whom Finlay C.J., expressed his "complete and precise agreement" referred (at 658) to judicial review of a decision on the grounds of unreasonableness as being "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".

Although rejecting the review based on "accepted moral standards" referred to in a House of Lords decision Henchy J., did state that "the ethical or moral postulates of our Constitution will, of course, make certain decisions invalid for being repugnant to the Constitution, but in most cases a decision falls to be quashed for unreasonableness, not because of the extent to which it has departed from accepted moral standards (or positive morality) but because it is indefensible for being in the teeth of plain reason and common sense." He then went on to conclude on this point by stating "I would myself consider that the tests of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision maker should be held to have acted ultra vires, for the necessarily implied constitutional limitation of jurisdiction in all decision making which affects rights or duties requires, inter alia, that the decision maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."

**The O'Keeffe Case**

This particular case concerned judicial review of a decision of An Bord Pleanala which granted permission for the erection of a radio transmission station and a 300 ft mast in County Meath. The applicant in that case sought to have the decision of the Board set aside, inter alia, that it was irrational and one which no reasonable planning authority, properly exercising its discretion could have decided.

In giving his judgment in that case Finlay C.J., with whom the other members of the Court agreed, applying the decision in Keegan stated:

"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'.

I am satisfied that these three different methods of expressing the circumstances under which a court can intervene are not in any way inconsistent with one another, but rather complement each other and constitute not only a correct but a comprehensive description of the circumstances under which a court may, according to our law, intervene in such a decision on the basis of unreasonableness or irrationality."

Finlay C.J., went on to cite with approval, which had also been cited by Henchy J., in Keegan, a passage from the judgment of Lord Brightman in *R v. The Chief Constable of North Wales XP Evans* [1982] 1WLR 1155 namely: "Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the Court as observed, the Court would in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power … judicial review as the words imply is not an appeal from a decision, but a review of the manner in which the decision was made."

Finlay C.J., went on to observe "It is clear from these quotations that the circumstances under which the Court can intervene on the basis of irrationality with the decision maker involved in an administrative function are limited and rare." He later added: "The Court cannot interfere with the decision of an administrative

decision making authority merely on the grounds that (a) it is satisfied on the facts as found it would have raised different inferences and conclusions or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it."

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.

**The Test for Judicial Review**

The jurisdiction conferred by the Constitution on the Courts in relation to decisions or actions of the other organs of Government, legislative and executive, are more extensive than the common law would allow. Unlike the historical or traditional common law constitutional structure parliament under our Constitution is not the supreme authority on the law.

Article 34.3.2 expressly confers jurisdiction on the High Court, and this Court on appeal, to review the validity of any law passed by the Oireachtas having regard to the provisions of the Constitution. Walsh J. said in *Byrne v. Ireland* [1972] I.R. 241at 281, "Where the people and the Constitution create rights against the State or impose duties upon the State, a remedy to enforce these must be deemed to be also available." He also observed in *Meskell v. Coras Iompair Eireann* [1973] I.R. 121 at 132 "It has been said on a number of occasions in this Court, and most notably in the decision in *Byrne v. Ireland* … that a right to be guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries with it its own right to a remedy or for the enforcement of it." It is the task of the Courts to ensure that where rights are wrongfully breached that remedies are effective. (See *Carmody v. Minister for Justice, Equality and Law Reform, Supreme Court, Unreported 23rd October 2009).*

Furthermore, in examining the compatibility of a statutory provision with the provisions of the Constitution the Court may subject it to a proportionality test. Judicial review of legislation by reference to the principle of proportionality has been

exercised by this Court without trespassing on a core constitutional function of the Oireachtas to decide policy and to legislate accordingly. See for example: *Heaney v. Ireland* [1994] 3 I.R. 593, *In Re Article 26 and the Employment Equality Bill* 1997 2 I.R. 321 and *In Re Article 26 and the Health (Amendment)(No. 2) Bill 2004.*

Judicial review is concerned with the Courts exercising their constitutional duty to ensure that powers, governmental and administrative, are exercised within the law and the Constitution and, inter alia, in a manner consistent with the rights of individuals affected by them.

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."

No issue arises in this case concerning the broad or general jurisdiction, constitutional or otherwise, of the Courts to review executive acts or decisions and the issue concerns the particular criteria according to which the Court may exercise that jurisdiction when the decision of a Minister, in a case such as this, is being reviewed. Nonetheless, I think it appropriate to refer to the constitutional context in which the Courts exercise their jurisdiction to review not only laws passed by the Oireachtas but also administrative decisions.

As Henchy J., pointed out in the Keegan case there is the "necessarily implied constitutional limitation of jurisdiction in all decision making which affects rights or duties" and that constitutional limitation requires "that the decision maker must not flagrantly reject or disregard fundamental reason or common sense".

Accordingly when Finlay C.J., approved of the statement that judicial review was concerned, not with the decision, but with the decision making process, he was not referring to simply a review of the procedural process by which the decision is made to the exclusion of other considerations.

As is patently evident from the dicta in the Keegan and O'Keeffe cases the substance of a decision may be set aside on various grounds, the most obvious in this context being irrationality, even though the decision maker whether an individual or tribunal, may have complied in every respect with the constitutional requirements as to due process and fair procedures.

Administrative decisions may be impugned on the grounds that the decision was mala fide, taken for an improper purpose so as to constitute an abuse of power, for a purpose not provided for by governing legislation. As Henchy J., pointed out in Keegan administrative decisions may be declared invalid "for being repugnant to the Constitution". In most cases concerning judicial review a decision is impugned for unreasonableness.

The purpose of judicial review is to provide a remedy to persons who claim their rights have been prejudiced by an administrative decision which has not been taken in accordance with law or, the principles of constitutional justice, as explained in *East Donegal Co-Operative v. Attorney General* [1970] I.R. 317.

In this case the appellant seeks to impugn the Minister's decision on the grounds of the irrationality of that decision.

In 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.

In doing so the Court may examine whether the decision can be truly "said to flow from the premises" as Henchy J., put it in Keegan, if not it may be considered as being "fundamentally at variance with reason and common sense".

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. 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.

In *Radio Limerick One Limited v. I.R.T.C.* [1997] 2 ILRM 1 at 20 Keane J., with whom other members of the Court concurred, acknowledged, if to a qualified extent, that the principle of proportionality may have a role to play in examining whether an administrative decision could be considered to be invalid on the grounds of irrationality.

Keane J., first of all referred to an article entitled 'Proportionality: Neither Novel nor Dangerous' by British authors, Professor Geoffrey Jowell and Lord Lester of Herne Hill (New Directions in Judicial Review (1988)). Of that article he noted "the learned authors argue persuasively that the recognition of proportionality as a doctrine in administrative law would not permit intervention in the merits of decisions of public officials to an extent greater than the Wednesbury test already allow. They urge, on the contrary, that its adoption, where appropriate, would be of assistance in eliminating the somewhat vaguer standards which would otherwise prevail in this area of the law." Keane J., then went on to state:

> "Whatever view may be taken as to the desirability of that approach, it can be said with confidence that, in some cases at least, the disproportion between the gravity or otherwise of a breach of a condition attached to a statutory privilege and the permanent withdrawal of the privilege would be so gross as to render the revocation unreasonable within the Wednesbury or Keegan formulation. Thus, in the present case, if the amount of advertising in the applicant's programmes had on two widely separated occasions exceeded the permitted statutory limit for a few seconds, the permanent revocation of the licence with

all that was entailed for the livelihood of those involved, would clearly be a reaction so disproportionate as to justify the Court in setting it aside on the grounds of manifest unreasonableness."

Although that statement of Keane J., was obiter it was indicative of the function which the principle of proportionality can properly play in examining the validity of administrative decisions.

It is inherent in the principle of proportionality that where there is grave or serious limitations on the rights and in particular the fundamental rights of individuals as a consequence of an administrative decision the more substantial must be the countervailing considerations that justify it. The respondents acknowledge this in their written submissions where it was stated "Where fundamental rights are at stake, the Courts may and will subject administrative decisions to particularly careful and thorough review, but within the parameters of O'Keeffe reasonableness review". In the same submissions the respondents stated "as to the test of reasonableness, the respondents have already made it clear that they have no difficulty whatever with the proposition that, in applying O'Keeffe, regard must be had to the subject matter and consequences of the decision at issue and that the consequences of that decision may demand a particularly careful and thorough review of the materials before the decision maker with a view to determining whether the decision was unreasonable in the O'Keeffe sense."

The principle of proportionality was both implicitly and expressly invoked in the judgments of Finlay C.J., and Walsh J., (with whom other members of the Court agreed) in the Fajujonu case. (cited above)

It was implicitly invoked by Finlay C.J., when he spoke of the need for a limitation on the constitutional rights of the family to be justified by grave and substantial reasons associated with the common good in the following passage:

> *"The discretion, it seems to me, which in the particular circumstances of a case such as this is vested in the Minister for Justice to consider as to whether to permit the entire of this family to continue to reside in the State, on the one hand, or to prevent them from continuing to reside in the State, on the other hand, is a discretion which can only be carried out after and in the light of a*

*full recognition of the fundamental nature of the constitutional rights of the family. The reason, therefore, which would justify the removal of this family as it now stands, consisting of five persons, three of whom are citizens of Ireland, against the apparent will of the entire family, outside the State has to be a grave and substantial reason associated with the common good."*

*"In these circumstances I am satisfied that the protection of the constitutional rights which arise in this case require a fresh consideration now by the Minister for Justice, having due regard to the important constitutional rights which are involved, as far as the three children are concerned, to the question as to whether the plaintiff should, pursuant to the Act of 1935, be permitted to remain in the State. I am however satisfied also that if, having had due regard to those considerations and having conducted such enquires as may be appropriate as to the facts and factors now affecting the whole situation in a fair and proper manner, the Minister is satisfied that for good and sufficient reason the common good requires that the residence of these parents within the State should be terminated … then that is an order he is entitled to make pursuant to the Act of 1935."*

*"There are no grounds, in my view, on the facts proved in this case nor arising from the attitude taken on behalf of the Minister in this case which would warrant this Court in concluding that the Minister and his officers would carry out the functions which now remain to be carried out by them pursuant to the Act of 1935 otherwise than in accordance with fair procedures and having regard to the rights which might have been identified in the judgments of the Court. I would, therefore, dismiss this appeal." (emphasis added).*

In that case the Court held that the Minister would have to revisit and decide again, in the light of changed circumstances since his initial decision, whether the applicants in that case, who were parents of children of Irish nationality, should be deported. Walsh J., with whom the three other members of the Court expressly agreed, expressed the view that the decision would have to be taken by the Minister with due regard for the principle of proportionality, in the following passage:

> "*I agree with the opinion expressed by the Chief Justice that there was nothing to suggest that the Minister had applied his mind to any of these considerations and the matter will have to be re-considered by the Minister, bearing in mind the constitutional rights involved. In my view, he would have to be satisfied, for stated reasons, that the interests of the common good of the people of Ireland and of the protection of the State and its society are so predominant and so overwhelming in the circumstances of the case, that an action which can have the effect of breaking up this family is not so disproportionate to the aims sought to be achieved as to be unsustainable." (emphasis added).*

In the circumstances of that case the Court clearly envisaged that the Minister would be required to state his reasons. As Hardiman J., stated in F.P v. Minister for Justice [2002] 1 I.L.R.M. 16 at 43 "… it seems clear that the question of the degree to which a decision must be supported by reasons stated in detail will vary with the nature of the decision itself." That was a case dealing with a decision of the Minister to reject the so called humanitarian grounds relied upon by a proposed detainee where the discretion of the Minister is much broader than that which the Minister enjoys when making a decision on non refoulement and s. 5 of the Act. Also, I agree with Fennelly J's analysis of that case.

In *Lobe & Ors v. the Minister for Justice, Equality and Law Reform* [2003] IESC 3 relying on the statements of Walsh J., and Finlay C.J., in Fajujonu I observed "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."

On the particular facts in that case I concluded "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."

The onus of course rests on an applicant to establish, where the principle of proportionality is relevant, that the decision is disproportionate. In the Lobe case I concluded "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." 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.

I am of the view that the principle of proportionality is a principle that may be applied for the purpose of determining whether, in the circumstances of a particular case, an administrative decision may properly be considered to flow from the premises on which it is based and to be in accord with fundamental reason and common sense. In applying the principle of proportionality in this context I believe the Court may have regard to the degree of discretion conferred on the decision-maker. In having regard to the degree of discretion a margin of appreciation should be allowed to the decision-maker in choosing an effective means of fulfilling any legitimate policy objectives.

Accordingly I am satisfied that the principle of proportionality has a legitimate and proper function in examining whether, in accordance with the principles of Keegan and O'Keeffe, in particular those outlined by Henchy J., an administrative decision is valid.

**English Cases and "Anxious Scrutiny"**

Counsel for the appellant submitted that the Court should extend the basis for judicial review of administrative decisions beyond the parameters set out in Keegan and O'Keeffe by submitting the decision of the Minister to a form of "heightened scrutiny" or "anxious scrutiny". These terms derive from a range of English judicial decisions relied on by counsel primarily, *Minister for Defence, ex parte Smith 1996*

*QB 517, re (Mahmood) v. Secretary of State for the Home Department 2001 1 WLR 840, and Regina v. Lord Saville & Others 2001 WLR 1855*.

The question of a recourse to the so-called "anxious scrutiny" test had been previously raised in the case of *V.Z. v. The Minister for Justice, Equality and Law Reform & Others 2002 2 I.R. 135*. In that case it was found unnecessary to address that issue. I have a certain sympathy for the view of McGuinness J., in that case where she stated:

> "I have a certain difficulty in the interpretation of the phrases used by the English Courts in the cases to which we have been referred - "anxious scrutiny", - "heightened scrutiny", and similar phrases. From a humane point of view it is clear that any Court will most carefully consider a case where basic human rights are in question. But from the point of view of the law, how does one define the difference between, say, "scrutiny", "careful scrutiny", "heightened scrutiny", or "anxious scrutiny"? Can it mean than in a case where the decision-making process is subject to "anxious scrutiny" the standard of unreasonableness/irrationality is to be lowered? Surely not. Yet it is otherwise difficult to elucidate the legal significance of the phrase. It must be said that this aspect of the case was not fully argued before this Court so that my remarks in this context are merely a preliminary impression. Further consideration must await a fuller argument in a future case."

Of course those cases involved much more than the semantic maze adverted to by McGuinness J., as she would have been the first to acknowledge if she had occasion to address the issue in substance. The judgments in those cases engage in an illuminating and often erudite discussion and analysis as to how the traditional common law principles for judicial review could be structured and enhanced so as to give an effective remedy to persons whose rights, and in particular human rights, have been prejudiced by administrative decisions. Apart from any disadvantages that might be perceived by the adoption of different criteria for judicial review according to the nature of the rights involved as envisaged by those cases I am of the view that the issue raised in this case can be properly and more appropriately resolved in the context of our constitutional framework and the case-law of this Court referred to

above. I therefore do not consider it apposite or useful to embark on a detailed review of those English cases.

**Review of the Minister's Decision in this Case**

The Minister's decision was taken pursuant to s. 3 of the Act of 1999.

That section empowers the Minister to make a deportation order requiring a non national to leave the State and to remain thereafter out of the State. The appellant is one of the persons specified in subsection (2) of that section in respect of whom a deportation order may be made namely "a person whose application for asylum has been refused by the Minister". There are two vital qualifications to the Minister's power to make such a deportation order.

The first is to be found in subsection 1 of s. 3 which makes the power to make a deportation order subject to the provisions of s. 5 of the Refugee Act 1996. That section has been cited in full above and it provides a clear prohibition on any person being expelled from the State in any manner whatsoever where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of the various matters referred to in that subsection. Subsection 2 of s. 5 goes on to specify that a person's freedom shall be regarded as being threatened, if, inter alia, in the opinion of the Minister the person is likely to be subjected to a serious assault (including a serious assault of a sexual nature).

Accordingly the Minister would have no power to make a deportation order in respect of the appellant if he was of the opinion that she was likely to be subjected to a serious assault.

Accordingly, before making a deportation order the Minister is required to consider in the circumstances of each particular case whether there are grounds under s.5 which prevent him making a deportation order. In cases where there is no claim or factual material put forward to suggest that a deportation order would expose the deportee to any of the risks referred to in s. 5 then no issue as regards refoulement arises and the decision of the Minister with regard to s. 5 considerations is a mere formality and the rationale of the decision will be self evident.

On the other hand if such material has been presented to him by or on behalf of the proposed deportee, as the case here, the Minister must specifically address that issue and form an opinion. Views or conclusions on such issues may have already been arrived at by officers who considered a proposed deportee's application for asylum, at the initial or appeal stages, and their conclusions or views may be before the Minister but it remains at this stage for the Minister and the Minister alone in the light of all the material before him to form an opinion in accordance with s. 5 as to the nature or extent of the risk, if any, to which a proposed deportee might be exposed. This position is underscored by the fact that s. 3 envisages that a proposed deportee be given an opportunity to make submissions directly to the Minister on his proposal to make a deportation order at that stage. The fact that certain decisions have been made by officers at an earlier stage in the course of the application for refugee status does not absolve him from making that decision himself.

The case of *Baby O v. Minister for Justice Equality and Law Reform* [2002] 2 I.R 169, was one in which an applicant sought to resist deportation on the grounds that she was pregnant and that deportation would be a breach of the right to life of the unborn due to deficient pre-natal and post-natal medical services in her own country. According to the head note the learned trial Judge, who had refused the application, certified that his decision involved a point of law of exceptional public importance, namely whether the Minister had the legal right or entitlement to deport a person who had failed to secure a declaration of refugee status from the State where she alleged she was pregnant.

Keane C.J., in his judgment concluded that the learned High Court Judge was correct in dismissing the application because it was out of time and certain other proceedings by way of judicial review had been struck out by consent. However while he found that it was "not strictly necessary to consider whether, on the merits, the applicant had in any event established an arguable case for the granting of leave in respect of these reliefs", it would be useful for the Court to decide the issues which had been debated in the course of the appeal".

Another key finding of Keane C.J., (at 181) was that the learned High Court Judge was correct in concluding that "this case has nothing to do with abortion or the right to life of the unborn or what is sometimes referred to as a woman's right to choose

…" He also concluded (at 182) that such and like matters (deficient health care or life expectation) would plainly not be a ground for interfering with deportation.

At the initial stages of her application for refugee status the second applicant in that case claimed that she was involved with a particular cult in Lagos, Nigeria and had been informed by the High Priest of the cult that she should bring human heads as soon as possible for "rituals" and that the mark of death was placed on her for not carrying out this order. It is not stated in the judgment that this was a ground advanced during her interview before an officer of the Department as a basis for relying on a threat to her life or freedom within the meaning of Article 5 but in particular there is no indication that it was relied upon in any form when representations were later made on her behalf to the Minister pursuant to s. 3 of the Act.

In that case, in dealing with the Minister's decision on s. 5 of the Act of 1966 (the prohibition against refoulement) at the s. 3 stage of the process Keane C.J., having noted that the second applicant had submitted that fair procedure requires the Minister to give reasons for holding that s. 5 had been satisfied stated "I am satisfied that this submission is also without foundation. Section 5 of the Act of 1996, does not require the first respondent to give any notice to a person in the position of the second applicant that he proposes to make a decision under that section: it simply requires the first respondent to satisfy himself as to the refoulement issue before making a deportation order. In this case, representations having been made to the first respondent as to why the second applicant should not be deported, she was informed that:-

> "The Minister has satisfied himself that the provisions of s. 5 (Prohibition of Refoulement) of the Refugee Act 1996 are complied with in your case."

I am satisfied there is no obligation on the first respondent to enter into correspondence with a person in the position of the second applicant setting out detailed reasons as to why refoulement does not arise. The first respondent's obligation was to consider the representations made on her behalf and notify her of his decision: that was done, and accordingly, this ground was not made out."

Keane C.J., did not refer to any material specifically relevant to refoulement, as distinct from humanitarian grounds, which were relied upon by the applicant at that stage. If there was no such material then the Minister's decision on s.5 would have been one of form only and not required any rationale.

However, I do not in any event understand Keane C.J's statement in that case as absolving the Minister from ensuring that his decision pursuant to s. 3 at that stage, in a case where an applicant has relied in his or her submissions on material expressly relevant to the prohibition on refoulement, is in terms which would enable the rationale, at least, of the decision to be discerned expressly or by inference. Certainly, the Minister when making a decision in relation to s. 5 on non refoulement is not bound, absent special circumstances at least, to enter into correspondence with the person concerned setting out the detailed reasons as to why refoulement does not arise. If the criteria for judicial review set out in Keegan and O'Keeffe are to be effectively deployed, even in circumstances where the application of the principle of proportionality does not arise, at the very least the rationale underlying the decision must be discernible expressly or inferentially.

The second qualification on the power conferred on the Minister to make a deportation order arises from the provisions of ss. 3 and 6 of s. 3 of the Act of 1999. By virtue of these provisions the Minister is required to have regard to the representations made at that stage by the proposed deportee, and the matters referred to in ss. 6, before deciding whether to proceed with the making of a deportation order.

The specific matters which the Minister is required to take into account in deciding whether to make a deportation order as set out in ss. 6 of s. 3 and are generally referred to as the humanitarian grounds upon which the Minister may decide not to make a deportation order notwithstanding that the person concerned has no legal right to remain in the State. The subsection is cited in detail above but the matters to be taken into account include the personal circumstances of the persons concerned such as their duration of residence, family and employment history and humanitarian considerations generally as well as the common good and considerations of national security and public policy.

As regards the actual decision of the Minister as quoted in full earlier in this judgment I consider that it falls into two parts reflecting the two qualifications to which I have referred on his power to make a deportation order. One is the s. 5 prohibition as refoulement the other the ad misercordiam considerations with regard to matters set out in s. 3(6).

The first essential part of the Minister's decision is the statement "in reaching this decision the Minister satisfied himself that the provisions of s. 5 (Prohibition of Refoulement) of the Refugee Act 1996 are complied with in your case."

I interpret the Minister's ensuing paragraph in which he states, inter alia, that he is satisfied that "the interests of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweighs such features of your case as may tend to support your being granted leave to remain in the State" as referring exclusively to his discretionary power when considering the so called humanitarian grounds advanced on behalf of the applicant.

**Section 5**

An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.

Unless that is so then the constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective.

In my view the decision of the Minister in the terms couched is so vague and indeed opaque that its underlying rationale cannot be properly or reasonably deduced.

The recommendation with which the memorandum submitted to the Minister with the file is not helpful and adds to the opaqueness of the decision. That states that "Refoulement was not found to be an issue in this case."

This decision is open to multiple interpretations which would include one that refoulement was not an issue and therefore it did not require any discretionary

consideration. On the other hand it may well be that the Minister did consider refoulement an issue and that there was evidence of the appellant in this case being subject to some risk of being exposed to FGM but a risk that was so remote that being subject to FGM was unlikely: alternatively he may have considered that while there was evidence put forward to suggest that the appellant might be subjected to FMG that evidence could be rejected as not being of sufficient weight or credibility to establish that there was any risk.

The fact remains that it is not possible to properly discern from the Minister's decision the actual rationale on foot of which he decided that s. 5 of the Act had been "complied with". Accordingly in my view there was a fundamental defect in the conclusion of the Minister on this issue.

In the circumstances I am satisfied that the appellant has established that there are "substantial grounds" within the meaning of that term, for impugning the Minister's decision and I would therefore allow the appeal and grant leave to the appellant to bring a judicial review in relation to that ground only.

**Section 3(6) Consideration**

As regards the second aspect of the Minister's functions under s. 3, namely, the requirement to take account of the so called "humanitarian" grounds advanced by an applicant I am of the view that the Minister has been conferred with a broad discretion in this regard. He has to balance, on the one hand, the personal circumstances and other matters referred to in ss. 6 of s. 3 and the common good, public policy including the integrity of the asylum system, on the other. In virtually every case there will be some humanitarian consideration and, unlike s. 5, even if he is of the opinion that there are humanitarian considerations which tend to support a claim that a deportee be permitted to remain, even temporarily he is not bound to accede to such a request since he has to balance those considerations with broader public policy considerations which may not be personal to the person concerned. It is evident from the terms of the decision that he took all the relevant considerations into account but explained that "the interests of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweigh such features of your case as might tend to support your being granted leave to remain in this State".

This is quintessentially a discretionary matter for the Minister in which he has to weigh competing interests and only the Minister, who has responsibility for public policy in this area, is in principle in a position to decide where that balance lies. One cannot rule out that there might be exceptional circumstances in which the principle of proportionality might arise but as a general rule the principle of proportionality would not arise for consideration in such cases and in any event the appellant has not shown that there is any basis for considering that there was any lack of proportionality in the decision taken by the Minister in this particular respect.

Accordingly I would grant leave to the appellant to apply for judicial review as sought at paragraph d) I and II of the Statement of Grounds; on the grounds set out in paragraph e) 1, 3, 5 and 7, insofar as they relate to section 5 (prohibition of refoulement) of the Refugee Act, 1996.

# THE SUPREME COURT

**Murray C.J.**
**Kearns P.**
**Denham J.**
**Hardiman J.**
**Fennelly J.**

**[S.C. No. 419 of 2003]**

**IN THE MATTER OF THE REFUGEE ACT, 1996 AS AMENDED and IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000**

**BETWEEN:**

**ABOSEDE ALUNWATOYN MEADOWS**

**APPLICANT/APPELLANT**

**AND**

**THE MINISTER FOR JUSTICE EQUALITY AND**

**LAW REFORM, IRELAND**

**AND**

**THE ATTORNEY GENERAL**

**RESPONDENTS**

**JUDGMENT of Kearns P. delivered on the 21st day of January**

**2010.**

I have read the comprehensive judgment about to be delivered by Hardiman J. and agree entirely with the reasoning and conclusions which he expresses in it.

This is a case where there have already been two merit-based hearings which have been the subject of adjudications adverse to the applicant and in respect of which no judicial review remedy was sought. The final step in the elaborate procedures for protecting the rights of this applicant then lay in her entitlement under S.3(3)(b) of the Immigration Act, 1999 to have the Minister consider representations as to why she should not be deported. This stage of the process can only be seen as an *ad misericordiam* application. It is not a revisitation of every aspect of the earlier hearings and decisions. As such it seems to me that there are very few ways in which the decision arrived at by the Minister at this stage of the procedures can be challenged. One might be where the relevant materials were never before the Minister. Another might arise where significant new or additional factual information became available which had not been available at the time of the merit-based hearings. Neither of those circumstances arose in the instant case.

I do not believe the test of proportionality has a role to play in determining whether the court should intervene to quash a decision of the kind given here – by which I mean a decision on an *ad misericordiam* plea made after two merit-based hearings which were not themselves

challenged. It is a test more appropriate to determine if a statutory provision is compatible with the Constitution or to consider if it invades a constitutional right more than is necessary. While it may serve well as a test for assessing first instance decisions in the context of judicial review it is in my view a quite inappropriate test to apply to a decision made by the Minister at the *ad misericordiam* stage of the decision-making process. It cannot but plunge the court into a further consideration of the merits and demerits of the particular case which have long since been determined.

Nor do I believe that the Minister in this context is required to give detailed or elaborate reasons for his decision and I would entirely agree with the views expressed in this sort of context by Geoghegan J. in *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26 when he stated (at p.34):-

> *"I do not think there was any obligation, constitutional or otherwise, to set out specific or more elaborate reasons in that letter as to why the application on humanitarian grounds was being refused. The letter makes clear that all the points made on behalf of the applicant had been taken into account and of course they were set out in a very detailed manner. The letter is simply stating that the (Minister) did not consider the detailed reasons sufficient to warrant granting the permission to remain in Ireland on humanitarian grounds. It was open to the (Minister) to take that view and no court can interfere with the decision in those circumstances."*

I believe that to expand the criteria for judicial review beyond those stated in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 or *Keegan v. Stardust Victims Compensation Tribunal* [1986] I.R. 642 would represent a significant hiking up of judicial activism which would, in this case at least, result in a quite inappropriate encroachment into the decision-making functions of the Executive. No matter how such an extended role might be presented or justified, the expanded meaning extended now to those decisions by the majority judgments in this case will involve a merit- based review of a ministerial decision by judges who lack any particular constitutional mandate to adopt such a role, and who may be far less qualified for that purpose than the decision-maker. If such an expanded view of the role of judges is to extend to all areas of judicial review it will engulf the courts in a greatly increased volume of cases which will be of even greater length than at present, given that decision-makers will inexorably be constrained in consequence to justify their decisions to the courts. It will in my view render our judicial review system, already struggling in one respect under the vast weight of asylum related court applications, virtually inoperable.

I believe the decisions in *Keegan* and *O'Keeffe* have, as stated by Hardiman J., provided a set of coherent principles which have stood the test of time and which are, in his words, "*transparent, stable and readily understandable"*. I do not favour recalibrating the principles in a way

which would create uncertainty and confusion as to where the parameters for intervention by a court would now lie.

I believe the applicant's constitutional rights have been fully vindicated by the process of hearings, appeals, judicial review options and the final ad misericordiam application in this case.

I would therefore answer the question posed in the certificate in the affirmative. I would refuse to grant leave on any ground and would dismiss the appeal.

# THE SUPREME COURT

**[Appeal No: 419/2003]**

**Murray C.J.**
**Kearns P.**
**Denham J.**
**Hardiman J.**
**Fennelly J.**

**Between/**

**Abosede Oluwatoyin Meadows**

**Applicant/Appellant**

**and**

**The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General**

**Respondents**

**Judgment delivered the 21st day of January, 2010 by Denham J.**

1. The High Court has certified a question of law for determination by this Court.

2. The question is:-

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

**The Doctrine of Reasonableness**

3. This case turns on the meaning and application of the common law doctrine of reasonableness in judicial review. The test of reasonableness has been the subject of many cases over the decades. In **The State (Keegan) v. Stardust Victims' Compensation Tribunal** [1986] I.R. 642, Henchy J. stated, at p.658:-

> "I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted *ultra vires*, for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."

4. A later case arose in the context of planning and development legislation. In **O'Keeffe v. An Bord Pleanála** [1993] 1 I.R. 39 at p.70, Finlay C.J. stated:-

> "'Irrational decision'.
> The question arising on this issue falls to be decided in accordance with the principles laid down by this Court in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 which are set out in the judgment of Henchy J. in that case, with which in respect of the legal principles applicable, all the other members of the Court specifically agreed.
>
> In dealing with the circumstances under which the Court could intervene to quash the decision of an administrative officer or tribunal on 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.'
>
> I am satisfied that these three different methods of expressing the circumstances under which a court can intervene are not in any way inconsistent one with the other, but rather complement each other and constitute not only a correct but a comprehensive description of the circumstances under which a court may, according to our law, intervene in such a decision on the basis of unreasonableness or irrationality."

5. Finlay C.J. went on to point out that the circumstances in which a court may intervene on the basis of irrationality are limited and rare. He stated that a court cannot interfere with a decision-making authority merely on the grounds that it is satisfied on the facts that it would have raised different inferences and conclusions, or that it is satisfied that the case against the decision was stronger than the case for it.

6. There are two other important factors in his analysis: (a) the nature of the decision-maker, and (b) the burden of proof. As regards the nature of the decision-maker, Finlay C.J. stated, at pp.71 to 72:-

> "Under the provisions of the Planning Acts the legislature has unequivocally and firmly placed questions of planning, questions of the balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of the planning authorities and the Board which are expected to have special skill, competence and experience in planning questions. The court is not vested with that jurisdiction, nor is it expected to, nor can it, exercise discretion with regard to planning matters."

In **O'Keeffe v. An Bord Pleanála** the decisions under review were those made by An Bord Pleanála and related to planning matters, an area of special skill and competence.

7. In **O'Keeffe v. An Bord Pleanála**, there were three important matters for consideration and application:-

a) An analysis to determine if the decision in issue was fundamentally at variance with reason and common sense.

b) An analysis of the nature of the decision maker.

c) A recognition that the burden of proof rests upon the applicant for judicial review.

The skilled nature of the decision maker in issue required such a refined approach. However, the application of the strict nature of the test in **O'Keeffe v. An Bord Pleanála** is limited to decisions of skilled or otherwise technically competent decision makers. I am satisfied that **O'Keeffe v. An Bord Pleanála** has been construed too narrowly and in that manner applied too broadly. The decision in **O'Keeffe v. An Bord Pleanála** related to a specialised area of decision making where the decision maker has special technical or professional skill. A court should be slow to intervene in a decision made with special competence in an area of special knowledge. The **O'Keeffe v. An Bord Pleanála** decision is relevant to areas of special skill and knowledge, such as planning and development.

**Common Law Doctrine**

8. The test of reasonableness in a judicial review is a matter which has been addressed in cases over many decades. It is a doctrine of the common law. Of its very nature it is a doctrine that is inherent in the system and has been applied to many new areas of the law as they develop within the legal system.

9. As the Oireachtas legislates in new areas of law a consequence is that new lists of cases rise in the courts. A good example of this is the growth of what are termed "the asylum" lists in the High Court. Such cases raise issues of personal rights and fundamental freedoms. An increase in such cases has occurred in other common law jurisdictions also. Other courts of the common law have reconsidered the test to be applied by the courts judicially reviewing such cases.

**Other jurisdictions**

10. Other jurisdictions have approached the growth of judicial review and fundamental rights in different ways. It appears to me that the issue should be addressed

in this State by applying Irish jurisprudence. In other words, there should be a common law approach in the context of the Constitution and the law.

**Effective remedy**

11. Judicial review should be an effective remedy. This is so especially when access to the courts has been curtailed by legislation. The process should be such as to give an effective remedy to the decisions under review, including those impinging on fundamental rights and freedoms.

12. The review in this case arises under s.5(2)(b) of the Illegal Immigrants (Trafficking) Act, 2000, hereinafter referred to as "the Act of 2000", which makes provision for an application for judicial review. The section limits access to the courts in a number of ways. (a) It provides that a person shall not question the validity of a series of decisions otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts. (b) The time for such an application is limited to a period of fourteen days commencing on the date on which the person was notified of the decision, unless the High Court considers there is good and sufficient reason for extending the period in which the application should be made. (c) Also, such an application should be made by motion on notice and the statute places a specific burden upon the applicant, i.e. the High Court must be satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed. (d) Further, that decision is final. No appeal lies to the Supreme Court from a decision of the High Court except with the leave of the High Court, which leave will be granted only where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the High Court.

13. Section 5 of the Act of 2000 was considered by this Court in **The Illegal Immigrants (Trafficking) Bill, 1999** [2000] 2 I.R. 360 and determined to be

constitutional. It was held that the requirements of s.5 did not constitute a denial of access to the courts nor could it be interpreted as restricting the right of any person to bring proceedings pursuant to Article 40.4.2˚ of the Constitution. Foreign nationals were held to have a constitutional right of access to the courts and were entitled to the same degree of fairness as a citizen.

**Time limitation**

14. In relation to the time limitation, the Court stated, at p.393:-

> "… the court is of the view that the State has a legitimate interest in prescribing procedural rules calculated to ensure or promote an early completion of judicial review proceedings of the administrative decisions concerned. However, in doing so, the State must respect constitutional rights and in particular that of access to the courts. Accordingly, the court is of the view that there are objective reasons concerning the public interest in the certainty of the validity of the administrative decisions concerned on the one hand and the proper and effective management of applications for asylum or refugee status on the other. Such objective reasons may justify a stringent limitation of the period within which judicial review of such decisions may be sought, provided constitutional rights are respected."

Thus, while the time limitation was held to be constitutional, the proviso, as throughout the judgment, was that constitutional rights be respected.

**Burden of proof**

15. In **The Illegal Immigrants (Trafficking) Bill** [2000] 2 I.R. 360, this Court considered the issue of the burden of proof, the requirement that the High Court shall not grant leave unless the Court is satisfied that there are substantial grounds for contending that the decision is invalid or ought to be quashed. Reference was made to **McNamara v. An Bord Pleanála** (No.1) [1995] 2 I.L.R.M. 125, where Carroll J. interpreted the phrase "substantial grounds" in the Local Government (Planning and Development) Act, 1992 as being equivalent to "reasonable", "arguable", and "weighty" and not "trivial" or "tenuous". This Court stated in **The Illegal Immigrants (Trafficking) Bill 1999** that:-

> "The court is of the view that the imposition of a requirement to show "substantial grounds" in an application for leave to apply for judicial review is one which falls within the discretion of the legislature. It is not so

> onerous, either in itself or in conjunction with a fourteen day limitation period, as to infringe the constitutional right of access to the courts or the right to fair procedures."

16. The High Court in this case, having reviewed the law, held:-

> "Accordingly, I take the view that as a matter of law, the applicant has to satisfy this Court that the grounds as made out for seeking leave to apply for judicial review are reasonable, arguable and weighty, with the added proviso that they must not be trivial or tenuous."

I would affirm this analysis taken by the learned High Court judge as to the term "substantial grounds".

**Access to court**

17. Access to court is a fundamental right. However, in addition, the access permitted should be an effective remedy. A remedy which is so limited that fundamental issues, such as fundamental rights, are not considered may not be effective. If the legislature has already limited access to the courts then that factor should not be joined with a principle from the common law which further limits the review so as to render it a breach of the Constitution.

It is the duty of the Court to ensure that the review process affords an effective remedy, especially when access to the court is limited by legislation. While the legislation applicable in this case has been held to comply with the Constitution, the use of rules at common law to restrict further the access to the courts could affect the constitutionality of the legal process.

**Fundamental rights**

18. Fundamental rights arise in some cases where decisions are being judicially reviewed. When the decision being reviewed involves fundamental rights and freedoms, the reviewing court should bear in mind the principles of the Constitution of Ireland, 1937, the European Convention on Human Rights Act, 2003, and the rule of law, while applying the principles of judicial review. This includes analysing the reasonableness of a

decision in light of fundamental constitutional principles. 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.

**Proportionality**

19. While the test of reasonableness as described in **The State (Keegan) v. Stardust Victims' Compensation Tribunal** and in **O'Keeffe v. An Bord Pleanála** did not expressly refer to a concept of proportionality, and while the term "proportionality" is relatively new in this jurisdiction, it is inherent in any analysis of the reasonableness of a decision.

20. "Proportionality" has been expressly referred to in judicial reviews in recent years. The doctrine of proportionality has roots in the civil law countries of Europe but it has been applied in other common law countries, as well as in Ireland. For example, in **Radio Limerick One Ltd v. Independent Radio and Television Commission** [1997] 2 I.R. 291, Keane J. stated at pp.311 and 312:-

> "The grounds on which the High Court can set aside a decision of a body such as the commission established by the Oireachtas with specified functions and powers have been made clear in a number of decisions and need be referred to only briefly. The *locus classicus* is the frequently cited passage from the judgment of Lord Greene, M.R. in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 K.B. 223."

Keane J. went on to quote from the **Wednesbury** case, and from Henchy J. and Griffin J. in **The State (Keegan) v. Stardust Victims' Compensation Tribunal**. He stated:-

> "Thus in the present case, if the only ground on which the commission terminated the applicant's contract was the carrying of the outside broadcasts and they were wrong in law in treating, as they did, those broadcasts as advertisements within the meaning of the Act, it is difficult to see how their decision could be described as 'reasonable' either in terms of *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223 or on the application of the criteria proposed by Henchy J. in *The State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642."

Keane J. then discussed the use of the test of proportionality in determining whether legislation was unconstitutional. The learned judge noted that no Irish authority had been cited for the proposition that the principle of proportionality could be invoked as a test on an administrative act. He referred to an approach being developed in England and stated at p.314 that:-

> "Whatever view may be taken as to the desirability of that approach, it can be said with confidence that, in some cases at least, the disproportion between the gravity or otherwise of a breach of a condition attached to a statutory privilege and the permanent withdrawal of the privilege could be so gross as to render the revocation unreasonable within *Associated Provincial Picture Houses* Ltd. v. *Wednesbury Corporation* [1948] 1 K.B. 223 or *The State (Keegan)* v. *Stardust Victims Compensation Tribunal* [1986] I.R. 642 formulation. Thus, in the present case, if the amount of advertising in the applicant's programmes had on two widely separated occasions exceeded the permitted statutory limit by a few seconds, the permanent revocation of the licence, with all that was entailed for the livelihood of those involved, would clearly be a reaction so disproportionate as to justify the court in setting it aside on the ground of manifest unreasonableness. It is unnecessary to emphasise how remote that example is from what admittedly occurred in the present case." [emphasis added]

This analysis of the proportionality test and the reasonableness test highlights the underlying similarity, with which I agree.

21. Irish Courts have referred previously to the concept of proportionality as described in Canada. Costello J. stated in **Heaney v. Ireland** [1994] 3 I.R. 593:-

> "The means chosen must pass a proportionality test. They must (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair the right as little as possible; and (c) be such that their effects on rights are proportional to the objective: see **Chaulk v. R.** [1990] 3 SCR 1303, at pages 1335 and 1336."

Costello J. went on to consider whether the restrictions imposed in that case were proportional to the object sought to be achieved. I would adopt an approach to the proportionality test similar to that of Costello J..

22. The nature of the proportionality test is that, as described above, it must be rationally connected to the objective; not arbitrary, unfair, or irrational. The inherent

similarity may be seen in the requirement in **O'Keeffe v. An Bord Pleanála** that the decision not be irrational, or at variance with reason or common sense.

**Principles**

23. It appears to me that the principles to be applied in a judicial review application, to determine if a decision is reasonable or irrational, are fundamentally as described by Henchy J. in **The State (Keegan) v. Stardust Victims' Compensation Tribunal** [1986] I.R. 642. They are broad principles.

24. A narrower aspect of the test, as stated by Finlay C.J. in **O'Keeffe v. An Bord Pleanála**, applies in circumstances where the review is of a decision of a technical or skilled or professional decision maker in the area of that special technical or skilled knowledge. The general test is not as narrow.

25. The relevant factors in the general test are as follows:-

(i) In judicial review the decision-making process is reviewed.

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

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

(iv) In considering the test for reasonableness, the basic issue to determine is whether the decision is fundamentally at variance with reason and common sense.

(v) The nature of the decision and decision maker being reviewed is relevant to the application of the test.

(vi) Where the legislature has placed decisions requiring special knowledge, skill, or competence, for example as under the Planning Acts, with a skilled decision maker, the Court should be slow to intervene in the technical area.

(vii) The Court should have regard to what Henchy J. in **The State (Keegan) v. Stardust Victims' Compensation Tribunal** referred to as the "implied constitutional limitation of jurisdiction" in all decision-making which affects

rights. Any effect on rights should be within constitutional limitations, should be proportionate to the objective to be achieved. If the effect is disproportionate it would justify the court setting aside the decision.

**The test**

26. The test to be applied for unreasonableness was stated by Henchy J. in **The State (Keegan) v. Stardust Victims' Compensation Tribunal** [1986] I.R. 642 at p.658. In **O'Keeffe v. An Bord Pleanála** [1993] 1 I.R. 38 at p.70, Finlay C.J. explained that the issue in that case fell to be decided in accordance with the principles laid down by this Court in **The State (Keegan) v. Stardust Victims' Compensation Tribunal** which, he stated, were set out in the judgment of Henchy J., with which all the other members of the Court agreed. Finlay C.J. referred further to the judgment of Henchy J., as set out earlier in this judgment. There was no departure from the principles as set out by Henchy J. The **O'Keeffe v. An Bord Pleanála** case was required to be decided in the specific situation where the decision-makers had made decisions exercising specific skill and knowledge.

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. As Keane J. stated in **Radio Limerick Ltd v. Independent Radio and Television Commission** [1997] 2 I.R. at pp.311 – 312, the disproportion between the gravity or otherwise of a breach of a condition attached to a statutory privilege and the permanent withdrawal of the privilege could be so gross as to render the revocation unreasonable within **The State (Keegan) v. Stardust Victims' Compensation Tribunal** formulation.

Thus a decision could be so disproportionate as to justify the court in setting it aside on the ground of manifest unreasonableness.

**Decision under review**

27. This appeal arises by way of an application for leave to apply for judicial review by Abosede Oluwatoyin Meadows, the applicant/appellant, referred to as "the applicant" in this judgment. The decision which the applicant seeks to have judicially reviewed was communicated to her by letter dated the 12th July, 2002. That letter was from an officer in the Department of the Minister, on behalf of the Minster, and it commenced:-

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

28. The deportation order of the 8th July, 2002 stated:-

> "WHEREAS it is provided by subsection (1) of section 3 of the Immigration Act, 1999 (No. 22 of 1999) that, subject to the provisions of section 5 (prohibition of *refoulement*) of the Refugee Act 1996 (No. 17 of 1996) and the subsequent provisions of the said section 3, the Minister for Justice, Equality & Law Reform may by order require a non-national specified in the order to leave the State within such period as may be specified in the order and to remain thereafter out of the State;
>
> WHEREAS Ms. Abosede Oluwatoyin Meadows a.k.a. Ms. Oluwatoyin Abosede Meadows is a person in respect of whom a deportation order may be made under subsection (2)(f) of the said section 3;
>
> And WHEREAS the provisions of section 5 (prohibition of *refoulement*) of the Refugee Act 1996 and the provisions of section3 are complied with … …

> NOW, I, Michael McDowell, Minister for Justice, Equality & Law Reform, in exercise of the powers conferred on me by the said subsection (1) of section 3, hereby require you the said Ms. Abosede Oluwatoyin Meadows a.k.a. Ms. Oluwatoyin Abosede Meadows to leave the State within the period ending on the date specified in the notice served on or given to you under subsection (3)(b)(ii) of the said section 3 pursuant to subsection (9)(a) of the said section 3 and to remain thereafter out of the State."

**High Court judgment**

29. The High Court (Gilligan J.) on the 4th November, 2003 described the facts of the case which led up to the issue of law. With the benefit of that judgment I shall refer to some of the salient facts. The applicant is a Nigerian national born on the 25th September, 1982. She arrived in Ireland in December, 1999, aged seventeen. She alleged that she was forced to flee Nigeria following clashes between her tribe, the Yoruba, and the Hausa tribe. Her mother and sister were involved in tribal clashes and are presumed dead. Her father intended to marry her off to a son of a business associate who was a member of the Hausa tribe. The applicant claims that as a result of this planned forced marriage she would be subject to female genital mutilation. Arising out of the tribal violence, the applicant's intended husband was killed and his father has issued a direct threat against the applicant. As a result the applicant stated that her father paid 500,000 units of the local currency to arrange for her to be flown to Dublin. On arrival in Dublin she sought refugee status.

The applicant has integrated well into Irish society. She attended school and did her Leaving Certificate examination in June, 2001. She was accepted as a student for a diploma in nursing studies course with St. John of God Hospital in association with University College Dublin and she was also placed on an A.I.B training programme by her school, which she completed. She wished to commence her nursing studies but due to her refugee status was unable to continue, though it was stated that UCD had held open a position for her subject to her application for refugee status.

On her arrival in the State the applicant complied with the relevant procedures which resulted in letters of the 30th June, 2000 and the 29th September, 2000 advising her that her application for refugee status had been refused. The applicant appealed this decision which came before a Tribunal member on the 3rd April, 2001, which affirmed the decision to refuse refugee status.

By letter dated the 10th September, 2001, the solicitor for the applicant wrote to the Minister pointing out that the decision of the Refugee Appeals Tribunal may adversely affect the applicant's constitutional rights, including the right of freedom from torture and inhuman and degrading treatment, and the applicant should have the opportunity of adducing expert evidence on relevant issues. It was submitted that such evidence would support the claim that the applicant would be in danger of being subjected to torture and inhuman and degrading treatment which would be a violation of her human rights and a breach of the principle of *non refoulement*.

On the 18th September 2001, a deciding officer on behalf of the Minister wrote to the applicant stating that the Minister, for the reasons set out in the recommendation of the Refugee Appeals Tribunal, had decided to refuse to give the applicant a declaration as a refugee. She was advised that she could make written representations to the Minister setting out reasons why she should be allowed remain temporarily in the state, which representations should be written within fifteen working days.

Her solicitor made written submissions in a letter of 8th October, 2001. The written submissions were extensive and reference was made to the previous request to submit expert evidence on Nigeria.

This letter was acknowledged on behalf of the Minister on the 11th October, 2001. There was no further communication. On the 7th June, 2002 the solicitors for the applicant wrote to the Minister seeking a reply, or alternatively that the applicant would

be given a temporary permission to enable her study to become a nurse, so that she could take up her placement.

On the 12th July, 2002 the Minister replied indicating that he had decided to make a deportation order, and the terms of that letter are set out earlier in this judgment. A copy of the deportation order was also sent to the applicant, and it too is set out earlier in this judgment.

On the 17th July, 2002 the solicitors for the applicant wrote seeking copies of the conclusions and recommendations as made to the Minister on foot of which he signed the deportation order. These were forwarded to the solicitor for the applicant on the 23rd July, 2002.

**The High Court**

30. The learned High Court judge concluded that:-

> "The documentation as exhibited by both the applicant and Mr. Charles O'Connell on the respondents' behalf clearly shows that there was extensive documentation before the first named respondent including a considerable amount of country of origin and U.N.H.C.R. documentation. The two principal documents appear to be the report on the examination of the file under s. 3 of the Immigration Act, 1999 as prepared by Derek A. Kelly, Clerical Officer, dated 19th June, 2002 and the report of Maria Dardis, Executive Officer, Repatriation Unit, dated 19th June, 2002 and as prepared pursuant to s. 3 of the Immigration Act, 1999. Both Mr. Kelly and Ms. Dardis appear to have had before them all relevant documentation. The recommendation of Ms. Dardis as set out in the report was
>
> > 'Ms. Abosede Oluwatoyin Meadows case was considered under Section 5 of the Refugee Act 1996 and under Section 3 (6) of the Immigration Act 1999. *Refoulement* was not found to be an issue in this case. Therefore on the basis of the foregoing I recommend that the Minister sign the deportation order across.'
>
> This report was signed off by a Mr. O'Connell on 3rd July, 2002 and appears to have been approved by the Minister on 4th July, 2002. No case is made out on the applicant's behalf that any particular relevant documentation was not before the Minister. Having regard to the documentation that was before him I am not satisfied that there is any substantial ground for saying that the decision of the Minister is fundamentally at variance with reason or common sense. I am satisfied that it was open to the Minister to come to the conclusion he arrived at on the basis of the documentation before him applying the test as laid down in *O'Keeffe v An Bord Pleanála*. It is not

> open to me to consider whether or not the Minister was obliged to consider the facts of this case and the documentation before him on the basis of an "anxious scrutiny test" bearing in mind that the applicants claim is one where she alleges an interference with her fundamental rights. It is no function of mine to consider the merits of the applicant's request for refugee status. My function is limited to considering the legal principles applicable to the first named respondent's decision.
>
> Accordingly in applying the test as set out in s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 against the criterion as set out in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, I come to the conclusion that the applicant has not made out a case for leave to apply for judicial review on substantial grounds and in the circumstances I decline to grant the applicant the relief as sought and dismiss the application."

31. The High Court decided that there was a point of law of exceptional public importance which transcended the facts of the case and that it was desirable in the public interest that the question be determined by this Court. That question is set out at the commencement of this judgment. The query is whether in determining the reasonableness of an administrative decision which affects or concerns constitutional or fundamental rights it is correct to apply the test as set out in **O'Keeffe v. An Bord Pleanála** [1993] 1 I.R. 39.

**Submissions**

32. On behalf of the applicant it was submitted that in reviewing the reasonableness of a decision of the Minister, having regard to the constitutional protection of basic human rights, together with protections available under international law, and having regard to the obligations to ensure an effective remedy, the Courts should depart from the test for review expounded in **O'Keeffe v. An Bord Pleanála** and should adopt a test which provides a real and effective review of a decision which fails, it is submitted, to protect adequately or to vindicate the applicant's basic human rights. It was submitted that the decision to make a deportation order in this case should be quashed for unreasonableness in that the decision of the Minister fails to have due regard to the protection needs of the applicant having regard to the facts of the case and the applicable law which requires that

the applicant should not be exposed to a real risk of possible or likely breach of human rights.

33. On behalf of the Minster, Ireland, and the Attorney General, the respondents, referred to in this judgment collectively as "the respondents", it was submitted that the question posed by the High Court should be answered in the affirmative. It was submitted that this Court should confirm that the **O'Keeffe v. An Bord Pleanála** standard of review continues to be applicable to judicial review of all administrative decisions, including those decisions "which affect or concern constitutional rights or fundamental rights". It was submitted that this did not mean that the test had to be applied in precisely the same way in all contexts. It was submitted that where fundamental human rights are at stake the courts may and will subject administrative decisions to particularly careful and thorough review, but within the test of reasonableness as established in **O'Keeffe v. An Bord Pleanála**. The respondents submitted that a new test of "anxious scrutiny" or "most anxious scrutiny" would be to go too far. It was submitted that to adopt such a test would alter significantly the role of the courts in judicial review and would effectively constitute the courts as the ultimate appellate tribunal from a vast range of administrative decisions.

**Decision**

34. I have analysed the relevant law earlier in this judgment and I will apply that analysis to the question certified.

35. The standard of judicial scrutiny was described by this Court in **The State (Keegan) v. Stardust Victims' Compensation Tribunal** [1986] I.R. 642 at p.658 where Henchy J. stated that:-

> "… the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted *ultra vires* , for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires,*inter alia* , that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."

All of the members of the Court agreed with the legal principles stated.

36. These principles were applied in deciding **O'Keeffe v. An Bord Pleanála** [1993] 1 I.R. 39 at p.70, as pointed out by Finlay C.J.. Finlay C.J. restated the legal principle but did not change the principles which had been described previously by Henchy J. and agreed to by the Court. However, in **O'Keeffe v. An Bord Pleanála** the nature of the decision-maker was a very relevant factor. Finlay C.J. pointed out that the legislature had firmly placed questions of planning with the planning authorities and the Board which are expected to have special relevant skills, competencies and experience on planning issues. The nature of the decision-maker in that case was a key factor.

37. The standard of judicial scrutiny in **O'Keeffe v. An Bord Pleanála** is grounded on the test as stated in **The State (Keegan) v. Stardust Victims' Compensation Tribunal**. Consequently, fundamentally the test was stated in **The State (Keegan) v. Stardust Victims' Compensation Tribunal** and then in **O'Keeffe v. An Bord Pleanála** a strict interpretation was taken in view of the nature of the decision-maker.

38. 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.

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.

41. In this case it was submitted that the fundamental rights of the applicant would be affected by her proposed deportation to a country where she has indicated a fear for her personal safety.

42. However, an aspect of the case was given only a glancing reference. In the letter of the 12th July, 2002 it was stated:-

> "In reaching this decision the Minister has satisfied himself that the provisions of section 5 (prohibition on *refoulement*) of the Refugee Act 1996 are complied with in your case."

The Deportation Order stated:-

> "And whereas the provisions of section 5 (prohibition on *refoulement*) of the Refugee Act 1996 … are complied with…"

43. I am satisfied that the test in **The State (Keegan) v. Stardust Victims' Compensation Tribunal** should be applied, and in construing whether the decision was reasonable it is part of that analysis to determine whether it was within the implied constitutional limitation of jurisdiction which affects rights, whether the decision was proportionate.

44. The applicant has claimed that she is fearful for her personal safety if returned to Nigeria. She has claimed that she is in danger of female genital mutilation.

45. I would apply the factors and the principles, as set out earlier in this judgment, to this case.

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

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

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

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

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

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

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

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

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

47. In the circumstances of this case I would distinguish **Baby O v. The Minister for Justice, Equality and Law Reform** [2002] 2 I.R.. I agree with the analysis by Murray C.J. of the judgment of Keane C.J. in that case.

48. In all the circumstances of this case it appears that the decisions of the Minister affect constitutional rights and fundamental rights, and thus they fall within the implied

constitutional limitation of jurisdiction of a decision which affects rights. It is this aspect of the decision which has caused me concern.

49. This judgment relates solely to the test to be applied by a court. It is intended to clarify the necessity to consider constitutional rights in the context of the reasonableness test by the use of the principle of proportionality.

50. The Executive has a primary role in relation to policy and immigration. However, the Court has a duty to protect constitutional rights. An aspect of this duty is that a remedy must be effective. The fact that there have been hearings at administrative level does not nullify the Court's duty. The facts and circumstances of the case, the hearings, the nature of the decision, and the policy of the area, are relevant to achieving a constitutional analysis of the reasonableness of a decision.

51. My conclusion is as follows. In determining the reasonableness of an administrative decision which affects or concerns constitutional rights the standard to be applied is that stated by Henchy J., in **The State (Keegan) v. Stardust Victims' Compensation Tribunal** [1986] I.R. 642. This has been set out previously in the judgment, but for clarity I restate it here:

Henchy J. stated at p.658:-

> "I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted *ultra vires*, for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."

This test includes the implied constitutional limitation of jurisdiction of all decision-making which affects rights and duties. Inter alia, the decision-maker should not disregard fundamental reason or common sense in reaching his or her decision. The constitutional limitation of jurisdiction arises *inter alia* from the duty of the courts to

protect constitutional rights. When a decision-maker makes a decision which affects rights then, on reviewing the reasonableness of the decision: (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on irrational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective.

52. In all the circumstances I am satisfied that the applicant has established substantial grounds for contending that the Minister's decision conveyed by letter of the 12th July, 2002 on s.5 (*non refoulement*) was manifestly unreasonable. I would grant an order to the applicant giving her leave to apply for judicial review of the decision of the Minister to deport her, dated the 8th July, 2002, but only on the aspect of the decision which related to her complaint of *refoulement* contrary to section 5 of the Refugee Act, 1996. The order should grant leave to apply for the relief sought at paragraph d) I and II of the Statement of Grounds; on the grounds set out in paragraph e) 1, 3, 5 and 7, insofar as they relate to section 5 (prohibition of *refoulement*) of the Refugee Act, 1996.

# THE SUPREME COURT

*Murray C.J.* *419/03*
*Kearns P.*
*Denham J.*
*Hardiman J.*
*Fennelly J.*

## IN THE MATTER OF THE REFUGEE ACT, 1996 AS AMENDED and IN THE MATTER OF THE IILEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000

**Between:**

**ABOSEDE OLUWATOYIN MEADOWS**

**Applicant/Appellant**

**and**

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

**IRELAND**

**and**

**THE ATTORNEY GENERAL**

**Respondents**

**JUDGMENT delivered the 21st day of January, 2010 by**

**Mr. Justice Hardiman.**

**Overview.**

This is an appeal from the High Court's refusal of leave to apply for judicial review. The review was sought in order to quash a Ministerial deportation order made in respect of a failed asylum seeker. Her application for asylum has already been the subject of two separate independent hearings and was twice rejected on the facts. These decisions are unchallenged by the appellant, who was legally represented throughout. In the present proceedings the appellant seeks to set aside the decision of the Minister to deport her following these unchallenged rejections. To this end, she seeks to change the long accepted criteria for obtaining Judicial Review in what I consider to be a very fundamental way, extending as I see it the scope of judicial discretion in immigration matters and diminishing that of the Executive, which is conferred by law, and creating a new, expensive and time consuming level of substantive appeal.

If she is successful in this and these criteria are altered in form or (more importantly) in substance, it will represent, in my view, a major revolution in our immigration arrangements and in administrative law more generally. Specifically it will represent a major transfer of power from the Executive to the judicial arm of government by conferring on the latter a general supervisory role over the exercise of a function

conferred by law by a member of the government. Almost as significantly, in practice, it will ensure that every attempt to deport a failed asylum seeker will end in the courts, which are already swamped by such cases. Furthermore, the years necessary to conduct, in our overcrowded and under-equipped legal system, the litigation thus spawned will in itself delay the working of the system so as, practically if not legally, to preclude deportation in many cases.

The applicant's attempt to alter the criteria for the grant of leave to seek judicial review is based in no small measure on the invocation of certain developments in the law of the United Kingdom, and in particular the introduction of the approach to judicial review denominated "anxious scrutiny". I have extensively explored this development below and conclude that it is neither necessary nor desirable to introduce it into our law, though for somewhat different reasons to those on the basis of which some of my colleagues (as I understand it) have reached the same conclusion.

But I am driven to conclude that though the formula "anxious scrutiny" has been rejected, the result of this case is to introduce its substance in our law. As a result of this, even in a case like the present where the applicant's factual claims to asylum status have been rejected

in two separate and independent hearings, she is enabled to ask this court to review the Minister's consequential decision to deport her on the basis that he must provide substantial and specific justification for this decision, to a court. I regard this as wrong and unnecessary and I fear that it will be grossly wasteful of time and resources. It will most certainly take place at tax payers' expense in the great majority of cases and, even if the claim is unsuccessful, occupy a period of years, in working its way through the courts.

I fail to see how it can be denied that this is a massive change from the previous dispensation where the applicant was required to show that there was "no" evidence on the basis of which the decision impugned might have been taken.

It is necessary to add that, as I understand it, my colleagues do not view the decision as having anything like so drastic an effect and I very much hope that in its application case after case hereafter, this view may be vindicated. But I feel obliged to dissent for reasons set out hereunder at a length proportionate to my view of the importance of the case.

Judicial Review of Administrative action is a very significant part of the workload of the High Court and of this court on appeal. Asylum

and immigration matters account in turn for a very significant portion of judicial review applications: between 2004 and December, 2008 the percentage of judicial review matters represented by asylum and immigration cases varied from 47% the first year to 54% in the last, and in two years, 2006 and 2007, constituted almost 60% of the total judicial review workload (59% in each year). This seems to suggest, though no figures appear to be available, that a very high percentage of applications for asylum which are decided unfavourably to the applicant, and/or subsequent deportation orders, rapidly become the subject of judicial review applications.

The Department of Finance is on record as stating that “almost every proposed deportee [goes] to court to fight every step of the removal process” (*The Irish Times*, September 12, 2009). Almost all of this is done by seeking Judicial Review. This decision will make that much easier.

In light of the foregoing, it is obviously important for applicants and respondents, but also for the coherence and consistency of our legal system, that the principles on which the courts operate in applications for judicial review of such decisions should, insofar as possible, be transparent, stable and readily understandable.

In the present case, the applicant applied for refugee status first to an immigration officer. When the officer's decision was adverse to her she appealed to the Refugee Appeals Tribunal. When this decision was in turn adverse to her she did not challenge it but applied to the Minister for leave to remain in this country on humanitarian grounds. The Minister rejected this application and proposed to make a deportation order in respect of her. The applicant asks the court to set aside his decision.

The Minister's decision-making power is one conferred by law, subject to certain constraints. It is fundamentally, in circumstances like those of this case, a decision on an *ad misericordiam* application. The applicant, who was professionally represented and advised at all material times, has never sought to challenge the decisions of the immigration officer and the Refugee Appeals Tribunal, which were decisions on the merits of her application for asylum. They therefore subsist, unchallenged. But, as will appear, a significant part of the present attack on the Minister's decision raises issues indistinguishable from those advanced on the application for asylum on the basis of refugee status. An issue also arises as to the form of the Minister's decision.

The learned High Court judge rejected the application for leave to seek judicial review and granted leave to appeal this rejection on grounds

which basically relate to the test to be applied on an application such as this. It is therefore clear that the case raises points of general, as well as individual, importance.

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This is the applicant's appeal against the judgment and order of the High Court (Mr. Justice Gilligan) delivered on the 4th November, 2003, whereby he declined leave to apply for relief by way of judicial review, to quash a decision by the Minister to make a deportation order in respect of the applicant. The appeal is brought pursuant to a certificate granted by the High Court under s.5(3)(a) of the Illegal Immigrants (Trafficking) Act, 2000. The certified point of law is as follows:

> "Whether or not in determining the reasonableness of an administrative decision which affects or concerns constitutional rights or fundamental rights it is correct to apply the standard set out in *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39."

Two things are immediately evident from the above recital. First, the appeal squarely raises the question, which has already troubled the courts of other jurisdictions, as to whether established criteria for the grant of judicial review of administrative actions (denominated the "**Wednesbury**" test in the United Kingdom and the "**O'Keeffe**" or

"**Keegan v. Stardust**" test in Ireland) continues to be the correct test to apply in cases in which administrative decisions which concern human or constitutional rights are in question. That is the general importance of the present case.

The established **Wednesbury** or **O'Keeffe** test is well illustrated by the citations in the judgment of Fennelly J. herein. **O'Keeffe** is reported at [1993] 1 IR 39 and I wish, in addition, to quote from the judgment of Finlay C.J. in that case, at p.72:

> "I am satisfied that in order for the applicant for judicial review to satisfy a court that the decision making authority has acted irrationally in the sense which I have outlined so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision making authority had before it no relevant material which would support its decision."

In **Laurentiu v. The Minister for Justice** [1999] 4 IR 31, Geoghegan J., in the course of his judgment in the High Court said:

> "It has been held time and time again that it is no function of the courts to consider the merits of an application for refugee status or asylum. The decision of the Minister on such an application could only be reviewed if that decision flew in the face of commonsense and was wholly and clearly unreasonable. The principles laid down in **O'Keeffe v. An Bord Pleanala** [1993] 1 IR 39 apply."

The views authoritatively expressed in the foregoing citations are now frequently criticised, in part because of a misapprehension as to what they mean. I wish to emphasise, however, that in my view the principle underlying the **O'Keeffe** test relates fundamentally to the separation of powers, an essential element in Constitutional Justice.

In **Keegan v. Stardust Victims Compensation Tribunal** [1986] IR 642 Griffin J. in this court addressed the nature of judicial review in a passage which draws on U.K. authority and is in my view both authoritative and correct. The case featured a challenge, on the ground of unreasonableness, to a decision of the Defendant Compensation Tribunal to refuse compensation to the applicant. Griffin J. said at p.661:

> "The question for consideration by this court is not whether the Tribunal made the correct decision in refusing to make an award to the applicant, nor is it whether this court might or might not have come to the same decision as that arrived at by the Tribunal. The proper purpose of the remedy of judicial review of administrative action was shortly and clearly stated by Lord Hailsham L.C. and Lord Brightman in Chief Constable of the North Wales Police v. Evans [1982] 1 WLR 1155. There, Lord Hailsham L.C. said at p.1160:
>
> 'But it is important to remember in every case that the purpose of the remedy [of judicial review] is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of that authority constituted by law to decided the matters in question'.
>
> And Lord Brightman at pp.1173-1174 said:

> ‘Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power… judicial review, as the words imply, is not an appeal from a decision but a review of the manner in which the decision was made’.”

These passages, to my mind, make a very salient point, with which I respectfully agree. Furthermore, I do not consider that the decision challenged in the present case, being the decision of a Minister, is for that reason not to be treated with curial deference. On the contrary, for the reasons set out later in this judgment, I believe that the decision of a member of the government answerable to Dáil Eireann, and who is himself a member of that body, on a matter properly his to decide, is emphatically entitled to deference in a democratic State. In my view, the passages just cited are applicable to judicial review on any ground, including that of unreasonableness. The power of the person or body to whom the decision making process has been entrusted by law may be usurped in a judicial review on the ground of unreasonableness as easily as by a judicial review on any other ground.

Since the separation of powers is itself “a high constitutional value not inferior in importance to any provision of the Constitution”, it follows that I consider that the present statutory arrangements for dealing with

immigration, residence and deportation on the basis of a ministerial (as opposed to a judicial) assessment of the requirements of the public good and the public interest, and the form of judicial review which respects those arrangements, to express and guard, in this area of the law, a high constitutional value. See, *inter alia*, **Sinnott v. Minister for Education** [2001] 2 IR 545.

The applicability of the established criteria referred to above, in immigration cases, has been recently and authoritatively mandated by Keane C.J. in giving the unanimous judgment of the court in **Baby O v. The Minister for Justice** [2002] 2 IR 169:

> "Unless it can be shown that there was some breach of fair procedures in the manner in which the interview was conducted and the assessment arrived at by the officer concerned or that, in accordance with the well established principles laid down in *The State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] IR 642 and *O'Keeffe v. An Bord Pleanala* [1993] 1 IR 39, there was no evidence on which he could have reasonably have arrived at the decision, there will be no ground of *certiorari* in respect of the decision".

I agree with, and am in any event bound to follow, this recent and unanimous decision of the court, given in a case of precisely this sort. We have not been invited to overturn it.

Amongst the grounds of challenge to the Minister's decision in this case are that he acted on a misapprehension of the evidence and that he failed properly to assess the evidence. It is significant to note that part of the evidence before the Minister was the view of the United Nations High Commission for Refugees, (previously headed by the former President of Ireland, Mary Robinson S.C.), that in Nigeria female genital mutilation, a topic much discussed below, is "a fast dying practice…" and that while it goes on, "… no-one can now force another to do it in the name of religion or custom. The only set of people who can be forced into it are babies…".

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The foregoing summarises the general importance of this case.

The narrower significance of the history summarised above is that, if the applicant succeeds on this appeal, she will succeed only in expanding the grounds on which she may seek judicial review, and will have to proceed with the substantive application for judicial review. Having regard to the dates which will shortly be set out, this will mean that the grounds on which she is permitted to seek judicial review will be determined more than ten years after she has arrived in this country, more than eight years after the Refugee Appeal Tribunal rejected her application for refugee status and more than seven years after the decision which she wishes to impugn. During the whole of this period the

applicant has been in Ireland where she has pursued certain courses of education.

**Background facts relating to the Applicant and her circumstances.**

The applicant is a Nigerian, now aged 27. According to her own account she left Nigeria on 19th December, 1999, just before attaining her majority. Her departure from Nigeria and entry to Ireland, she says, was arranged by her father who paid £500 to a "Mr. Patrick", to take her out of the country. This person was in possession of a passport with her photograph on it, though she could not be sure that it had her name on it. He flew with her to Amsterdam where they stopped over, she thought, for about an hour and then flew to Ireland where Mr. "Patrick" took her through immigration. "He showed them some paper and we walked through". "I followed him and he told me I should look for Justice and he left me. I walked up and down and asked for Justice and some people took me from the airport to the City".

This occurred, according to the applicant, on the 19th December, 1999, more than a decade ago. No attempt was made, as required by the Dublin Convention, to seek asylum in Holland, the first undoubtedly "safe country" she arrived in.

The applicant made a written application for asylum in Ireland on the 21st December, 1999. In this she stated her reasons for seeking asylum which require to be quoted in full:

> "I am seeking asylum because I need protection. Alhaji Salisu, my father's business partner who brings cattle to sell my father from Kano, Northern Nigeria, is from the Hausa Tribe. He was my father's friend also. And they were even talking about marrying me to one of his sons (against my wishes).
>
> When the tribal war started at (illegible) we learned that Alhaji was involved and that his first born son got killed and he vowed to avenge his death. Other Hausa men came to the house and started (illegible) things. That day my mother had gone to the market with Alaba, my baby sister. My father took me and my brother and ran for our lives. The men burnt down the house and everything in it. We went to our village at (illegible) to hide and my father left us there. He came back later to tell us that my mother and Alaba had been killed. They didn't make it back home. We didn't see their corpses but we saw many others. And I pray and hope that one day she will return with Alaba. My father and everyone else believes they're dead and we even mourned and performed the funeral rites for them in (illegible) but I'm still hopeful.
>
> Alhaji is very bitter and is out to get me and he said he wanted my father to feel the pain he felt when the Yorubas killed his first born. I'm unlucky I guess to be the first born. But also I'm glad, not because of the fights and killings but because of my coming here. I pray that here they will let me study and when I am older let me marry whom I please. Because in the (illegible) culture when I marry they will circumcise me so that I will not sleep with another man. Every girl hates this and some die because of the pain and infection. I pray that I've escaped it forever. Before the fight I had been thinking of running away but there was nowhere to go because I don't work and [had] no money."

The applicant said that immediately before she departed Nigeria she had been living with her parents in the City of Lagos. It appears from the evidence taken before the Refugee Appeals Tribunal that, according to the applicant, the fight in which her mother and sister are presumed to have been killed took place in a market place there, which was where her father carried on business in the wholesale meat trade, and which is about three minutes from her home on foot. The fight in the market was dated as happening in early December, 1999 and the date of her departure from Nigeria was said to be the 19th December, 1999. It thus appears that her father arranged for her to leave the country within about a fortnight of the fighting in the market.

The applicant's application for refugee status, based on the grounds set out above, gave rise to several interviews and statements by the applicant. The notes of many of these, in the form they have been exhibited by her, are not readily legible. However, by letter dated the 23rd June, 2000, from Ms. Ann Farrell, Higher Executive Officer in the Asylum division in the Department of Justice, the applicant was informed that:

> "Your application has been considered on the basis of the information you provided in support of it both in writing and at interview, and it has been decided that your application is not such to qualify you for refugee status in accordance with the definition contained in the 1951 Convention relating to

> the status of refugees as amended by the 1967 Protocol and as defined by s.2 of the Refugee Act, 1996.
>
> You have not demonstrated a well founded fear of persecution for a Convention reason. Accordingly your claim for asylum is rejected."

The balance of the letter is taken up with an explanation of the procedures for appeal.

The applicant's solicitors were also informed of this decision.

By letter dated the 14th February, 2001, the Solicitors appealed it. The solicitors acting on her behalf were Messrs. Blackwell and Co. of Drumcondra. The Notice of Appeal alleged, in relation to the claim of a risk of "circumcision" or female genital mutilation (FGM), that the applicant was on risk of this because "she is a woman who is obliged to submit to her father". In another paragraph it is stated that "her father and male members of the family will force her to undergo female genital mutilation, which constitutes torture". Nevertheless, upon her own account, it was actually her father who paid 500 Nigerian pounds to an "agent" to get her out of the country. She herself did not allege that her father would force FGM upon her and made no complaint of her male relatives in this or any other connection.

The appeal was conducted partly in writing, in particular via the Notice of Appeal quoted herein and partly orally, at a hearing which took place before a member of the Appeals Tribunal on the 12th June, 2001. The member, Ms. Lawlor, gave a written judgment on that date. The judgment referred to the application for asylum, the Notice of Appeal, the decision of the original deciding officer and his written assessment and documentation submitted by or on behalf of the applicant. The applicant was represented by a solicitor at the hearing before the member of the Appeal Tribunal and called a witness, said to be an expert. The judgment records that "It was submitted on behalf of the applicant that (she) left for reasons of ethnic violence". The contention about the alleged intention to kill her on the part of Alhaji Salisu was repeated. The witness who was called on behalf of the applicant gave evidence about FGM which the Appeal Tribunal described as "as being an abhorrent practice and amounts to torture".

The presenting officer submitted to the Appeal Tribunal that the original primary reason given by the applicant for leaving Nigeria was the inter-ethnic violence and that the matter of FGM and forced marriage were "to an extent, added on". It seems consistent with the dates set out above that it was the fighting in the market and its results that triggered her departure from Nigeria.

The applicant's solicitor submitted that her client's father was "a rural man" who would "insist on an arranged marriage and female genital mutilation". It was held, however, that "the facts are not consistent with this latter submission": the applicant's father was a businessman and based in Lagos. His daughter had received a full education while in his care., sufficient for her to enter University in Ireland. There was no evidence that the applicant's father at any time referred to the issues of arranged marriage or FGM. It was thought unlikely that a marriage would or could be arranged between a Yoruba Christian, which is how the applicant described herself; and a Muslim Hausa. The applicant's evidence of forced marriage and FGM was based on hearsay and rested on a comment attributed to her mother. In the event, the Appeals Tribunal considered that the applicant had not established a credible connection between her specific circumstances and the risk of forced marriage or female genital mutilation.

In other words, it was not in issue that there was inter-tribal violence in Nigeria nor that arranged marriages, some involuntary, and also female genital mutilation, sometimes took place. But the applicant failed in her application because of a lack of credibility found to attach to her allegation that she herself was at risk of these things, or any of them.

**Unchallenged nature of the foregoing decisions.**

It is important to emphasise that the decisions of the deciding officer and of the Appeal Tribunal *have not themselves been challenged by the applicant who was professionally advised and represented* and presumably advised as to her entitlement to challenge those decisions if there were grounds to do so. It may be noted that the most recent of these decisions was taken as long ago as June 2001. The failure to challenge these decisions is difficult to understand in view of the fact that by a letter of December, 2001, the applicant's solicitors suggested to the Minister that the separate conclusions of the two officers were each "unreasonable and incorrect because they failed to take account of relevant cultural considerations and are ethno-centric and euro-centric". But the solicitors may have thought it difficult or impossible to establish these allegations in evidence.

In other words, the solicitor said that they considered that the decision was such as might be judicially reviewed or at least made that case to the Minister. But they took no steps actually to seek judicial review in the matter. Instead the solicitor suggested that, unprecedentedly, the Minister himself hear further expert evidence. These solicitors are amongst the leading firms in the area of refugee law.

By a further letter dated the 18th September, 2001, from Ms. Linda Greally, an officer in the Department of Justice, it was communicated to the applicant that the Minister had decided to refuse to grant her a declaration that she was entitled to refugee status. The same letter informed the applicant that the Minister proposed to make a deportation order in relation to her "under the power given to him by s.3 of the Immigration Act, 1999". She was then advised of her entitlement to make written representations to the Minister "setting out any reasons as to why you should be allowed to remain temporarily within the State". Various other rights of the applicant were also notified to her.

**Female Genital Mutilation.**

Female genital mutilation (FGM), also referred to as female genital cutting (FGC), and female circumcision, is defined by the World Health Organisation as including "all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs whether for cultural, religious or other non-therapeutic reasons."

The term is used in the asylum context to describe traditional, cultural and religious procedures to which parents must give consent, because of the minor age of the subject, rather than to procedures

generally done with a patient's own consent, such as labiaplasty and vaginoplasty.

Female genital mutilation appears to be practised in many areas of the world but is most commonly found in Africa. It is, as the decision of the Refugee Appeals Tribunal in this case makes clear, extremely controversial. Opposition is motivated by concerns regarding the consent or lack thereof of the patient and, separately, to the safety and long term consequences of the procedure. There have been many efforts by the World Health Organisation to end the practice and there is now (on February 6th) an "international day against female genital mutilation". See World Health Organisation statement 06/02/2006. There is near unanimity in Europe and America that the practice is a barbarous one and amounts to torture and indeed the practice has been criminalised in various First World countries. However, there is also a view that condemnation of the practice reflects a Western oriented and even a post-Colonial viewpoint: see Ehrenreich and Barr "*Inter-sex Surgery, Female Genital Cutting and the selective condemnation of cultural practises*". Harvard Civil Rights/Civil Liberties Law Review 40(1): 71-140.

In similar vein the Irish Times on the 2nd April, 2009, published an article by a Nigerian commentator, Bissi Adigun, on the topic. Speaking of FGM, this writer argued that:

> "It is rather Eurocentric and judgemental of the Western media and commentators to deem the tradition barbaric… I think it is high time Westerners stopped behaving as if they were the superior race as regards the issue of female circumcision."

Whatever about the Western view of the practice, it is very pervasive in many countries and is said, for instance, to be observed by up to 95% of women in Mali. In the applicant's affidavit in the present case it is described as "customary", "private to the family and the tribe", and "not subject to outside regulation". In the large volume of "country information" put before the officials and the Minister in this case (as in all cases), it is stated that the practise of FGM is publicly opposed by the Nigerian Government and there is a "Nigerian National Committee" to campaign against it. But "the cultural nature of the practice in Nigeria" determines "*that the mothers of young daughters are able to veto treatment if they oppose it*". Communities from all of Nigeria's major ethnic groups and religions practise FGM, although adherence is neither universal nor nationwide. In 1985/6 a survey found "that it was not practised at all in six of the nineteen (Nigerian) States surveyed".

The Nigerian government's difficulties in relation to the practice are summed up in the phrase "As this is viewed by some communities as a long standing tradition, the government may have difficulty in discouraging FGM, while being seen to respect the traditions of the group involved".

The (Nigerian) Womens Centre for Peace and Development "estimated that at least 50% of women are mutilated. Studies conducted by the U.N. Development Systems and the World Health Organisation estimated that the FGM rate is "approximately 60% amongst the Nation's female population". The Centre "believes that the practise is perpetuated because of a cultural belief that uncircumcised women are promiscuous, unclean, unsuitable for marriage, physically undesirable or potential health risks to themselves and their children especially during childbirth… nevertheless most observers agree that the number of women and girls who are subjected to FGM is declining."

Another part of the documentation produced to the Minister, and by him to the Court, is the expert view of the United Nation's Refugee Agency, the U.N.H.C.R. This informed him that "circumcision is not a necessary part of conversion to Islam in Nigeria" and that "circumcision of males and females has more to do with custom than religion in

Nigeria." Female genital mutilation is described as "a fast dying practise, thanks to the efforts of activists who have succeeded in getting some States legislation to declare it illegal". The United Nations High Commission for Refugees continues, speaking of Nigeria in particular: "**Of course, the practice goes on but no-one can now force another to do it now in the name of custom or religion. The only set of people that can be forced into it are babies…**". (Emphasis added)

This last observation is clearly a significant conclusion which the minister was entitled to take into account.

The United Nations High Commission for Refugees considers that FGM is not a requirement of any of the major religions (Islam and Christianity in the case of Nigeria) and is considered to be a pagan practise. It also described FGM as "a traditional practise".

It may be noted that there is no evidence, either specific to this applicant's case, or in the "country information", that FGM would be enjoined upon Ms. Meadows by her "father or male relatives" as was alleged by the applicant's solicitor. There was specific evidence that no-one but a baby could be forcibly or involuntarily mutilated.

It is important to note that no issue is taken with the factual accuracy of the “country material” placed before the Minister, which has been fully disclosed to the applicant.

FGM has been criminalised in various First World countries such as (originally) Sweden and Queensland, Australia. In Sweden, the law extends both to mutilation within the country and to the apparently very common problem of mutilation on visits back to the refugee’s homeland, often Somalia. The mother of one victim and the father of another have been jailed for periods of years in Sweden, for participation in FGM.

The United Nations Division for the Advancement of Women has surveyed the suspected rates of FGM amongst immigrant populations in Europe and the content of the various laws against it: this survey is contained in a paper, available on the Internet, by Els Leye and Alexia Sabbe from the International Centre for Reproductive Health, Ghent University, Belgium. This source also chronicles proposals, notably in Sweden, so far all rejected, for the compulsory medical examination of girls up to the age of six years old to see if FGM has been practised and to facilitate prosecutions.

In Sweden, this was proposed by the Burundian born politician Ny Amko Sabuni, later Minister for Integration and Gender Equality. She did not consider it feasible to confine the compulsory examination she proposed to girls from the immigrant communities, because she considered that this would be an act of discrimination. This logic is not easy to follow. But the proposal was, apparently, objectionable to immigrants and natives alike as an invasion of privacy. No similar proposal has been implemented, to the best of my knowledge, in any European country.

The most immediate significance of this is that the detection and suppression of FGM is difficult for highly bureaucratised First World countries such as Sweden and presumably not less difficult for African governments.

There is clearly an enormous cultural clash between Western societies who view autonomy as a principal value in sexual matters and FGM practising populations who put a much higher value on conformity with communal norms. The latter tends to favour societal authority whereas the Western approach places a much higher premium on individual autonomy, or personal freedom.

For the reason set out in the last paragraph, the topic of female genital mutilation elicits a very strongly negative response in Ireland and other First World Countries. These societies are, nevertheless, generally reluctant to proclaim in the public sphere any preference for their own cultural moral or ethical inheritance over those of other countries or civilisations, so as not to appear to dictate to such countries. This response to FGM, therefore is expressed, as Bissi Adigun pointed out in the article referred to earlier in this judgment, even at the cost of creating an impression of "behaving as if they [Westerners] were the superior race as regards the issue of female circumcision".

In some instances, the issue of FGM and the appropriate response to it in an asylum context involves an attempt on the part of asylum seekers or their representatives to portray the need to provide asylum to potential victims of FGM as a sort of litmus test of the receiving countries' commitment to personal autonomy, or to womens' equality in general. Thus, in this case, it was said by the applicant's lawyer, though not by herself, that she was at risk of FGM because, as a woman, she was subordinated to her father who, as a "rural man" would "insist on … female genital mutilation". On the evidence, however, he was not a rural man, whatever that may mean, and the applicant herself never suggested that he would insist on female genital mutilation of her. Indeed she

herself said that he had gone to considerable expense to get her out of the country rather than keeping her in Nigerian and asserting any form of dominance over her, and had ensured that she received a full education while in his care.

Female genital mutilation is, in my opinion, a wholly reprehensible practice and carrying it out forcibly on any person would be a grave crime. In the view of the United Nations High Commission for Refugees, FGM cannot be inflicted on any person in Nigeria other than babies. This conclusion has not been challenged, and it was before the Minister.

FGM is one of an unfortunately considerable number of practices, not uncommonly found in certain countries, which appear repulsive to Irish, European or American opinion and which certainly constitute a grave invasion of an individual's human rights, as we conceive such rights. There are countries where, unfortunately, it can be credibly alleged that murder, torture, rape, deprivation of property, slavery, life long or prolonged imprisonment without trial and social isolation may be the lot of those who dissent from the government, or who have unpopular political or religious views, or who are members of ethnic, religious or other minorities. It is important to emphasise that all of these things are grave infringements of the human rights of an individual and specifically

a grave interference with his or her “freedom” as that phrase is used in s.5 of the Act of 1999. The text of this provision is quoted below.

It is however important to point out that *all* of the things mentioned above, and not just female genital mutilation, contravene the person’s human rights and, if established, would enable him or her to claim refugee status. Neither the International Conventions nor the Irish Statutes on the subject discriminate between one applicant for refugee status and another on the basis of the precise manner in which it is said his or her life or freedom will be threatened. A person who can establish a likelihood of being subjected to female genital mutilation would be entitled to refugee status, as would a person who can establish a likelihood of being subjected to murder, torture, or any other practices mentioned above.

By the same token, the criteria for establishing an entitlement to refugee status, or to humanitarian leave to remain after such application has been refused, are no different - they are neither more nor less onerous - in a case of a person claiming refugee status on the ground of a well founded fear of FGM, to a person claiming refugee status on any other ground. There is simply no foundation in law for any such differentiation and none can be implied by the courts.

**The application to the Minister.**

On the 8th October, 2001, the applicant's solicitors wrote to the Minister "… in relation to her application for leave to remain in the State on humanitarian grounds". They also referred to their previous letter and repeated its content. This letter restated the case already made on several occasions by or on behalf of the applicant. It set out the applicant's desire to qualify as a nurse in University College Dublin and to remain in Ireland. It concluded:

> "We request that the applicant is granted leave to remain in the State on humanitarian grounds and in accordance with International and Domestic Human Rights law. It is further submitted that a forcible removal of the applicant from the State to her country of origin will be a violation of her human rights and will result in a serious threat to her life liberty and security of person."

In the course of the letter claims were made inter alia that returning the applicant to Nigeria would result in a violation of Article 3 of the European Convention on Human Rights prohibiting "torture inhumane and degrading treatment and punishment" and specifically repeated the claims in relation to forced marriage and FGM.

**Similarities in the three applications.**

It will be observed from the above summary that the issues of ethnic violence, forced marriage and FGM and the consequences of these

things for the applicant were at issue before the original deciding officer, again before the Appeals Tribunal, and were again raised in the solicitor's application to the Minister. Evidence had been called on the question of forced marriage and FGM before the Appeals Tribunal. No attempt was made to explain why the evidence later proposed to be called before the Minister was not called before the Appeals Tribunal or to what subject it was proposed to address such evidence, other than the matters already urged before the Tribunal. Having regard to the many thousands of applications for asylum in Ireland it will be evident and unsurprising that it is not usual for the Minister himself to conduct oral hearings on applications for humanitarian leave to remain in Ireland, and there does not appear to be any obligation upon him to do so. None was identified in argument.

The Minister, having considered the solicitor's application and other matters set out below, decided to make a deportation order and communicated this in a letter dated the 12th July, 2002, which enclosed the order itself. Both the letter and the order recited that the provisions of s.5 of the Refugee Act, 1996, were complied with in the applicant's case. The reason for the Minister's decision was stated to be:

> "… that you are a person whose refugee status has been refused and having regard to the fact set out in s.3(6) of the Immigration Act, 1999 including the representations made

> on your behalf the Minister is satisfied that the interest of public policy and the common good of maintaining the integrity of the Asylum and Immigration system outweigh such features of your case as might tend to support your being granted leave to remain."

By letter of the 17th July, 2002, the solicitors asked for "a copy of the conclusions and recommendations made to the Minister on foot of which he signed the deportation order" and this fairly voluminous documentation was supplied by letter dated the 23rd July. It includes the "country information" referred to above.

**The proceedings.**

Less than three days after receipt of the last letter, on the 26th July, 2002, the applicant issued a notice of motion returnable for the 8th October seeking judicial review by way of *certiorari* of the deportation order.

There are thirteen grounds upon which the applicant seeks relief, which are set out at paragraph E of the Statement of Grounds dated the 26th July, 2002. They were summarised as follows by the learned trial judge:

> The central thrust is that the applicant made written submissions seeking leave to remain in the State pursuant to s.17(6) of the Refugee Act, 1996 and the applicant also makes submissions as to why she should not be the subject of a deportation order. The applicant is a person who arrived in the State as a minor at the age of seventeen years, although of course this is now almost ten years

ago. She was of full age prior to the appeal hearing. She sought leave from the Minister to remain in this jurisdiction on humanitarian grounds, having regard to the real risk that she would be subjected to FGM if returned to Nigeria and having regard to her personal circumstances;

That there was a failure by the first respondent to allow the applicant to adduce expert evidence in respect of his exercise of discretion pursuant to s.17(1)(b) and 17(6) of the Refugee Act, 1996 and no such opportunity was afforded by the first-named respondent and that he thereby fettered his discretion improperly and/or abdicated his duty to ensure that the applicant received protection in accordance with law;
That the first respondent never previously advised the applicant of his decision in respect of her application for leave to remain, which said application fell to be considered pursuant to the provision of s.17(6) of the Refugee Act, 1996 and having regard to the applicant's constitutional rights, including a right to be protected from torture, inhuman or degrading treatment, a right to bodily integrity and privacy and a right not to be returned to her country where she was at a real risk of violation of her fundamental rights, a right to freedom of conscience and freedom to choose her life partner and there was no evidence that any or any due regard was had to the question whether a force to return of the applicant to Nigeria was contrary to the provisions of the Constitution by reason of a real risk that her fundamental human rights would be infringed;

That the first-named respondent's decision to make a deportation order is bad in law and *ultra vires* the powers under the Acts and contrary to the requirements of natural justice;

That in making a deportation order and thereby effectively refusing the applicant leave to remain, the decision of the first-named respondent is flawed by reason of a mistake of fact and of law, that the first-named respondent misdirected himself on the facts of the case and failed to assess her properly and assess the evidence having regard to the factors outlined at s.3(6) of the Immigration Act, 1999 and the applicant's right to bodily integrity;

That the first-named respondent misdirected himself in law in failing to consider or properly consider the protection issues arising in the case and in particular the legal obligation of the State to

> vindicate the applicant's constitutional rights as protected by Articles 41 and 43 of the Constitution and that the first-named respondent further failed to assess her properly and to assess the evidence in deciding that the requirements of s.5 of the Refugee Act, 1996 were complied with;
>
> That failing to provide for the appropriate consideration of the applicant's protection needs and by providing no means of reviewing a decision taken other than by way of judicial review, the applicant's right to an effective legal remedy is curtailed and her only remedy is by way of judicial review;
>
> Further references were made to the standard to be applied in judicial review cases pertaining to asylum matters and it was submitted that the criteria laid down in **O'Keeffe v. An Bord Pleanala** [1993] IR 39 is not the correct test having regard to the constitutionally enshrined nature of the applicant's personal rights.
>
> Further, it was submitted that there is a real risk that the applicant's removal from the State placed her fundamental human rights at risk and having regard to the presumption of constitutionality and the double construction rule the power vested in the first-named respondent under the provisions of the Refugee Act, 1996, the Illegal Immigrants (Trafficking) Act, 2000 and the Immigration Act, 1999 should be exercised in such a manner as to ensure that the applicant's personal rights are vindicated."

On this appeal, however, only the issue certified by the learned trial judge arises and only that was argued.

**The Minister's discretions.**

Section 17(6) of the Refugee Act, 1996 provides:

> "The Minister may at his or her discretion grant permission in writing to a person… to whom the Minister has refused to give a declaration [i.e., a declaration of refugee status] to remain in the State for such period and subject to such conditions as the Minister may specify in writing."

This was the power which the applicant wanted the Minister to exercise, so that she could stay in Ireland, despite being a failed asylum seeker.

Section 3 of the Act of 1999 confers on the Minister a power to require a person refused refugee status to leave the State. But s.5 of the same Act provides as follows:

> "5(1) A person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race religion nationality or membership of a particular social group or political opinion.
>
> (2) Without prejudice to the generality of subsection (1) a person's freedom shall be regarded as threatened if, in the opinion of the Minister the person is likely to be subject to a serious assault (including an assault of a sexual nature)".

At the hearing in the High Court, it appeared to be accepted that there was "an overlap" between the Acts of 1996 and the Act of 1999 "Thus in this case the letter of the 18th September, 2001 which marks the end of the asylum process for the applicant, is also the beginning of the immigration process and reflects both s.17(5) of the Act of 1996 and s.3(3)(a) of the Act of 1999", as the learned trial judge put it. The Minister submitted in the High Court that the interaction between the two Acts has already been the subject matter of judicial decision, in **F.P. v.**

**Minister for Justice** [2002] 1 IR 164. This case will be referred to again below: it appears to support the form of decision given by the Minister in this case.

Once representations on behalf of an applicant who has failed to secure asylum as a refugee are received within the statutory time, the Minister becomes obliged, pursuant to s.3(3)(b) of the Act of 1999 to do the following things:

"(i) Before deciding the matter, take into consideration any representations duly made to him or her under this paragraph in relation to the proposal [i.e. the proposal to make a deportation order], and

(ii) Notify the person in writing of his or her decision and the reasons for it…".

The "matter" is whether or not to make a deportation order.

Pursuant to s.3(6) of the Act of 1999:

> "In determining whether to make a deportation order in relation to a person, the Minister shall have regard to
>
> (a) The age of the person;
> (b) The duration of residence in the State of the person;
>
> (c) The family and domestic circumstances of the person;
>
> (d) The nature of the person's connection with the State, if any;
> (e) The employment (including self employment) record of the person;

(f) The employment (including self employment) prospects of the person;

(g) The character and conduct of the person both within and (where relevant and ascertainable) outside the State including any criminal convictions;

(h) Humanitarian considerations;

(i) Any representations duly made by or on behalf of the person;

(j) The common good; and

(k) Considerations of national security and public policy, so far as they appear or are known to the Minister.

**Legal and constitutional context.**

This court and the High Court have had numerous opportunities to consider the legal and constitutional status of non-Nationals. This has been done comprehensively in this court in **The Illegal Immigrants (Trafficking) Bill, 1999** [2000] 2IR 360 in particular at pages 382 - 386 of the report. This passage refers to the judgment of Costello J. in **Pok Sun Shum v. Ireland** [1986] ILRM 593 and to the judgment of Gannon J. in **Osheku v. Ireland** [1986] IR 733. The effect of these decisions is summarised in the judgment of Keane J. (as he then was) in **Laurentiu v. Minister for Justice** [1999] 4 IR 26, at p.91 as follows:

> "… The general principle that the right to expel or deport aliens inheres in the State by virtue of its nature and not because it has been conferred on particular organs of the State by statute."

In both of the earlier judgments referred to, this inherent power is regarded as an aspect of "the common good referred to, the definition, recognition and the protection of the boundaries of the State".

In **F.P. v. Minister for Justice** [2002] 1 IR 164, I said at p.168:

> "The inherent nature of these powers in a State is demonstrated by their assertion over a vast period of history, from the very earliest emergence of States as such, and its existence in all contemporary States, even those which vary widely in their constitutional, legal and economic regimes, and in the extent to which the Rule of Law is recognised."

The following passage from the judgment of the Court in the last mentioned case is also applicable to the present circumstances:

> "In Ireland, the other common law jurisdictions, the Member States of the European Union and elsewhere, this power is the subject of detailed regulation both by domestic law and by international instruments. There is a detailed provision directed at ensuring the constitutional and human rights of applicants for asylum. In these cases it is to be presumed, and the documents exhibited in these applications in my opinion demonstrate, that these rights have been fully vindicated in unchallenged proceedings conducted pursuant to statutory provisions."

I would also emphasise the following passage from p.172 of the report in **F.P**:

> "Before considering whether any of [the applicants complaints about the Minister's decision] have sufficient merit to ground a grant of leave to apply for judicial review, it is worth restating the status of the applicants at the time they made their representations. They were persons whose

> application for asylum had been rejected in the first instance and on appeal. They lacked any entitlement to remain in the country save that deriving from the procedures they were operating i.e. a right to await a decision on a request not to be deported. Both the fact that they had been refused refugee status, and the nature of the decision awaited as it appears from the Act of 2000, emphasise that this was in the nature of an *ad misericordium* application. The matters requiring to be considered were the personal circumstances of the applicant described under seven sub-headings; the applicant's representations (which in practice related to the same matters) and "humanitarian considerations". The impersonal matters requiring to be considered were described as "the common good and considerations of national security and public policy". <u>They did not include in any way an obligation to revisit the original decision</u>.". (Emphasis added).

The last sentence appears to me to be of crucial importance in the resolution of the present case. The applicant has, some nine years ago, been found not to be a person who is a "refugee" within the meaning of the Geneva Convention relating to the Status of Refugees, 1951. A refugee, within the meaning of this instrument is:

> "Any person who… owing to well founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of its nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country."

The applicant failed twice to establish herself in this status fundamentally for reasons of lack of credibility. It was not disputed that there was inter-tribal conflict in Nigeria, nor that forced marriage and

female genital mutilation were to some extent practised in that country. But the deciding officer and the Appeals Tribunal were not satisfied that she had established that she herself was at risk of such treatment, as opposed to establishing that such things occurred in Nigeria.

It is essential to the proper working of the asylum process that the distinction just made should be borne in mind. There are many countries in the world where practises which are widely considered unacceptable by Irish, European or American opinion are nonetheless commonplace either as a matter of government policy or (as in the case of female genital mutilation) as a matter of tradition or custom. It is plainly impossible to grant asylum simply on the basis that unacceptable practices occur in an applicant's country of origin: that would commit the receiving country to accept for asylum every person who, in theory, *might* be the victim of such a practice. On the contrary, it is necessary for the applicant to go further and to establish a personal "well founded fear". Any other policy would represent an open door for asylum seekers.

It is also of central importance to restate yet again that the applicant took no step to challenge the refusal of refugee status nor the confirmation of that decision on appeal.

It is also of importance to restate that the reasons for her failure amounted fundamentally to a failure in her credibility, which of course is best assessed by those who have seen and heard her, in this case the immigration officer and the independent member of the Refugee Appeals Tribunal.

It appears to me that the present judicial review proceedings, ostensibly directed against the Minister's decision to make a deportation order, are in effect directed at obtaining a review of the initial decision and the decision of the Refugee Appeals Tribunal on appeal. There is nothing in the letter or other representations to the Minister to suggest that the risk of persecution or assault in Nigeria has materially worsened between the date of those original decisions and the time of the decision to issue a deportation order. That case was not made in argument. The central thrust of the present proceedings was that the applicant should not be deported to a country where she was at a real risk of violation of her fundamental rights, freedom of conscience, freedom to choose her life partner and risk of female genital mutilation. All of these matters have previously been raised in connection with her application for asylum, even if they were not, originally, its principal ground.

The concluding portion of the letter of the 8th October, 2001 from the applicant's solicitors makes perfectly clear the almost total overlap between her application to the Minister and her earlier applications for asylum. Insofar as there is a substantive difference, it is the claim that the Minister failed to allow the applicant to adduce expert evidence in respect of his exercise of discretion pursuant to s.17(1)(b) and 17(6) of the Act of 1996. This was first requested in the applicant's solicitor's letter of the 10th September, 2001. Little is said about the content of the evidence but the following sentence occurs towards the end of the letter:

> "We submit that such evidence will further support the claim that the applicant is in danger of being subjected to torture, inhuman and degrading treatment and that such treatment would amount to a violation of the rights of the applicant and a breach of the principle of non-refoulement."

These are precisely the matters urged before the deciding officer and the Appeals Tribunal, nearly a decade ago now.

It is also of interest that the letter complains, in relation to the decision of the Refugee Appeals Tribunal that "… these conclusions were unreasonable and incorrect because they fail to take account of relevant cultural considerations and are ethnocentric and euro-centric".

If this was the belief of the applicant's solicitors, and if it were capable of being supported, it would have justified a legal challenge to the decision of the Refugee Appeals Tribunal, and the earlier decision, on grounds of unreasonableness. But no such challenge was launched, though it was presumably considered. These decisions have stood unchallenged for more than nine years.

Instead, leaving aside for a moment the alleged improper refusal of the Minister to hear expert evidence, the Minister's decision is attacked on grounds that appear to be substantially the same as those which might have been, but in fact were not, deployed against the decision of the Refugee Appeals Tribunal and of the original deciding officer.

This court has already unanimously held, in a passage quoted above, that the Minister's responsibilities do not include a duty to revisit the earlier decisions. Nor, I would add, does it include a duty to address issues which amount in substance to a revisiting of the earlier decision, unless perhaps a case can be made that the position has changed in the time between the decision of the Refugee Appeals Tribunal and the Minister's later decision. No attempt that I can see has been made to take this latter point here.

It must be borne in mind that what is presently before the court is an appeal from the learned trial judge's decision giving the applicant leave to appeal, as required by Statute, on one ground only, that set out earlier in this judgment. Furthermore, this ground itself may only be agitated insofar as it relates to the applicant's attack on the Minister's decision to make a deportation order, as opposed to any of the earlier decisions on which that is based. These were never challenged by the applicant, and any attempt to do so now would be, literally, years out of time.

I am, unfortunately, unable to follow the very learned judgments of two of my colleagues in distinguishing, to some extent, the present case from **F.P.** on the basis that "It does not appear from the judgment in the **F.P.** case that the appellants made any complaint of a risk of probable subjection to abuse of their personal or human rights on return to their countries of origin. In particular no issue regarding a risk of exposure to FGM was mentioned".

In the circumstances of **F.P.** as Fennelly J. points out, the (male) Romanian applicants there could not credibly have claimed a risk of subjection to FGM. But they certainly claimed that they were at risk of subjection to abuse of their personal or human rights if returned to their

country of origin: indeed they could hardly have made the underlying claim to refugee status without making this allegation. It was unnecessary to explore these claims in the case that came before this court, because, as in the present case, the claim for relief was wholly in relation to the Minister's decision. However I summarise below what was claimed in the **F.P.** case, as the grounds for seeking asylum.

All three applicants in **F.P.** were of Romanian nationality. Mr. **F.P.** claimed that he had been persecuted in Romania on the basis of his ethnic origin. He claimed that he had been dismissed from his employment because his mother was an ethnic Romany and claimed that he reasonably feared that he would be persecuted on account of his ethnic origin in a prosecution that he was to face relating to alleged assault on a police officer. **C.B.** claimed asylum on the basis of a fear of persecution if he were returned to Romania on account of his personal background. He said his wife had died during demonstrations prior to the downfall of the Communist regime in 1989. He further claimed that the police had been responsible for the death of his wife and the circumstances of her death had never been adequately investigated. He claimed that the police had not dealt with allegations of extortionist demands made upon him by a local mafia when he attempted to earn a living as a shopkeeper. He further claimed that, on account of his political views, he had been

dismissed from his employment and harassed following a change in the leadership of his trade union. **A.L.** claimed asylum on the basis of a fear of persecution owing to his religious opinions and said that he would be forced contrary to his conscience to undergo military service if he were returned to Romania.

It was quite unnecessary for the court to form any view as to the credibility or substance of these claims. Although they did not and (in the circumstances of the case, as Fennelly J. points out, could not have) involved FGM, the applicants in that case certainly claimed matters capable of being regarded as impinging on their fundamental personal, human and political rights.

My inability to follow other members of the Court in distinguishing the present case from **F.P.** is indeed a fundamental difference. I wish to emphasise that in my view the material set out above demonstrates that **F.P.** was a case where the applicants alleged that their fundamental rights were at risk so that (unless one is prepared to put cases of any alleged fear of FGM in an entirely different and more privileged position to those in which a breach of other fundamental rights is alleged), the cases are indistinguishable. Fennelly J. is of course quite correct to say of the judgment in this court in **F.P.** that:

> "The judgment makes no mention of infringements of fundamental rights of any risk of inhumane treatment or torture on return to the country of origin of the appellants. Allegations of infringement of such rights were necessarily made at the earlier stages and, in particular, as part of the asylum process, but they played no part in the judgment of this court."

But with every possible deference, I am unable to follow this approach as a ground of distinguishing the two cases. The specific allegations made by the Romanians in **F.P.** were quite irrelevant to their attempt to judicially review the Minister's decision, just as the precise nature of the appellant's application for asylum in this case is irrelevant to the judicial review application. To hold otherwise would be to depart from firm statements in **F.P**.and in **Baby O** that the Minister is not obliged to revisit the application for asylum. **F.P.** is authority for this last proposition, and also for the proposition that a form of decision essentially similar to that in the present case is a sufficient discharge of any obligation to give reasons. In this latter regard the court relied on what was said by Geoghegan J. in **Laurentiu v. Minister for Justice** [1999] 4 IR 26, at p.34:

> "I do not think there was any obligation constitutional or otherwise to set out specific or more elaborate reasons in that letter as to why the application on humanitarian grounds was being refused. The letter makes clear that all the points made on behalf of the applicant had been taken into account and of course they were set out in a very detailed manner. The letter is simply stating that the [Minister] did not consider the detailed reasons sufficient to warrant granting their

> permission to remain in Ireland on humanitarian grounds. It was open to the [Minister] to take that view and no court can interfere with the decision in those circumstances".

**F.P.** was the unanimous decision of this court (Keane C.J., Denham, Murphy, Murray and Hardiman JJ) and was given in recent times.

The somewhat similar case of **Baby O v. the Minister for Justice** [2002] 2 IR 169 also led to a recent unanimous decision of this Court (Keane C.J., Denham, Murphy, Murray and McGuinness JJ). It was a case where another Nigerian, who had arrived in Ireland within days of the arrival of Ms. Meadows (24th or 25th December, 1999), claimed that her life was in danger due to the homicidal activities of a body called the "Ogboni Fraternity", whom, she claimed, were going to kill her because of her "omission to bring them three human heads for cultish purposes". She also claimed that the care and medical facilities available for her unborn child in Nigeria were very inadequate. In other words, the case plainly raised an alleged express threat to her life which was however discounted by the immigration officer and the Appeals Tribunal on the grounds that she lacked credibility. The court also dealt with another issue, also raised in this case, relating to the laconic statement that "the Minister has satisfied himself that the provisions of s.5 (Prohibition of

Refoulement) of the Refugee Act, 1996 are complied with in your case".

Keane C.J. held that:

> "I am satisfied that there is no obligation on the first-respondent to enter into correspondence with a person in the position of the second applicant setting out detailed reasons as to why refoulment does not arise. The first-named respondent's obligation was to consider the representations made on her behalf and to notify her of his decision: that was done and accordingly this ground is not made out."

That case seems to me to preclude the grant of leave in the present case on the basis of an alleged defective treatment of s.5 obligation in the wording of the Minister's decision.

I have already expressed the view that FGM is, by our standards, and by the international standards espoused by the United Nations and its organs, a wholly reprehensible practice. Equally, it must be clear that it is a wholly reprehensible practice, and amounts to torture and criminal homicide to subject a person to murder at the hands of a cult, for a failure to provide it with three human heads for some cultish purpose. This is not only reprehensible, it is scarcely comprehensible. There can be no mandate for the court to rank these outrageous practices in some ordinal system: both FGM and the cultish practice as described in **Baby O**, and many other practices all alike produce a rational fear in a person on real risk of suffering them, which would entitle him or her to claim asylum. They are, all alike, simply outrageous and inhumane. There is no question

of treating one class of asylum seeker differently and more favourably than others because of the precise form of invasion of their human rights which is in question. If there were, then apart from anything else, it is predictable that, regardless of the actual reason for seeking asylum, the reasons most likely to lead to a good result would be adopted in as many cases as possible. A person who had simply heard of the morbid deeds of the Ogboni fraternity might, for example, invoke them as a ground for seeking asylum even though, in reality, he was not on personal risk of becoming a victim. The same applies to FGM. That is why each individual case requires careful scrutiny, as happened in this instance.

It appears to me that the conclusions I propose in relation to the absence of any obligation on the Minister to reconsider the applicant's application for refugee status, or other issues founded on the same allegations or claims; to the form of the decision on the refusal of humanitarian leave to remain; and the form of the decision in relation to refoulment (which issues are also found in this case) all derive support from what I regard as the binding precedents of the two recently and unanimously decided cases mentioned. We were not invited to depart from these precedents.

**The criteria for judicial review.**

As noted earlier in this judgment, the question of the criteria to be applied on applications for judicial review, in particular those involving rights described as “human rights”, “constitutional rights”, or “fundamental rights”, has preoccupied the courts in a number of jurisdictions for some time now. This concern has arisen from a number of sources, one of which is certainly a feeling that, at least without modification, the **O’Keeffe/Keegan/Wednesbury** test disables a court from applying the degree of scrutiny which the principles of ECHR proportionality demand. I do not agree with this and consider, for reasons set out in the judgment of Fennelly J., that the established test is more flexible than its critics allow. Towards the end of this judgment, I set out what I think to be the proper scope of judicial review.

The **O’Keeffe/Keegan/Wednesbury** test is easily stated and readily comprehensible, which has no doubt contributed to its longevity. In the struggle for a new and (from an applicant’s point of view) less onerous standard, no similarly pithy form of words has been found. Instead, discussion in the United Kingdom has evolved around such vague phrases as “anxious scrutiny”, “most anxious scrutiny”, “heightened scrutiny”, “special responsibility”, and “proportionality review”. These phrases are not, in my view, at all helpful and indeed have

been sources of much confusion. As we shall see, elsewhere in the common law world other proposed criteria have emerged.

The question of a changed criterion for judicial review has been debated, inconclusively, in several Irish cases. In **V.Z. v. the Minister for Justice** [2002] 2IR 135 McGuinness J. discussed the question of whether the **O'Keeffe/Keegan** test should be supplanted in a passage with which I respectfully agree. She referred to:

> "… these well established standards and parameters of judicial review… of the decision making procedures of the respondent" and continued
>
> "Should he [the judge] in addition have applied an additional element of 'anxious scrutiny' or "heightened scrutiny" as required in the English cases opened to this court by counsel for the applicant? I accept that the outcome of the respondent's decisions and of this court's decision is of crucial importance to the applicant's future….the outcome of judicial review proceedings in many cases and in many contexts is of crucial importance to applicants. The court is committed to submitting the decision making process in all cases to careful scrutiny. In the instant case the High Court judge delivered two lengthy careful and detailed reserved judgments. It cannot be argued that he did not subject the applicant's claim to the most careful scrutiny."

I have a certain difficulty in the interpretation of the phrases used by the English courts in the cases to which we have been referred - "anxious scrutiny", "heightened scrutiny" and similar phrases. From a humane point of view it is clear that any court will most carefully

consider a case where basic human rights are in question. But from the point of view of the law, how does one define the difference between, say, “scrutiny”, “careful scrutiny”, “heightened scrutiny”, or “anxious scrutiny”?

To quote McGuinness J. again [2002] 2 IR 135:

> “Can it mean that in a case where the decision making process is subject to “anxious scrutiny” the standard of unreasonableness or irrationality is to be lowered? Surely not. Yet it is otherwise difficult to elucidate the legal significance of the phrase. It must be said that this aspect of the case was not fully argued before this court… I consider it sufficient that the applicant’s judicial review application receive careful scrutiny under the established standards relating to reasonableness”.

As I have mentioned, I share the concerns expressed by Mrs. Justice McGuinness. I believe that the phrases she quotes, “anxious scrutiny” and the like, are confusing precisely because they focus on the quality of the scrutiny and not on the criteria which are to be applied, which is the legal issue.

In a later Irish case, **AO and OJO v. Minister for Justice** [2003] 1 IR 1 certain members of the court addressed the question of the applicability of **O’Keeffe**, although it had not been addressed in argument. Fennelly J., who dissented as to the result of the case,

considered this issue in some detail in remarks which he acknowledged to be *obiter*:

> "It seems to me that, where as in this case constitutional rights are at stake, such a standard of judicial scrutiny must necessarily fall well short of what is likely to be required for their protection. This appears to have led to some modification of the tests in other jurisdictions. In **R (Mahmood) v. Secretary of State for the Home Department** [2001] 1 WLR 840 the decision of the English Court of Appeal, upon which the Minister has relied, Laws L.J. and Lord Phillips M.R. both applied a significantly modified test as expounded in the case of **Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation** [1948] 1KB 223 based on "anxious scrutiny", to a case involving interference of fundamental rights. In a case such as the present, the routine application of the unmodified test as expounded in **Wednesbury** makes the decisions of the Minister virtually immune from review."

These *dicta* were pronounced against a background of considerable ferment in the English cases on the subject. The concept of "anxious scrutiny" appears to takes it rise in the speech of Lord Bridge in the case of **Bugdaycay** [1987] 1 AC 514. This case, which was also an asylum/deportation case, led Lord Bridge to observe that where fundamental rights were in question the court must anxiously scrutinise the case. I do not think that, in saying this, Lord Bridge was attempting to formulate a new standard for judicial review. He was making a statement which is in some ways an obvious one, and similar to what has been said in this country in extradition cases, that when one is contemplating a

decision which will send a litigant outside the jurisdiction and therefore outside the protection of our courts, one must be very careful. But that observation, in itself, says nothing about such topics as the standard for judicial review, the onus of proof in judicial review cases and other matters which later users of the phrase have sought to implicate within it.

It is well to set out the precise words of Lord Bridge, at p.952 of the report:

> "…the resolution of any issue or act and the exercise of any discretion in relation to an application for asylum as a refugee lie exclusively within the jurisdiction of the Secretary of State subject only to the courts powers of review. The limitations on the scope of this power are well known and need not be restated here. *Within those limitations* the court must, I think, be entitled to subject the administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life, and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny." (Emphasis added)

It thus appears that Lord Bridge, in the very passage in which the phrase "anxious scrutiny" was coined, specifically reasserted the established limitations of the courts power on an application for judicial review. In the United Kingdom, these limitations are expressed in the **Wednesbury** criteria.

Without further discussing the English cases for the moment, I think it important to make the obvious observation that “anxious scrutiny” is not in itself, either verbally or conceptually, a legal test at all, nor even an attempt to express a legal standard. It seems to me, oddly, to be a statement of the care which the judiciary will entertain the application. It is to be hoped and assumed that the judiciary will be undeviatingly careful in any case where there is an entitlement to apply for judicial review.

Furthermore, I agree with the written submission of the respondent in this case that a new criterion of judicial review for some cases only, along the English lines “is likely to prove chimerical in practise. Virtually any judicial review can be characterised as engaging constitutional fundamental rights to some extent”.

No matter which of the English phrases one adopts, there is no disguising that each of them suggests, for the first time, a two tier standard for judicial review: a lower one for cases thought to involve (in an Irish context) constitutional rights or perhaps other rights thought to be fundamental or very significant, and a higher and, to the applicant, more demanding criterion in other cases, where he has to establish unreasonableness as that term has been traditionally understood.

This point seems to me to lie at the heart of some remarks, with which I respectfully agree, of McCarthy J. in the High Court in **BJN v. Minister for Justice** [2008] 1 EHC 8 where, speaking of the applicant's arguments he said:

> "… the proposition that he advances is that a distinction may (and I stress may) be drawn between a class of case where constitutional rights are at stake, such as the present one, and others I am not at all sure that such a distinction can be validly drawn or if it can be so drawn, I think it must be said that a great many applications for judicial review in fact raise issues of constitutional rights in one form or another, such as breach of the principles of constitutional justice, say, in relation to a planning decision or the grant or refusal of a license, or the dismissal of an office holder."

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**English Controversies on "Anxious Scrutiny".**

There can be no doubt, either, that the "anxious scrutiny" test as applied in the United Kingdom operates in some circumstances at least to cast a positive onus on the decision maker to justify his decision. Thus, in **Mahmood**, cited above, Laws L.J. emphasised that the decision maker was:

> "… accordingly required to demonstrate that his proposed action does not interfere with the right, or, if it does, that there exists considerations which may reasonably be accepted as amounting to a substantial objective justification for the interference."

Similarly, the decision in **R. v. Lord Saville** [2002] 1WLR 1855 speaks in terms of "compelling justification" for the impugned decision. These examples could be multiplied. This approach is quite unprefigured in the speech of Lord Bridge but now, it seems to me, is at the heart of "anxious scrutiny" as practiced in Great Britain.

In **Nash v. Minister for Justice** [2004] 3 IR 296, a case about the transfer of a prisoner, Kearns J. in the High Court observed:

> "Nor does the court see any reason for extending the purview of the judicial review simply by applying "anxious scrutiny" test in a case of this nature. This was the fall back position advanced on behalf of the applicant. To go down that road would be a dangerous exercise in judicial adventurism which would set aside decades of case law in this area. To adopt such a course might quickly bring in its wake an endless stream of judicial review applications in cases where human rights might to any degree be said to be affected by some ministerial or administrative decision."

I believe that it must be acknowledged, on the basis of experience of judicial review applications, which are now among the major components of the case load in this court, that a great many such applications arise in areas where there can be little doubt that a constitutional right is implicated. A review of the disposition of a criminal matter by the District Court would almost certainly be in this category as would the great majority of, if not all, asylum cases. The great bulk of litigation arising from Tribunals and Commissions of Inquiry also

deals with constitutional rights to good name and otherwise which are said to be implicated and an enormous number of cases where the points made are fundamentally procedural involve the constitutional value of "fair procedures", a preoccupation of the courts since at least the decision of **In Re Haughey** [1971] IR 217. .

Accordingly, it is predictable that if the criteria for application of judicial review is changed in cases involving constitutional rights, the remnant of cases which will not be subject to the change will indeed be a poor remnant, hard enough to define in theory in light of the wide range of constitutional (not to mention Convention) rights and, I should imagine, very rarely met with in practice.

**Anxious consideration: Trojan horse or Russian doll?**

I have set out above the misleadingly modest origins of the phrase "anxious consideration", upon which so much judicial ink has since been spilt. The phrase is used in different senses, which any outside observer of judicial developments must find thoroughly confusing. But such observers are mostly lawyers, academic or otherwise, and are almost invariably *partis pris*, whose strong taste for novelty, and specifically for the extension of the domain of the law, leads them to pass lightly over the absence of rigour or even of specific meaning, in the phrase as now used.

They do this, seduced by the intoxicating prospect it has come to represent of a dramatic judicial incursion into the political and administrative field.

This prospect was emphatically not inherent, or indeed present at all, in the phrase as originated by Lord Bridge. Nor was it lurking, concealed, in his words, ready to spring out when he or some other jurist gave the signal: his dictum quoted above is sufficient to demonstrate this. The phrase was in my view always unfortunate, because of its introduction of a two tier scheme for judicial review; one tier must necessarily be inferior to the other. But it was no Trojan horse whereby a revolutionary extension of the judges' power in judicial review might be attempted.

Despite the absence of any such intention on the part of Lord Bridge, however, the phrase has in my view become the banner or mantra beneath which just such a revolution has taken place in the adjacent jurisdiction. If not a Trojan horse, it is perhaps the verbal or linguistic equivalent of a Russian doll, concealing layers of meaning unsuspected even on a detailed scrutiny of the exterior, however intense or "anxious".

Thus, in English cases such as **Mahmood** and **Lord Savill**, "anxious scrutiny" has enabled the judges to require that statutorily constituted decision makers provide "substantial justification" for the decisions which, by law, they are entitled and obliged to make. This justification is to be provided to an unelected judge, sitting in a court. Though theorists may quibble, this is in practice a substantial transfer of power from the politically responsible organs of government to an unelected judiciary. I deprecate this for the reasons given by me in **T.D. v. Minister for Education** [2001] 4 I.R. 259 and **Sinnott v. Minister for Education** [2001] 2 I.R. 545.

With hindsight, it is possible to discern the mechanism by means of which this epochal change, as I see it, was introduced in England and Wales. I do not believe that this is a purely academic exercise; it may even provide a template for reflection on possible developments here.

Firstly, there was in England a felt dissatisfaction with the older or **Wednesbury** criteria for judicial review. Remarks and observations such as that **Wednesbury** was dead but that it had not yet proved possible to issue a death certificate or perform the last rites, were commonplace. Similar observations have become common in Ireland, about the **O'Keeffe** and **Keegan** criteria. See, for example, M. Rogan "Faster,

Higher, Stronger? Sections 5 and 10 of the Illegal Immigrants Trafficking Act, 2000": (2002) ISLR 10; Moynihan "Anxious Scrutiny, Heightened Scrutiny: Recent Developments in Wednesbury unreasonableness": for UCD LR 37 (2004)"; Hogan "Judicial Review, the doctrine of reasonableness and the Immigration process" (2001) 6 Bar Review 329. The latter article contains the statement that, in the categories of reasonableness, irrationality and proportionality, "it may seem heretical to say so, [but] in these cases judicial review operates as a form of limited appeal from the decision maker".

(It is irrelevant to the present largely historical analysis that these critiques were often gravely flawed for example by overstating the rigidity of the established criteria, (as has been learnedly expounded by Fennelly J. in his judgment in this case) and by wholly ignoring the logic of the established criteria given our constitutionally required separation of powers, as outlined by Griffin J. in a passage quoted above, which was quoted with express approval by Finlay C.J. in **O'Keeffe** (above).

I would add to the dicta of Griffin J., and the authorities cited by him, a reference to the decision of Kelly J. in **Flood v. Garda Síochána Complaints Board** [1997] 3 IR 321, at 346. There, having cited passages

from **Chief Constable of North Wales Police v. Evans** [1982] 1 WLR 1155, from Brightman L.J., Kelly J. went on to say:

> "Even if this court would have reached a conclusion different from that of the respondent, it is not entitled on judicial review to substitute its view in that regard for the one borne by the entity charged by statute with forming the appropriate opinion. This limitation on the power of judicial review must be borne in mind so as to ensure that this court does not trespass upon matters in respect of which it has neither competence nor jurisdiction. I would not be justified in interfering with the decision of the respondent merely on the grounds that on the facts presented to it I would have reached different conclusions. Once I am satisfied (as I am) that the appropriate procedures were followed and that the decision impugned is not irrational, the decision of the respondent must be upheld." (Emphasis added)

The established criteria, in Ireland and elsewhere, required a considerable degree of judicial restraint, which in the nature of things can only be self imposed. This is itself unacceptable to those who feel that many of the ills of humanity are susceptible of a judicial or judicially imposed solution. Alternatively, such critics may perceive a grave failure of one or both of the other organs of government and may consider that the judges are entitled to correct it, as was considered by the High Court in the case of **T.D.**, cited above.

Next, against this background of dissatisfaction with established criteria for judicial review (which are based fundamentally on judicial self restraint, and on a respect for the separation of powers), new *subjects*

of judicial review arose. These were often very emotive, such as the plight of the disadvantaged, of those suffering from pity-inducing diseases or conditions, or of alleged refugees who say that they fear torture, death or mutilation unless granted relief by way of judicial review. These topics attract much media attention.

The combination of these things, and the virtual abandonment in some circles of any sense of the need for a separation of powers, led to a sometimes irresistible impatience with the established criteria as mere technicalities, groundless constraints on judicial power, amplified (as by then it was), by the ECHR. This feeling of impatience is at its height in the more emotive cases, where a lawyer can indulge the unaccustomed feeling of riding a wave of public or at least journalistic support, real or imagined. But any extension of judicial power established in such circumstances will of course endure even where the cause is less than popular.

I believe that the foregoing characterisation of the great jurisprudential developments which have taken place in England and Wales under the banner of “Anxious Scrutiny” or some similar phrase, is illustrated by an examination of the cases. Moreover, much of it is the work of one distinguished and influential jurist, Sir John Laws, a Lord

Justice of Appeal, widely known even outside the United Kingdom for his extensive extra-judicial writings, notably in the journal *Public Law*. The most notable of these, *Law and Democracy*, proposed a considerable revolution in Britain's Constitutional arrangements in the interest of a "higher order law". This was reviewed by Professor Griffiths of the L.S.E. in the *Modern Law Review,* under the title "The Brave New World of Sir John Laws."

Whatever about these controversies, the first major adoption and development of Lord Bridges phrase about "Anxious Scrutiny" took place in **R. v. Cambridge Health Authority, *ex parte* B** [1995] 2 AER 129. This was, perhaps, as emotive a case as can be imagined. **B** was a ten year old girl suffering from non-Hodgkin's lymphoma and from leukaemia. Chemotherapy and other treatments were at first successful but she suffered a serious relapse in January 1995 and had a life expectancy of only six to eight weeks. Her medical advisers took the view that she should be given no further remedial treatment but only palliative treatment. Her family thought differently and engaged two experts who advised that further treatment, including a second bone marrow transplant, was possible. There were no beds available in the only National Health Service Hospital prepared to carry out such treatment, so it could only be administered privately. The proposed course of treatment

would be administered in two stages, the first being a course of chemotherapy costing £15,000. It had an estimated 10% - 20% chance of success and if a remission was achieved it would be followed by a second stage of treatment, being a second bone marrow transplant costing £60,000 which similarly had a 10% - 20% chance of success. On this basis the father asked the Health Authority responsible for the child's care to allocate £75,000 for the proposed treatment but the Health Authority refused. Judicial Review proceedings were launched to quash their decision and to require them to finance the treatment. The Health Authority said that it had acted as it did by considering whether the proposed course of treatment was appropriate for the child having regard to the clinical judgement of the treating doctors and having regard to guidance given by the Department of Health in respect of non-proven or experimental treatment. Laws J. (as he then was) granted partial relief in a judgment reported in (1995) 25 BMLR 5.The learned judge declared that:

> "From the outset, however, I entertained the greatest doubt whether the decisive touchstone for the legality of the respondents' decision was the crude *Wednesbury* bludgeon. It seems to me that the fundamental right, the right to life, was engaged in the case. I invited counsel's attention to two Authorities in their Lordship's house [the first of these was Bugdaycay]".

At p.12 he considered the passage already quoted from Lord Bridges speech in **Bugdaycay** and certain other *dicta* which he considered to point the way to a -

> "… developing feature of our domestic jurisprudence relating to fundamental rights which should now… be regarded as having a secure home in the common law… The principle is that certain rights, broadly those occupying a central place in the European Convention on Human Rights and obviously including the right to life, are not to be perceived merely as moral or political aspirations, nor as enjoying a legal status only upon the international plain of the country's convention obligations. They are to be vindicated as sharing with other principles the substance of the English common law. Concretely, the law requires that where a public body enjoys a discretion whose exercise may infringe such a right, it is not to be permitted to perpetrate any such infringement unless it can show a substantial objective justification on public interest grounds. The public body is the first judge of the question as to whether such a justification exists. The court's role is secondary." (Emphasis added)

This approach had in fact been foreshadowed in Laws J's earlier article *Is the High Court the Guardian of Fundamental Human Rights?* [1993] PL 59. In **B**, Laws J. did not consider that the reasons advanced for their action by the Local Authority provided the necessary "substantial objective justification". It may be noteworthy that Laws J. would have quashed the Health Authority's decision even on ordinary *Wednesbury* principles because the Authority had omitted to consider a relevant matter namely the views of **B's** family. He also considered that the Authority were in error in describing the treatment as experimental,

and therefore triggering the Department of Health's guidelines about treatment of that kind. It would appear, therefore, that his observations on the criteria for judicial review are to that extent *obiter*. But Laws L.J. (as he became) later described the *Wednesbury* concept of unreasonableness dismissively and went on to prefer another approach which he described as follows:

> "The second approach recognises that a fundamental right… is engaged in the case; and in consequence the court will insist that that fact be respected by the decision maker, who is accordingly required to demonstrate, either that his proposed action does not in truth interfere with the right or, if it does, that there exists considerations which may reasonably be accepted as amounting to a substantial justification for the interference."

This, in Laws J's view is on the basis that:

> "… The intensity of review in a public law case will depend on the subject matter in hand; and so in particular any interference by the action of a public body with a fundamental right will require a substantial objective justification."

These last two citations are both from **Mahmood v. Home Secretary** [2001] 1 WLR 840.

I have set out in some detail some issues in and the decisions of the High Court of England and Wales in the **B** case because it is the earliest example that I can find of the adoption of the new test for judicial review

which is firmly associated with, and often now described as “anxious scrutiny”.

But the clear innovation, as I see it, represented by the judgment of Laws J. in **B** was immediately judicially controversial. The controversy was immediate in the most literal sense because the decision of Mr. Justice Laws in that case was appealed by the Health Authority and set aside by the Court of Appeal on the very day of the High Court judgment. The Court of Appeal (Sir Thomas Bingham M.R.), at pages 135/136 emphasised that the facts of the case meant that the decision was one that could be regarded only with the greatest seriousness. He went on to say however:

> “… that the courts are not, contrary to what is sometimes believed, arbiters as to the merits of cases of this kind. Were we to express opinions as to the likelihood of the effectiveness of medical treatment, or as to the merits of medical judgement, then we should be straying far from the sphere which our under our Constitution is accorded to us. We have one function only, which is to rule upon the lawfulness of decisions. That is a function to which we should strictly confine ourselves.”

Having considered the criticisms the trial judge made of the Health Authority’s decision the Master of the Rolls continued at p.137:

> “Difficult and agonising judgements have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a

> judgement which the court can make. In my judgement, it is not something that a health authority can be fairly criticised for not advancing before the court."

The Master of the Rolls, at p.138, considered himself:

> "… obliged, expressly, to disassociate myself from the learned judge's opinion that it would be hard to imagine a proper basis upon which this treatment, at least in its initial stage, could reasonably be withheld. In my judgement, it would be open to the Authority readily to reach that decision… I feel bound to regard this as an attempt, wholly understandable but nonetheless misguided, to involve the court in a field of activity when it is not fitted to make any decision favourable to the patient."

I am fully aware that, subsequent to the **B** case "Anxious Scrutiny" in its broader sense has been applied in various cases in the United Kingdom, whether by Laws L.J. or by other judges. Some of these cases have been cited above. But I must say that I find myself in full agreement with the decision of the Court of Appeal in **B**, which I consider to be a decision along the lines of the traditional criteria for judicial review. Moreover, I consider that (of more immediate importance for present purposes) the Superior Courts in Ireland have not been moved to accept various invitations tendered to them in a variety of cases to adopt the "anxious scrutiny" test.

Some of these cases have been referred to above, notably the judgment of McGuinness J. in the case of **V.Z. v. The Minister for Justice** [2002] 2 IR 135.

I also wish to refer to **Dikilu v. Minister for Justice** (unreported, High Court, Finlay-Geoghegan J., 2nd July, 2003), to **Sekou Camara v. Minister for Justice** (High Court, unreported, Kelly J. 26th July, 2000) and to **TA v. Minister for Justice** (High Court unreported, Smyth J., 15th January, 2002). In these cases, the first of which led to a decision in favour of the applicant, appear each to constitute a strong affirmation of the traditional judicial review test, as traditionally understood and a rejection, where appropriate, of the suggested application of a new test.

**Anxious consideration: Form and substance.**

For reasons explored in the judgments in this case, it does not appear that the concept of anxious consideration, as it has emerged in the neighbouring jurisdiction, is likely to attract judicial support here. This is, in some cases, because it is thought that an innovation along the lines denominated "anxious consideration" in England, Wales and Northern Ireland is unnecessary or undesirable here because the deficiencies identified in the traditional criteria in those jurisdictions do not obtain here, and in part because "anxious consideration" as it has developed

amongst our neighbours has aspects which are objectionable to our constitutional arrangements, in particular separation of powers. For my part, I would reject an innovation along the lines which have developed in England for both of these reasons. That, of course, is in no way to criticise its adoption in the United Kingdom by judges who must be the best interpreters of the constitutional and administrative law principles applying there.

I hope it will be clear from what has gone before that I would reject not merely the form of words "anxious consideration" but what it has come to mean in some at least of the transpontine cases: nor merely a review of the manner in which a particular decision was reached but a merits based review of the question as to whether there is substantial justification for that decision. In this connection I would reiterate the approval I have already expressed for the *dicta* of Griffin J. in **Keegan**, and for the authorities which he cited, and from which I have quoted above.

I am not of course unaware that, since those decisions were arrived at, the European Convention on Human Rights has been, in somewhat different ways, incorporated into the domestic law both of Ireland and of the United Kingdom. I am also aware of a need, arising from that, and

from our own Constitution, to ensure that interference under law with personal rights, where that is deemed necessary, be accomplished in a manner compatible with the norms of a free and democratic State and that it occurs to the minimum degree necessary by that standard.

I do not however think that the matters just referred to require a judicial merit based review of the decisions of decision makers constituted by law *in individual case after individual case*, at enormous expense. Questions such as proportionality in my view apply to an assessment of the laws and procedures established by law whereby decisions of a particular kind are made, rather than to the individual decisions themselves. Such assessment would fall to be made in the event of a challenge to the legislation or arrangements made under it on the basis that they were unconstitutional or amounted to a breach of the State's obligations under the European Convention on Human Rights. It does not in my view fall to be made unless either of these jurisdictions is specifically invoked. They were not invoked here. If they were invoked, it would be necessary to consider our present legal dispensation in the context of our recent experiences with immigration, whether based on a claim to refugee status or otherwise, on the effect of this phenomenon and on the resources available to deal with it. None of these matters were the subject of evidence or submission before this court.

I believe that the conclusions set out above are correct in law and are in accordance with precedents, including unanimous decisions of this court, which we have not been invited to overrule. They are also in accordance with good sense and with the manifest need for efficiency and consistency in public administration. The present applicant, like many applicants for judicial review in this context, has already had not one but two impartial decisions on the merit of her application. It appears, from the source cited above, that almost every person who has been unsuccessful in these separate impartial adjudications seeks to avoid the effect of these prior decisions by seeking judicial review. This makes our sophisticated, and very much rights based, asylum system virtually unworkable and it causes gross delays. This latter point is all too clearly illustrated by the chronology of the present case which I have set out in some detail above. It is very necessary, to adapt a famous phrase, that sound law and sound administrative practice should rhyme. In my view, only very unsound law would confer a right to a third hearing on the merits some eight or nine years after the first two. In my view this would risk bringing not merely the asylum system but the entire legal system into a state of confusion.

**Nature of Judicial Review.**

I see a great difficulty in the application of an "anxious scrutiny" test whether under that name or any other. It seems to me to confer on the court a power of substantive, merit-based review of the essence of the Minister's decision. The search for an objective justification (see the English citations above and paragraph 60 of the judgment of Denham J. in this case) of the impugned decision is very hard to distinguish from an appeal. I believe, with McGuinness J. in the passage cited above, that the proposed test lowers the standard of unreasonableness in judicial review. Like McGuinness J., I believe that it is difficult to elucidate the legal significance of the phrase "anxious scrutiny", or its surrogates, on any other basis, and I believe the English cases, in speaking of an obligation to justify administrative decisions, are suggestive in this regard, and indeed go further than simply lowering the standards of unreasonableness.

I am also concerned that the process of requiring "justification" of the impugned decision will in practice cast an onus on to the decision maker, here the Minister, to justify his decision to the courts. In his judgment in this case Fennelly J. speaks of the absence of any material "to explain how the Minister came to the conclusion that the applicant should, nonetheless, be deported". In my view, to impugn the decision on

these grounds is not consistent with the judgment of this court in **F.P**. or in **O'Keeffe** both cited above and casts onto the Minister an onus positively to justify his decision. This, notwithstanding the fact that there is in the documents provided to the applicant and placed by her before the court, ample material justifying it. Below there is cited a decision of the High Court in which a District Judge was adjudged to have made a decision based on the evidence, although he made no reference to it: I am sure that the learned District Judge was fully entitled to the measure of deference, in the technical sense in which that term is used in judicial review, which allowed an appreciation of the evidence to be attributed to him. But I am equally sure that the Minister is entitled to the same degree of deference. To put this another way, if the Minister's decision requires to be justified by an express reference to the evidence on which he has acted, and not merely proof that there was such evidence, then that approach (which to my mind is characterised by a high degree of artificiality) must be applied to every other decision maker as well; for example to every decision of a District Judge, and many other decision makers.

The fact that the law puts a particular decision into the hands of a member of one of the constitutionally established organs of government, the Executive, does not in my view disentitle the decision to respect and

to deference as that word is used in a judicial review context. On the contrary, I believe that the democratic nature of the State and the constitutional position of the decision maker, affirmatively entitles the decision in this case to deference in that technical sense.

Furthermore, where (as here) the grounds of challenge included an allegation of an absence of evidence to ground the decision or a misapprehension of the evidence, I consider it legitimate to look to the evidence said not to exist or to have been misunderstood. In this case the evidence includes the expert view of the U.N.H.C.R. on the prevalence and enforcement of FGM in Nigeria, which seems highly relevant to the Minister's decision. Since this evidence is plain to be seen in the documentary information which was before the Minister and his officials, and since that material was produced at the applicant's request, and relied on by her, I believe it is proper to take it into account in assessing the Minister's decision.

In **Kenny v. Judge Coughlan and Anor.** [2008] 1 EIHC 28 (8 February 2008) a complaint was made, on an application for judicial review, that a decision of a District Judge was so laconically expressed as to fail to convey the reasons for it. O'Neill J. refused relief saying:

> "… the statement of the learned District Judge in giving his decision, looked at solely and in isolation, may appear to explain very little, but when seen in the light of the proceedings which have occurred will be fully understandable and unequivocally convey the basis for the decision to the parties to the proceedings and others who may have been in attendance…".

It seems to me that to try this application for judicial review without taking heed of the "country information" which was before the Minister would be to try it in self imposed blinkers.

**The grounds of difference.**

It is with great regret and only after serious consideration that I feel compelled to differ with the analysis of Fennelly J. in this case and thus with the order proposed by him. This regret is not merely a conventional expression because I greatly admire the formidable erudition and legal subtlety with which the developments in United Kingdom law have been explored in his judgment and the deep concern for human rights which underpins it. I also agree that a phrase (such as anxious scrutiny) or the title of a case (such as **O'Keeffe** or **Wednesbury**) which one uses to express the correct standard for a grant of refusal to judicial review, can lead merely to a semantic exercise and that nothing much turns on the phrase as a thing in itself. I further agree with his repeated statements that, in judicial review, the onus must always remain upon the applicant.

But with great regret I am forced to the view that the test now proposed to be applied has quite the contrary effect: it looks for explanation and justification from the decision maker which I believe to be inconsistent with the proper principles of judicial review, and with the view that the onus of proof remains on the applicant. This, in my view, is a revolution in the law of judicial review, differing only semantically from that which has occurred in Britain.

Fennelly J. places a considerable emphasis on two citations from the written submissions of the respondent herein, set out at paragraphs 65 and 66 of his judgment. I wholly agree with each of them but I cannot agree that either or both had the effect contended for.

In applying the legal conclusions to the facts of the present case (at paragraphs 73ff on the judgment) the aspect of the approach proposed with which I have difficulty becomes clear. It will be noted that (par.76) the difficulty with the Minister's decision is thought to arise wholly with his decision that he is satisfied "… that the provisions of s.5 (Prohibition of Refoulement) of the Refugee Act, 1996 were complied with".

In other words, the fault found by my colleagues with the Minister's decision relates wholly to his decision on non-refoulement,

and not on the more general decision on the applicant's leave to remain on humanitarian grounds or *ad misericordium* grounds, as I have described them elsewhere.

Moreover, it is important to note (par. 79) the precise nature of the fault found with the Minister's decision. It is that the statements that he was "satisfied…" that the provisions of s.5 (prohibition of refoulement) of the Refugee Act, 1996 [had been] complied with.

Under the established test set out in **O'Keeffe** and much quoted elsewhere in this judgment it would have been necessary for an applicant positively to show that "there is no relevant material which would support [the Minister's] decision."

The criticism of the Minister's decision here are quite outside that admittedly and necessarily restrictive criterion. It is said:

> "That the Minister's statement does not disclose the basis on which the appellant's complaint of risk of subjection to FGM was rejected."

And also:

> "That the Minister does not disclose whether he believes or disbelieves the appellant…".

And that he does not disclose:

> "What his views are regarding the extent or the existence of FGM in Nigeria."

Or:

> "Whether or not he believes that the appellant is subject to the risk or, if not, why not?"

It is then concluded that:

> "The difficulty posed by the form of the Minister's decision is not merely his failure to provide reason for his decision, though that is undoubtedly the case, but that the decision is defective as a result."

The next critique is that:

> "There is a complaint of a serious risk of exposure to what is arguably an infringement of life or freedom as defined in s.5 of the Refugee Act, 1999 and nothing on the other side, nothing to explain how the Minister came to the conclusion that the applicant should, nonetheless, be deported."

References then made to the discussion in my judgment of the issue of FGM and a number of policy considerations in relation to it. But the Minister's decision is finally critiqued on the basis that:

> "None of these matters were advanced in explanation of the Minister's decision."

Whether or not one regards these criticisms of the Minister's decisions as well founded, it can scarcely be denied that they represent a total departure from the nub of the approach mandated by **O'Keeffe**. But

that case itself is cited apparently with approval, in the majority judgments, which I find difficult to understand. The nature of my difficulties is set out in some detail below. I do not of course exclude the possibility that these difficulties are due to some obtusity or defective perception on my part, but I have found it impossible to overcome them.

In any event, I do not consider that these criticisms of the Minister's decision are well founded. The Act of 1999 prohibits the deportation of a person where, in the Minister's opinion, "her life or freedom would be threatened on account of her race, religion, nationality, membership of a particular social group or political opinion". That is all it does; it does not oblige or enjoin the provision of an explanation to a court of why, precisely, the Minister does not hold the opinion which would prevent him from ordering deportation. The **Baby O** case says specifically that he does not have to do this. In the circumstances of this case, the material before the Minister provides ample basis for his not coming to the view that this applicant's deportation is prohibited. In cases in our Superior Court to do with a decision of a Planning Authority to grant permission despite expert evidence to the contrary, and with a decision of a District Judge to convict of a criminal offence, the Courts were quite prepared to look to the surrounding material (although it was not expressly referred to in the decision challenge) to see if there was

some evidence capable of supporting the decision. I frankly do not understand why this very necessary exercise was not undertaken in this case. In the result, the applicant will be granted leave to apply for judicial review on the basis of a perceived defect of form in the Minister's decision. I regard this as highly artificial and, in its broader consequences, most unfortunate.

In the following paragraph it is observed that "… the appellant has established substantial grounds for concluding that the Minister did not address the complaint of the appellant regarding the danger of exposure to breach of her fundamental rights (including FGM) before deciding to deport her."

Earlier in the judgment (para. 71) a striking passage appears:

> "This test, properly applied, permits the person challenging the decision to complain of the extent to which the decision encroaches on rights or interests of those affected. In those cases the courts will consider whether the applicant shows that the encroachment is not justified. Justification will be commensurate with the extent of the encroachment. The burden of proof remains on the applicant to satisfy the court that the decision is unreasonable." (Emphasis added)

I cannot regard this view of the correct test as consistent with the passages cited above and used later in applying the test to the facts of this case. I have two major difficulties with it.

Firstly, I refer to the endorsement in **F.P.** (cited above) of what was said by Geoghegan J. in **Laurentiu v. Minister for Justice** [1999] 4 IR 26 at 34. There, the learned judge was speaking about the somewhat laconic form of decision adopted by the Minister in relation to his refusal of "Humanitarian leave to remain". This passage is set out in full earlier in this judgment. I can see no basis whatever for distinguishing between the expression of the Minister's decision thus endorsed and the expression of his decision on the question of a refoulement. It is for this reason that I consider that the present case is to be decided on the basis of the authority of **F.P.** and of **Baby O** and that any approach which would lead to the granting of relief in the present case represents a departure from those Authorities. The Minister's reference to refoulement on **F.P.** is set out at p.171 of the report and seems to me indistinguishable from that in the present case. The unambiguous judgment of Keane C.J. in **Baby O** has already been referred to.

It is clear from the earlier portions of this judgment that I agree with Fennelly J. that there is no need whatever to adopt the approach described as "anxious consideration" in the neighbouring jurisdiction. But it occurs to me that the approach actually proposed, based on an absence of "justification"; of a failure "to provide reasons for his decision"; to "address the complaint of the appellant" and to "disclose whether he

believes or disbelieves the appellant" are, in substance, requirements on the decision making authority to provide reasons justifying his decision to the court. This has been the precise novelty introduced by "anxious scrutiny" in the United Kingdom. I am particularly concerned at the notion that the Minister should be made to state "whether he believes or disbelieves the appellant": the Minister has not seen the appellant and in the nature of things cannot see the thousands applicants to him in connection with immigration or asylum. The officials who did see her rejected her claim and, as I have already stated on well established authority, the Minister is not obliged to go behind that decision. I unfortunately cannot see a form of words which sees as an important omission in the form of the Minister's decision an omission to state whether he believes or disbelieves her as other than imposing an obligation to revisit the earlier decisions, and to conduct some form of oral hearing. How else can subjective belief or disbelief be addressed?

In particular, I cannot regard the failure of the Minister to set out or refer to the material which was before him as constituting or evidencing any sort of defect in his decision. For reasons set out earlier in this judgment I believe that, to fault the Minister's decision on this basis is wholly to withhold from him that curial deference, in the technical sense in which that phrase is used in judicial review, to which any court from

the lowest to the highest and a great many administrative bodies and public sector decision makers are entitled. It is at variance with the approach of this Court in **O'Keeffe**, discussed below.

I have also had the advantage of reading the judgment of Denham J. in this case and noting in particular the substantial reliance she places on the judgment of Henchy J. in **The State (Keegan) v. Stardust Compensation Tribunal** [1986] IR 642. I wish to say that I entirely agree with what Mr. Justice Henchy said in that judgment. I am unable, however, to read it as in anyway supporting, much less requiring the supplanting of the established grounds for the grant of judicial review or the imposition of a different ground. In that case, Mr. Justice Henchy recorded (p.657) that the applicant's claim was based on an invocation of the **Wednesbury** case and in particular of the formulation "… so unreasonable that no reasonable authority could ever have come to [the impugned decision]…". Speaking of this contention, Lord Greene M.R. said "… to prove a case of that kind would require something overwhelming."

Mr. Justice Henchy, in the passage cited by Denham J. discussed the concept of unreasonableness or irrationality in the following terms:

> "I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision maker should be held to have acted *ultra vires*, for the necessarily implied constitutional limitations of jurisdiction in all decision making which affects rights or duties requires, *inter alia*, that the decision maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."

"Fundamental reason and common sense" are, in their terms, not legal concepts: rather they are used in this passage in an attempt to illustrate what is involved in the concepts of unreasonableness or irrationality.

Having spoken as quoted above, Henchy J. went on to observe that the applicant in **Keegan** made a case limited to one proposition: that he was denied compensation on evidence which was similar to, and no less cogent than, the evidence on which his wife was awarded £50,000 compensation. Henchy J. went on to analyse the facts of the case along the lines that the tribunal had decided without objection that it would apply to the applicant's claim for nervous shock the criteria laid down by Lord Wilberforce in **McLoughlin v. O'Brian** [1983] 1 A.C. 410. On the basis of the distinctions in that speech between various types of plaintiff, and the partial information available to the Supreme Court of the facts of the two **Keegan** cases, the court found that "it is possible to detect

differences between the two cases in relation to the tests laid down by Lord Wilberforce". That was the precise basis of the decision of Mr. Justice Henchy and it does not, in my view, remotely indicate or provide any justification for an alteration in the criteria for granting judicial review. Indeed, the applicant's case was based on the **Wednesbury** criteria.

Moreover, Finlay C.J. in the same case, having expressed his "complete and precise agreement with the passage just quoted from the judgment of Henchy J. went on to find:

> "… the principle that judicial review is not an appeal from a decision but a review of the manner in which the decision was made, as is stated by Lord Brightman in Chief Constable of North Wales Police v. Evans [1982] 1 WLR 1155 is consistent with this concept of a judicial review based on irrationality of the decision."

This appears to me to be an endorsement of the speech of Lord Brightman which I have already cited with approval earlier in this judgment. It was Lord Brightman who, having made the distinction quoted by Finlay C.J. went on to observe:

> "Unless that restriction on the power of the court is observed, the court will in my view under the guise of preventing the abuse of power be itself guilty of usurping power…".

I repeat that I cannot see in the judgment of this court in **Keegan** any authority whatever, express or implied, for altering the principles on which judicial review is granted.

As Denham J. has pointed out, the judgments delivered in this court in **Keegan** were much discussed in the later and heretofore canonical case of **O'Keeffe v. An Bord Pleanála and Ors.** [1993] 1 IR 39. As Denham J. remarks on several occasions, the decision impugned in that case, that of An Bord Pleanála, was a decision of an expert body. I would not withhold this description from the Minister in holding the balance between the case made on behalf of the applicant for leave to remain and the requirements of the public good in the administration of the asylum and immigration systems, or on the risk of refoulement. In recent years Nigeria has been the country which has provided the largest number of applicants' for refugee status in this country and an enormous number of these applications have come before the Minister. He must have had literally thousands of opportunities for becoming familiar with the "country information" about Nigeria provided by the United Nations High Commission for Refugees and various other bodies.

In **O'Keeffe**, the principal judgment was given by Finlay C.J.; Griffin J., Hederman J. and Lynch J. agreed with him. At p.72 of the

report, having set out the relevant passages from the judgments of Henchy J. and Griffin J., which included his citation from Lord Brightman, Finlay C.J. went on to say:

> "I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision making authority had before it no relevant material which would support its decision." (Emphasis added)

McCarthy J., who delivered a separate judgment in **O'Keeffe** said:

> "An applicant for judicial review of an administrative decision must, so far as reasonably possible, identify and prove in evidence the material upon which the decision was made… when seeking leave to apply for judicial review the applicant must state the grounds upon which it is sought and verify the facts on affidavit."

In **O'Keeffe**, the Supreme Court rejected a challenge to a decision by An Bord Pleanála to grant permission for a radio mast even though the Board's own inspector and another expert associated with him had recommended against it. The Court found, significantly, that there was evidence in the reports before the Board itself which contained ample material on all the issues which would justify rejection by the Board of the Experts' conclusions.

The Court moreover held (page 77 of the Report) that it would be sufficient if it were possible to establish in evidence the documents which, in addition to the two reports before it were considered by the Board in the form of a list of documents made available to the applicant in a judicial review. It would be sufficient to rebut an allegation of "no evidence to ground the decision" if *some* evidence could be found amongst the documentation produced capable of supporting the judgment.

I must say that I am entirely unable to see how this judgment can be relied upon as mandating, permitting or facilitating an alteration of the established criteria for judicial review. On the contrary, it states in the plainest possible terms that the onus is on the applicant to show that there was no evidence before the decision maker which could justify his decision. Moreover, as the recitation of the facts of this case (above) clearly establishes the applicant sought and was given, within three days, copies of all the recommendation made to the Minister and the documents on which they were based.

In **O'Keeffe**, the Court scrutinised the material which was before the Board and found there was ample material in it to justify its decision. In those circumstances I find it impossible to understand why the failure

of the Minister to deliver a more discursive set of reasons for his decision should allow leave to apply for judicial review to be granted when it is perfectly clear, and has been demonstrated above, that the material before the Minister contained ample material to justify his decision.

I have also had the advantage of reading the judgment of the Chief Justice in this matter. As in the case of the other judgments, there is much in it, and in the Authorities which it cites, with which I entirely agree.

I would however supplement the citations from **O'Keeffe** with the citation above referring to the fact that the applicant must establish to the satisfaction of the court that the decision making Authority "had before it no relevant material which would support its decision".

It appears to me that in the case cited by the learned Chief Justice, **Radio Limerick One Limited v. IRTC** [1997] 2 ILRM 1, Keane J. (as he then was) regarded an established disproportionality as capable of being *evidence* of manifest unreasonableness and I agree with this. That is not, however, to create a new basis on which judicial review may be sought or granted. On the contrary, in **Baby O v. Minister for Justice** [2002] 2 IR 169 a few years later, Keane C.J. explicitly and strongly reasserted the established test, in a passage quoted later in this judgment.

In the case of **Fajujonu v. Minister for Justice** [1992] IR 151 the applicant had in my view established in evidence a particular factual case: that the Minister proposed to deport from Ireland some members of a family forcing them either to break up their family by leaving behind three of the children who were Irish citizens and who were entitled to remain here or to require those children to leave the country in violation of their lawful preference and legal right to stay here.

They were also able to establish that part of the reason for their deportation was that the father was unable to support his family. But such inability to support them resulted from the fact that the State had refused to give him a work permit thereby bringing about the poverty which contributed to the proposed deportation.

It appears to me that both of these factual aspects of the case, unless explained in some way, suggested an irrationality which was in defiance of “fundamental reason and common sense”.

This, however, is to my mind quite different from the circumstances of the present case. Here, there are quite simply no facts proved or alleged even to suggest any unreasonableness or irrationality in the Minister’s decision. The applicant has made substantially the same

case to the Minister in relation to her fears if returned to Nigeria as she had previously made to the two independent decision makers who dealt with her application for refugee status. She failed in this application, on credibility grounds.

In my view, therefore, she has established no case whatever, not alone a substantial or weighty one, even on a suggestive basis, against the impugned decision. To hold otherwise, in my view, is to disregard the two earlier, unchallenged decisions rejecting her overlapping claim to refugee status.

**The most relevant Irish Authority.**

One must also of course bear in mind the authoritative decision by this court in **Baby O v. Minister for Justice** [2002] 2 IR 169 where Keane C.J. set out the criteria as follows:

> "Unless it can be shown that there was some breach of fair procedures in a manner in which the interview was conducted and the assessment arrived at by the officer concerned or that, in accordance with the well established principles laid down in the *State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] IR 642 and *O'Keeffe v. An Bord Pleanala* [1993] 1 IR 39, there was no evidence on which he could reasonably have arrived at the decision, there will be no ground for an order of certiorari in respect of the decision." (Emphasis added)

This is a recent decision of this court from which I am not inclined to depart in the circumstances of this case unless constrained to do so. In referring to “the circumstances of this cases” I am thinking specifically of the fact that the substantive points made have already been the subject of two adjudications, each unfavourable to the applicant, and neither the subject of an application for judicial review. Furthermore, the body of materials, specifically on the topic of FGM, placed before the Minister before he made his decision was an impressive one and I do not consider that he was obliged by statute or otherwise either to conduct a third oral hearing or to himself to hear a witness who, for all that appears, might have been adduced before the Refugee Appeals Tribunal or at the earlier stage. It seems to me that if, contrary to my understanding of the statutes, (which insofar as material have been set out above) the Minister were required personally to conduct oral hearings, it is difficult to see how his executive functions could be carried on at all.

It must not be overlooked that the decision to issue a deportation order has been conferred by the Oireachtas on the Minister, a member of the Executive arm of government, and not upon the judiciary. On the face of it, he is entitled to exercise this power. I would not be minded to adopt any criterion, whether denominated “anxious scrutiny” or not, which involved any suggestion that, without any showing or offer of proof on

the part of an applicant, the Minister had to come before the court and justify his decision; or that there was any transfer of an onus of proof on to the Minister or other decision makers. I am quite clear that the onus of proof is and must remain on the person who asserts that the decision is defective, the applicant. To hold otherwise, would, in my view, be very significantly to interfere with the separation of powers and to hamper or obstruct the Minister in taking a decision which is clearly within his scope. The courts would naturally and properly baulk at any suggestion of a ministerial interference in a matter properly within their jurisdiction: the corollary of this is that the courts must respect the Minister's jurisdiction and interfere only upon proper proof by the applicant that the Minister's decision is flawed.

I agree with the judgment of Fennelly J. in the present case to the effect that the established test is a less crude instrument than is sometimes thought and contains potential for a wide ranging review, when the need for this is established in evidence. It is not, however, entirely clear to me that the test described by Fennelly J. does not logically involve to some degree a shifting of the onus from the applicant to the decision maker and I wish to make it clear that, for my part, I do not consider that the onus is in any way or at any time shifted but remains throughout upon the person who asserts that the administrative decision if flawed. I wish also to re-

assert what is said in **F.P.** about the nature of the reasons to be given: this is an area featuring many thousands of cases raising similar and sometimes identical issues so that it is neither surprising nor inadequate if the statement of reasons in these very similar cases is similar or identical, for the reasons set out in that case.

As I have already said, one of my great difficulties with an "anxious scrutiny" standard is that the phrase does not seem to me apt to describe a legal approach to judicial review but instead focuses on an attitude on the part of the judicial decision maker. I do not consider that this is helpful. It is as well to bear in mind other approaches to the question of the standard for judicial review, and, without endorsing it, I should like for comparative purposes to draw attention to the approach taken by the Supreme Court of Canada in **Baker v. Canada** (Minister for Citizenship and Immigration) [1999] 2 SCR 817. There, the Supreme Court propounded a "pragmatic and functional" approach which recognised that "standards of review for errors of law are appropriately seen as a spectrum with certain decisions being entitled to more deference, and others to less…". In the words of L'Heureux-Dubé J:

> "The pragmatic and functional approach takes into account considerations such as the expertise of the tribunal, the nature of the decision being made, and the language of the provision and of the surrounding legislation. It includes factors such as whether the decision is 'polycentric' and the

> intention revealed by the statutory language. The amount of choice left by Parliament to the administrative decision maker and the nature of the decision being made are also important considerations in the analysis. The spectrum of standards of review can incorporate the principle that in certain cases the legislature has demonstrated its intention to leave greater choices to decisions makers than in others, but that a court must intervene when a decision is outside the scope of the power accorded by Parliament."

On this basis the Canadian test contemplates three types of standards: patent unreasonableness (in Irish terms, Keegan unreasonableness), unreasonableness *simpliciter* and "correctness". In **Baker**, which was an immigration case, the judge continued:

> "I conclude that considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision maker is the Minister, and the considerable discretion evidenced by the statutory language. Yet in the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court and the Federal Court of Appeal in certain circumstances, and the individual rather than polycentric nature of the decision, also suggests that the standard should not be as deferential as 'patent unreasonableness' ".

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In view of genuine apprehensions such as those so well expressed by Fennelly J. in **AO v. Minister for** Justice [2003] 1 IR 1, that "where… constitutional rights are at stake, [the traditional] standard of judicial

scrutiny must necessarily fall well short of what is likely to be required for their protection", it may be useful to set out my view of the nature of the scrutiny actually available. I do so bearing in mind that it appears to be agreed that the onus of proof in such a case will always remain on the applicant. I would therefore say:

(a) That each applicant, in a case like the present, must credibly allege specific deficiencies in the making of the decision challenged.

(b) That these alleged deficiencies must be proved by the applicant and must relate to a specific alleged breach or breaches of fair procedures or to an absence of any evidence capable of supporting the decision made. (See the judgment of Keane C.J. in **Baby O v. Minister for Justice** [2002] 2 IR 169).

(c) That an applicant is not entitled to call on the decision maker to justify his decision to the court: on the contrary, it is for the applicant to attack the decision.

(d) Unless there is a credible case, supported by evidence, that the impugned decision is afflicted by a deficiency of the kind mentioned in paragraph (b) above, leave to seek judicial review should not be granted.

(e) If the foregoing conditions have been met, the court will consider such evidence as is adduced with a view to deciding if there was any cognisable irregularity in the decision made. Where fundamental human rights are at stake, the courts may and will subject administrative decisions to particularly careful and thorough review, but within the parameters of **O'Keeffe** reasonableness review. In this event, the court may invoke all powers available to it to investigate the allegations made. In doing so, the court will of course bear in mind the significance of the decision for both parties and will assess the significance of any established deficiency in procedures in that light. Furthermore,

following the decisions of the High Court in **M.J. Gleeson v. Competition Authority** [1999] 1 ILRM 401 and of the Supreme Court **Orange Communications v. ODTR** [2000] IESC 22, there is scope to challenge a decision on the basis that it is clearly established that a wrong inference has been drawn in respect of a matter going to the root of the decision. I do not consider that this approach is in any way novel, or that it requires any special description such as "anxious scrutiny".

(f) That the ministerial decision in a case such as the present is a decision on an *ad misericordiam* application. It does not involve a revisiting of the applicant's original application for refugee status, and the nature of the application may properly influence both its consideration and the form of decision upon it. (See **F.P. v. Minister for Justice)** [2002] 1 IR 164).

**Conclusion.**

I would answer the certified point of law by saying that the **O'Keeffe** standard is the correct standard to be applied in a case such as the present. I would refuse leave to seek judicial review.

**THE SUPREME COURT**

**No. 419/2003**

**Murray C.J.**
**Kearns P.**
**Denham J.**
**Hardiman J.**
**Fennelly J.**

**IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED)**
**IN THE MATTER OF THE IMMIGRATION ACT 1999**
**AND IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000**

**BETWEEN**

**ABOSEDE OLUWATOYIN MEADOWS**

**APPLICANT/APPELLANT**

**AND**

**THE MINISTER FOR JUSTICE, EQUALITY & LAW REFORM**
**IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Fennelly delivered the 21st day of January 2010.**

1. This appeal is brought pursuant to a certificate granted by the High Court (Gilligan J) under section 5(3)(a) of the Illegal Immigrants (Trafficking) Act, 2000 ("the 2000 Act"). The certified point of law is as follows:

> *"Whether or not in determining the reasonableness of an administrative decision which affects or concerns constitutional rights or fundamental rights it is correct to apply the standard set out in O'Keeffe v An Bord Pleanála [1993] 1 IR 39."*

Having obtained that certificate, the appellant filed a full notice of appeal dated 10th December 2003. All grounds of appeal relate essentially to the certified point.

2. The administrative decision mentioned in that certificate is that of the first-named respondent (whom I will call the Minister) to make a deportation order, following exhaustion of the usual asylum procedures, in relation to the appellant, a Nigerian national.

**The facts and immigration procedures**

3. The Appellant is a 26-year-old Nigerian national. She arrived in the State in December 1999 when she was seventeen years of age. She sought refugee status.

4. Her application was initially dealt with in accordance with the procedures applied by the State at that time, described as the *"Hope Hanlon procedures"*. Those procedures were subsequently replaced by the Refugee Act, 1996 ("the 1996 Act") when that Act came into force in November 2000.

5. The Appellant claimed that she had been compelled to flee Nigeria following violent conflict between the Yoruba tribe (of which she was a member) and the Hausa tribe. She said she feared that, if returned to Nigeria, she would be killed by her father's former business partner who, she said, had threatened that he would do so in revenge for the death of his son. The Appellant also claimed that, if returned to Nigeria, she would be forced into a marriage arranged by her father and would, as a result, be subjected to female genital mutilation ("FGM"). Her allegations in relation to this last matter, FGM, are central to the present appeal.

6. By letter dated 30th June, an official informed the Appellant on behalf of the Minister that she had not demonstrated a well-founded fear of prosecution for Convention reasons and that her application for refugee status was refused. She appealed to the Asylum Appeals Unit. Her appeal came before a member of the Appeal Tribunal on 3rd April 2001. The Tribunal heard evidence regarding the practice and prevalence of FGM in Nigeria.

7. The Refugee Appeals Tribunal on 12th June 2001 decided, pursuant to section 16(2)(a) of the Refugee Act 1996 as amended, that the appellant was not a refugee within the meaning of section 2 of the Act and affirmed the earlier decision. In dealing with the appellant's fear of FGM, the Tribunal accepted without question that this was an abhorrent practice and that it amounted to torture. Having reviewed the facts of the appellant's case, the Tribunal expressed the view that she had not established a credible connection between her circumstances, on the one hand, and forced marriage and FGM on the other. The Tribunal notified the appellant of the decision by letter dated 9th August 2001.

8. By letter dated 18th September 2001, the Minister notified the appellant that, following the investigation of her application for refugee status, in accordance with section 17(1)(b) of the Refugee Act, 1996, he was refusing to make a declaration granting her the status of a refugee and that her right to remain temporarily in the State in accordance with section 9(2) of that Act had expired. By the same letter, the Minister gave her notice that, as a result of the decision refusing her refugee status, he proposed to make a deportation order in respect of her pursuant to the power given to him by section 3 of the Immigration Act, 1999. He informed her of her right to make representations setting out any reasons why she should be allowed to remain temporarily in the State.

9. Solicitors for the appellant, in a lengthy letter dated 8th October 2001, made representations to the Minister. They had, in fact, already written to him on 10th September in advance of the Minister's letter of 18th September. The letter claimed, *inter alia*, that removal of the appellant to her country of origin would contravene Article 3 of the European Convention on Human Rights, which prohibits the practice of *"torture, inhuman and degrading treatment and punishment."* It repeated the appellant's claims that she would be subjected to forced marriage followed by FGM. The letter claimed that the appellant would suffer further hardship by reason of the lack of family relationships, if returned to Nigeria. It also advanced more general humanitarian grounds relating to the present circumstances and future prospects of the appellant in the State. It appeared to set out all relevant factors which the Minister was being asked to take into account. It emphasised, in particular, the request to be permitted to submit expert evidence on the appellant's country of origin. The overwhelming thrust of the representations related to the claimed likelihood of exposure of the appellant, on return to Nigeria, to forced marriage accompanied by subjection to FGM.

10. The Minister did not communicate further with the appellant or her solicitors prior to making his decision. The Minister's decision to make a deportation order took the form of a formal order dated 12th July 2002 accompanied by a letter of the same date. The formal order recites the Minister's powers. It states:

> *"AND WHEREAS the provisions of section 5 (prohibition of refoulement) of the Refugee Act 1996 and the provisions of the said section 3 [of the Immigration Act, 1999] are complied with in the case of [the appellant];*
>
> *Now, I, [name and title of the Minister] in exercise of the powers conferred on me by the said subsection (1) of section 3, hereby require you the said [appellant] to leave the State within the period ending on the date specified in the notice served on or given to you under subsection 3(b)(ii) of the said section 3 pursuant to subsection (9)(a) of the said section 3 and to remain thereafter out of the State."*

11. The Minister's accompanying letter of 12th July 2002 explained the decision in the following terms:

> *"I am directed by the Minister for Justice, Equality and Law Reform to refer to your current position in the State and to inform you that the Minister has decided to make a deportation order in respect of you under section 3 of the Immigration Act, 1999. ……*
>
> *In reaching this decision the Minister has satisfied himself that the provisions of section 5 (prohibition of refoulement) of the Refugee Act 1996 are complied with in your case.*
>
> *The reasons for the Minister's decision are that you are a person whose refugee status has been refused and, having had regard to the factors set out in section 3(6) of the Immigration Act, 1999, including the representations made on your*

*behalf the Minister is satisfied that the interests of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweigh such features of your case as might tend to support your being granted leave to remain in this state."*

12. Following a request from the appellant's solicitors, the Minister wrote on 23rd July 2002 enclosing what were described as the "conclusions and recommendations made to the Minister on foot of which he made the deportation order…" The key document was headed: "Examination of File under Section 3 of the Immigration Act 1999." It concluded with a recommendation of an Executive Officer that the Minister sign the deportation order. There was a large set of accompanying documents.

13. Charles O'Connell, an Assistant Principal Officer in the Minister's Department swore in his affidavit in the judicial review proceedings that the Minister had been provided with the entire file from the time of the appellant's initial application for asylum and that this included considerable country-of-origin information and material from the United Nations Commission on Human Rights including extensive information relating, *inter alia,* to FGM. Mr O'Connell swore that the Minister had *"ample information available to him to make decisions including any questions relating to abuse or risk of abuse of human rights and refoulement and humanitarian considerations."*

14. The prohibition of "refoulement" reflects Article 33 of the Geneva Convention of 1951 relating to the Status of Refugees. Section 5 of the Refugee Act, 1995 gives it effect as follows:

*5.—(1) A person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.*

*(2) Without prejudice to the generality of subsection (1), a person's freedom shall be regarded as being threatened if, inter alia, in the opinion of the Minister, the person is likely to be subject to a serious assault (including a serious assault of a sexual nature).*

15. There can be no doubt that, as was accepted by the Refugee Appeals Tribunal, FGM is an abhorrent practice. For present purposes, it suffices to say that it arguably comes within the scope of section 5 of the Refugee Act, 1995, specifically the section's reference to *"serious assault (including a serious assault of a sexual nature)."* No suggestion to the contrary was advanced on behalf of the Minister during the hearing of the appeal.

16. The appellant submitted to the Minister that she should not be deported from the State because of what she alleged was the risk that, if returned to Nigeria, she would be subjected to FGM. The executive officer's recommendation which led to the Minister's decision of 12th July 2002 contains, *inter alia*, the following:

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

- "traditional religious beliefs are widespread in Nigeria. Some of these are described as witchcraft or Ju-Ju. Nigerians are generally free to follow these traditional beliefs, but where these practices may have resulted in criminal activity, the Nigerian police have investigated them. As these practices are often secret and take a wide variety of forms, it is very difficult to obtain reliable information……"

- "Nigeria is not one of those countries to which failed asylum seekers cannot be returned according to the United Kingdom Home Office"

- attached information from the UK Home Office included the following: "FGM is practised by communities from all of Nigeria's major ethnic groups and religions, although adherence is neither universal nor nationwide. A 1985-6 survey found that it was not practiced at all in 6 of the 19 states surveyed. Estimates about the proportion of women who have undergone [FGM] varies from between 50 to 90%. However, most experts agree that the number of girls now facing FGM is declining."

- "[for] individuals who fear persecution…….the option of internal flight is a real possibility in Nigeria, taking account of its size and population…"

17. The recommendation to the Minister contained the statement: "refoulement was not found to be an issue in this case." It does not otherwise address the appellant's claimed apprehension of the risk of being subjected to FGM. The Ministers decision expressed the matter differently by stating that section 5 (prohibition of refoulement) were *"complied with"* in the appellant's case. The Minister did not give the reason which had been given by the Refugee Appeals Tribunal, namely that the appellant had not established a credible connection between her circumstances and forced marriage or FGM.

18. I will postpone until I have considered the appropriate test to be applied any further account of the material which was before the Minister. It will be possible to give proper consideration to the question of whether leave should be granted to question the validity of the decision impugned in this case only after clarification of the correct standard of judicial review to be applied when considering the Minister's decision.

**The judicial review application**

19. By notice of motion dated the 26th July 2002 returnable for 8th October, the appellant sought leave to apply for judicial review by way of certiorari and various declarations in relation to the deportation order.

20. The learned High Court judge also treated the appellant as having sought judicial review of the decision of the Minister of 18th September 2001, summarised at paragraph 8

above, notifying the appellant, in accordance with section 17(1)(b) of the Refugee Act, 1996, that he was refusing to give her a declaration that she was a refugee. Any application for judicial review in that respect—and no clear application for that relief had been made—was clearly out of time. The judge found that there was no good reason for the delay and refused to consider the application. There is no appeal in that respect. Thus, as the learned trial judge stated, the real thrust of the appellant's case is her challenge to the deportation order.

21. The essence of the grounds advanced, at considerable length, in support of the application for judicial review was:

- There is a real risk that the appellant, if returned to Nigeria, will be subjected to FGM;
- The Minister did not pay any due regard to the appellant's rights to be protected from torture, inhuman or degrading treatment or her right to bodily integrity in deciding to return her to a country where she was at risk of violation of her fundamental rights;
- The Minister failed, in his assessment of the facts to have regard to the appellant's fundamental rights;
- In particular, the Minister failed properly to assess the evidence in deciding that the requirements of section 5 of the Refugee Act, 1996 had been complied with
- The decision of the Minister was flawed for unreasonableness and irrationality: the decision of the Supreme Court in *O'Keeffe v An Bord Pleanála* did not lay down a correct or appropriate test.

22. The learned trial judge considered the application for leave to apply for judicial review in accordance with section 5(2)(b) of the Illegal Immigrants (Trafficking) Act, 2000, which provides:

> *"An application for leave to apply for judicial review under the Order in respect of any of the matters referred to in subsection (1) shall—*
>
> *(a) be made within the period of 14 days commencing on the date on which the person was notified of the decision, determination, recommendation, refusal or making of the Order concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made, and*
>
> *(b) be made by motion on notice (grounded in the manner specified in the Order in respect of an ex parte motion for leave) to the Minister and any other person specified for that purpose by order of the High Court, and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed."*

23. The statutory standard thus requires that *"substantial grounds"* be shown. The learned trial judge concluded, following the judgment of the Supreme Court delivered by Keane C.J. in *Re Illegal Immigrants (Trafficking) Bill*, 1999 [2000] 2 I.R. 360 that the grounds for judicial review under that provision must be *"reasonable, arguable and weighty, with the added proviso that they must not be trivial or tenuous."*

24. He then reviewed extensively the authorities on the general legal standard of judicial review. He expressed himself satisfied that, as the law stands, and against the background where the appellant claims that her fundamental human rights will be violated if she is returned to Nigeria, the appropriate test was that laid down by Finlay C.J. in *O'Keeffe v An Bórd Pleanála* [1993] I.R. 39 (hereinafter *"O'Keeffe"*). The Chief Justice there brought together, at page 70, three dicta from the judgment of Henchy J in *State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 (hereinafter *"Keegan"*) to produce a statement to the effect that, for a decision to be impugned on the ground of unreasonableness or irrationality, it must be shown that:

    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'."*

25. On the application of that test, the learned judge said that, having regard to the documentation that was before the Minister he was not satisfied that the decision of the Minister was fundamentally at variance with reason and common sense.

26. The appellant submits on the appeal that in cases of this nature courts should not confine themselves to a consideration of the test set out in *Keegan and O'Keeffe*, but should submit the decision in issue to "most anxious scrutiny." The latter expression comes from a number of English judicial decisions commencing in the 1980's. The appellant refers principally to: *R v Minister for Defence, ex parte Smith* [1996] QB 517, *Re (Mahmood) v Secretary for State for the Home Department* [2001] 1 WLR 840, and *Regina v. Lord Saville of Newdigate and others* [2000] 1WLR 1855 (The "Bloody Sunday Inquiry case"). There are other important cases.

27. The point certified by the learned trial judge asks whether the O'Keeffe test is sufficient in a case involving the judicial review of "the reasonableness of an administrative decision which affects or concerns constitutional rights or fundamental rights…"

28. I propose to consider the following:

    a. The decisions of this Court in Keegan and O'Keeffe;

    b. Other Irish decisions relating to the scope and quality of judicial review;

c. The English foundation case of *Wednesbury;*

d. English development of the notion of "anxious scrutiny;"

e. Decisions of the European Court of Human Rights concerning the adequacy of judicial review in English law;

f. The basic objects and limits of judicial review.

**Keegan and O'Keeffe**

29. The appellant challenges the adequacy of the existing test for judging irrationality or unreasonableness in decision-making in Irish law. That test is propounded in a definitive passage in the judgment of Henchy J in Keegan at page 658:

> *"I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted ultra vires , for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, inter alia , that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."*

30. Henchy J did not differentiate between unreasonableness and irrationality. A requirement to demonstrate that a decision was irrational would set the bar at an almost impossibly high level. In the quoted passage, Henchy J twice draws *"fundamental reason"* and "common sense" together. Mark de Blacam, in his work, Judicial Review, [Tottel Publishing, 2nd Ed. 209 at page 338] distinguishes between irrationality and unreasonableness, observing that *"the irrational is limited to the absurd or perverse, whereas the unreasonable includes a broader range of wrongful acts."*

31. The Court was concerned to arrive at a viable definition of unreasonableness in the light of the intervening English decision in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, which was not found, by this Court, to provide a convincing development of *Wednesbury.* Henchy J was not persuaded by Lord Diplock's references, at page 410, to *"defiance of logic or of accepted moral standards"* as tests of unreasonableness.

32. Finlay C.J. (see page 654) said that he was in *"complete and precise agreement"* with the test propounded by Henchy J. The Chief Justice, Henchy J and Griffin J took the principles laid down in *Associated Provincial Picturehouses Limited v Wednesbury Corporation* [1948] I K.B. 223 *("Wednesbury"*), to which I will return, as their starting point.

33. Keegan concerned a decision of an administrative tribunal assessing damages for personal injury or loss. It raised no broad constitutional issues. It is important, therefore, to note that Henchy J, in the quoted passage, referred, even in the limited context of that case,

to the *"necessarily implied constitutional limitation of jurisdiction* in all decision-making." In addition, he expressed the view that:

> *"The ethical or moral postulates of our Constitution will, of course, make certain decisions invalid for being repugnant to the Constitution……"*

34. This Court in *O'Keeffe* emphatically restated the principles laid down in *Keegan.* The judgment of Finlay C.J. is principally notable for its emphasis on the limitations on the power of judicial review. He recalled that Griffin J, in *Keegan*, had cited the following passage from the speech of Lord Brightman in *Chief Constable of the North Wales Police v. Evans* [1982] 1 W.L.R. 1155 at pages 1173-4:

> *"Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power . . . Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made."*

35. This passage, which emphasises the *decision-making process*, is not, however, wholly applicable to judicial review on the ground of unreasonableness, which potentially relates to the substance of the decision and not merely the procedure leading to it. It lays down, nonetheless, the rule which is the quintessence of judicial review, namely that it is not for the courts to step into the shoes of the decision-maker.

36. Finlay C.J. went on in *O'Keeffe* to stress *"the circumstances in which the court cannot intervene,"* notably that it would not suffice that the court would itself raise different inferences or conclusions from those of the administrative body or even that the case against the decision was much stronger that the case for it. He combined three formulations from the judgment of Henchy J in *Keegan* to produce the passage quoted by Gilligan J (see paragraph 24 ante). They amount in fact to a reiteration of the test whether the decision is *"fundamentally at variance with reason and common sense."* Finlay C.J. concluded, at page 71, that:

> *"…the circumstances under which the court can intervene on the basis of irrationality with the decision-maker involved in an administrative function are limited and rare."*

37. It is desirable to reiterate the basic principle that, leaving aside the need to take account of the human-rights dimension in the judicial review of decision-making, the decision is and remains at all times that of the decision-maker and not of the courts. Judicial review is not a process of appeal. This remains a constant and fundamental theme of the law of judicial review.

38. The legislature has full power, subject to the constitutional limits explained in *Cityview Press Ltd. v An Comhairle Oiliúna* [1980] I.R. 381, to delegate tasks to administrative bodies which involve the making of administrative decisions. The modern state confers an

enormous range of decision-making powers on a variety of bodies. Such bodies carry out and supervise vast areas of the work of government and of economic and social life. Their decisions routinely affect the lives of almost everyone. The powers they exercise in many cases affect the fundamental and constitutional rights of individuals.

**Protection of rights: other Irish decisions**

39. While respecting the limits of judicial power, the courts are under a fundamental obligation incumbent upon them by virtue of the Constitution to ensure the protection of the fundamental rights which it guarantees. It is equally a constant theme of our case-law that persons or bodies exercising executive power must, in their decisions, take due account of the constitutional rights of those affected. Most notably, Walsh J in his judgment in *East Donegal Co-operative v Attorney General* [1970]1 I.R., writing at page 344 about the powers conferred on a Minister, emphasised that:

> *"…they [were] powers which cast upon the Minister the duty of acting fairly and judicially in accordance with the principles of constitutional justice, and they do not give him an absolute or an unqualified or an arbitrary power to grant or refuse [a licence] at his will."*

40. Similarly, in the decision of this Court in *State (Lynch) v Cooney* [1982] I.R. 337, O'Higgins C.J., upholding the exercise of the power to prohibit the broadcasting of material (in the form of election broadcasts for Sinn Féin) said at page 361:

> *"These, however, are objective determinations and obviously the fundamental rights of citizens to express freely their convictions and opinions cannot be curtailed or prevented on any irrational or capricious ground. It must be presumed that when the Oireachtas conferred these powers on the Minister it intended that they be exercised only in conformity with the Constitution."*

Keane C.J., in his judgment in *O'Neill v Governor of Castlerea Prison* [2004] 1 I.R. 298, at 314, cited this dictum in support of his statement that: *"Like every other power conferred on any of the arms of government, it can only be exercised in conformity with the Constitution and its correction in cases where it is not so exercised is exclusively a matter for the judicial arm."*

41. The same principle has been recognised in cases concerning the compulsory acquisition of property. In *O'Brien v Bord na Móna* [1983] I.R. 255, Keane J. stated:

> *"In each case, the person exercising the function is determining whether the constitutionally guaranteed rights of the citizen in respect of his private property should yield to the exigencies of the common good."*

42. In *Greene v Minister for Agriculture* [1990] 2 I.R. 17 at page 26, Murphy J held an administrative scheme adopted by the Minister pursuant to a very broad discretion granted by a European Community Directive to be *ultra vires*, in part for failure to respect the constitutional principle of equality (between married couples and cohabiting unmarried couples).

43. Most recently, Geoghegan J, writing for a unanimous Supreme Court in *Clinton v An Bórd Pleanála* [2007] 4 I.R. 701 at 723, a case concerning compulsory acquisition of land said:

> *"It is axiomatic that the making and confirming of a compulsory purchase order (CPO) to acquire a person's land entails an invasion of his constitutionally protected property rights. The power conferred on an administrative body such as a local authority or An Bord Pleanála to compulsorily acquire land must be exercised in accordance with the requirements of the Constitution, including respecting the property rights of the affected landowner (East Donegal Co-Operative v. The Attorney General [1970] I.R. 317). Any decisions of such bodies are subject to judicial review. It would insufficiently protect constitutional rights if the court, hearing the judicial review application, merely had to be satisfied that the decision was not irrational or was not contrary to fundamental reason and common sense."*

44. Two fundamental principles must, therefore, be respected in the rules for the judicial review of administrative decisions. The first is that the decision is that of the administrative body and not of the court. The latter may not substitute its own view for that of the former. The second is that the system of judicial review requires that fundamental rights be respected.

45. It is the second of these considerations, considered in the context of personal rights, which has led the English courts to doubt whether traditional *Wednesbury* principles were sufficient and to move in the direction of "anxious scrutiny." It is clearly necessary to have a rule which accords with the two principles I have identified. The question is whether our rule, as explained in *Keegan* and restated in *O'Keeffe* is suited for the task. First I will discuss the decision in *Wednesbury.*

**Wednesbury: a summary**

46. As I have mentioned, the judgments of Finlay C.J., Henchy J and Griffin J in Keegan take the judgment of Greene M.R. in *Wednesbury* as the starting point for their analysis. Greene M.R. laid down the famous *Wednesbury* principles in a respect of an application for certiorari of a perfectly routine type of administrative decision. The total prohibition on cinematograph performances on a Sunday contained in the Cinematograph Act, 1909 had been relaxed by the Sunday Entertainments Act, 1932. But the *Wednesbury* Corporation imposed a condition on a licence for showing films on Sunday that no children under the age of fifteen years should be admitted. The challenge by the cinema owners raised no larger issue of individual or human rights. Greene M.R. firstly referred to the judicial-review principle that it may be unlawful for a decision-maker to have regard to matters to which he should not have regard or, conversely, to fail to take into account matters which he is bound to consider. *Wednesbury,* however, has become synonymous with the proposition then laid down by Greene M.R., at page 230, that:

> *"It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require*

*something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind."*

47. Putting the matter slightly differently, he proceeded:

> *"It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind."*

48. These passages make it clear, as has been stated in multitudes of judgments, that the decision is that of the responsible administrative authority to which it is entrusted by law and not of the court, whose function is limited to control of the limits of administrative power.

**Anxious scrutiny appears in English law**

49. The courts in England became concerned from some time in the 1980's that the *Wednesbury* principles, literally interpreted, were insufficiently responsive to the obligation of the courts to ensure that administrative decisions respected fundamental human rights. At some points a distinction was made between *"the conventional Wednesbury principle"* and a rule requiring a decision-maker to show that a right either had not been interfered with or that, if it had, any interference was supported by substantial objective justification. (See, for example Laws L.J. in *Re (Mahmood) v Secretary for State for the Home Department*, cited above at page 847). Some, but not all of the English cases were concerned with immigration decisions. Most famous among them is the decision dealing with the Savile Inquiry.

50. A small sample of these judicial dicta will suffice for present purposes. The notion of *"anxious scrutiny"* made its first appearance in 1987. Lord Bridge of Harwich in *Regina v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] A.C.514 repeated the basic rule that the exercise of discretion in relation to asylum applications lay exclusively within the jurisdiction of the Secretary of State and that the limitations on that power were well known. He went on, however, to coin the expression "anxious scrutiny" in a passage at page 531of his speech:

> *"Within those limitations the court must, I think, be entitled to subject an administrative decision to the more rigorous examination to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."*

51. Lord Templeman added (at page 537):

> *"In my opinion where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision making process."*

52. Dealing, in *Regina v Secretary of State for the Home Department, ex parte Brind* [1991] 1 A.C., with restrictions on the broadcasting of words spoken by persons in support of terrorism, Lord Bridge considered that the House of Lords was *"perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important public interest will be sufficient to justify it."* Lord Templeman qualified the Wednesbury test, saying: *"It seems to me that the courts cannot escape from asking themselves whether a reasonable Secretary of State, on the material before him, could reasonably conclude that the interference with freedom of expression which he determined to impose was justifiable."*

53. *R v Minister for Defence, ex parte Smith* [1996] QB 517, a decision of the Court of Appeal in England, involved a challenge to a blanket policy of the Ministry of Defence that persons of homosexual orientation would be discharged from the Army. The court decided that the policy could not be set aside as irrational, though at least one member of the court thought the policy doomed. The headnote contains a useful summary of the way in which English law had developed:

> *"…where an administrative decision was made in the context of human rights the court would require proportionately greater justification before being satisfied that the decision was within the range of responses open to a reasonable decision-maker, according to the seriousness of the interference with those rights; that in applying the test of irrationality, which was sufficiently flexible to cover all situations, the court would show greater caution where the nature of the decision was esoteric, policy-laden or security-based…"*

54. Lord Bingham M.R. accepted in *Smith* that Lord Bridge's two statements quoted above were accurately distilled in a statement made by counsel, Mr. David Pannick, Q.C., which has been widely quoted and has become in some senses definitive. The statement is:

> *"The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."*

55. This is a very important passage. It was accepted as the correct test for judicial review by both sides in the *Savile Inquiry* case. As will appear later, it has influenced the stance adopted by the government of the United Kingdom before the European Court of Human Rights. As I will show, a statement quite close to it was also accepted as an accurate statement of the position in our law by counsel for the Respondents in the present appeal. (See paragraph 65 below). Nonetheless, the challenge to the blanket policy failed even the modified test.

56. The Court of Appeal in the Savile Inquiry case was concerned with the conditions laid down by the Tribunal to protect the lives of soldiers giving evidence before it. Lord Woolf, having referred to the fact that the parties before the court had agreed to adopt Mr. Pannick's test (set out at paragraph 54 above), proceeded to explain:

> *"What is important to note is that when a fundamental right such as the right to life is engaged, the options available to the reasonable decision-maker are curtailed. They are curtailed because it is unreasonable to reach a decision which contravenes or could contravene human rights unless there are sufficiently significant countervailing considerations. In other words it is not open to the decision-maker to risk interfering with fundamental rights in the absence of compelling justification. Even the broadest discretion is constrained by the need for there to be countervailing circumstances justifying interference with human rights. The courts will anxiously scrutinise the strength of the countervailing circumstances and the degree of the interference with the human right involved and then apply the test accepted by Sir Thomas Bingham M.R. in Reg. v. Ministry of Defence, ex parte Smith."*

57. Lord Nicholls, in his speech in *A v Secretary of State for the Home Department; X v same* [2005] 2 A.C. 68 at paragraph 80 summarised the modern variable standard adopted in the courts of England and Wales as follows:

> *"The duty of the courts is to check that legislation and ministerial decisions do not overlook the human rights of persons adversely affected. In enacting legislation and reaching decisions Parliament and ministers must give due weight to fundamental rights and freedoms. For their part, when carrying out their assigned task the courts will accord to Parliament and ministers, as the primary decision-makers, an appropriate degree of latitude. The latitude will vary according to the subject matter under consideration, the importance of the human right in question, and the extent of the encroachment upon that right. The courts will intervene only when it is apparent that, in balancing the various considerations involved, the primary decision-maker must have given insufficient weight to the human rights factor."*

This variable approach has been characterised as a "sliding scale of review." (See Michael J Beloff, "the End of the Twentieth Century: the House of Lords 1982-2000! In *"The Judicial House of Lords* 1876-2009." Eds Louis Blom-Cooper, Brice Dickson and Gavin Drewry Oxford University Press 2009, page 408-409, footnote 137). There is, for example less intense scrutiny where economic or property rights are at stake.

58. It is notable that the move towards anxious scrutiny predated and was well under way before the passing of the Human Rights Act, 1998. Professor Paul Craig, in *"Substance and Procedure in Judicial Review,"* (in "Tom Bingham and the Transformation of the Law," A Liber Amicorum, Eds. Mads Andenas and Duncan Fairgrieve, Oxford University Press 2009) writes that *"the endorsement of more searching rationality scrutiny in Smith was a welcome development."* Professor Craig goes on to review the subsequent criticism by the European Court of Human Rights of the adequacy of the remedy of judicial review

provided by the English courts. After 1998, the European Court heard a number of cases concerning the standard of judicial review in the United Kingdom. These cases raised, in particular, the question whether the Wednesbury approach provided a sufficiently effective remedy for the protection of Convention rights.

**The view of the European Court of Human Rights: effective national remedy**

59. The parties to the appeal have referred to a number of decisions of the European Court of Human Rights concerning the adequacy of judicial review scrutiny in the English courts, in the light of the requirement of *"an effective remedy before a national authority,"* contained in Article 13 of the Convention. These are relevant to this case, because the rights of the appellant protected by Article 3 of the Convention (prohibition against torture or inhuman or degrading treatment) are engaged. The Minister cites authorities which, he claims, clearly indicate that the availability of judicial review in the United Kingdom has been held sufficient to satisfy the requirements of Article 13 of the Convention regarding the availability of a national remedy.

60. I am not at all persuaded that the cases cited by the Minister support his case. He refers to *Soering v United Kingdom* (1989) 11 EHRR 439, *Vilvarajah v United Kingdom* (1992) 14 EHRR 248 and, more recently, *Bensaid v United Kingdom* (2001) 33 EHRR 10. A perusal of these decisions shows that the European Court was persuaded in a some cases to accept the effectiveness of judicial review in English law specifically because it accepted that the English courts applied *"anxious scrutiny"* to decisions *"where an applicant's life or liberty may be at risk…"* For example, in Vilvarajah (at paragraph 125), the court observed:

> *"Indeed the courts have stressed their special responsibility to subject administrative decisions in this area to the most anxious scrutiny where an applicant's life or liberty may be at risk…" (emphasis added)*

61. The United Kingdom had cited the seminal passage from the speech of Lord Bridge, which I have quoted at paragraph 50 above. In the later case of *Bensaid,* the court, at paragraph 56, noted that the English courts would *"not reach findings of fact for themselves on disputed issues"* but added: *"the Court is satisfied that the domestic courts give careful and detailed scrutiny to claims that an expulsion would expose an applicant to the risk of inhuman and degrading treatment."* (emphasis added) In these cases, therefore, the European Court accepted the adequacy of the traditional judicial review standard, subject to its modern development in the direction of "anxious scrutiny."

62. The European Court did not invariably approve the English standard of review. Most notably, in *Smith and Grady v United Kingdom* (Application numbers (33985/99; 33986/96 (1999) 29 EHRR 493 the court had to consider the complaints of the plaintiff in *R v Minister for Defence, ex parte Smith*, already discussed. Specifically, it considered the standard of judicial review that had been applied by the Court of Appeal in that case and found it wanting in the following passage:

*"……the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention."*

63. This led the court to find that the United Kingdom was in violation of Article 13 of the Convention. Lord Bingham, in his speech in *R v Secretary of State for the Home Department, ex parte Daly* acknowledged that in *"Smith and Grady v United Kingdom* (1999) 29 EHRR 493, the European Court held that the orthodox domestic approach of the English courts had not given the applicants an effective remedy for the breach of their rights under article 8 of the Convention because the threshold of review had been set too high."

**Consideration of the test**

64. *The Wednesbury* principle or the *Keegan* explanation of it has never been an inflexible test. It is not surprising to see the courts act with particular caution before interfering in the case of routinely administrative decisions or decisions made by persons with particular technical expertise. Planning authorities have the technical expertise and knowledge necessary for the granting or refusal of planning permissions. *Wednesbury* was concerned with conditions excluding children under 15 from the cinema (it might be added, in the 1940's); *Keegan* was concerned with a compensation award by a tribunal under a statutory scheme and *O'Keeffe* with a planning decision made under statutory powers. In none of these was the court confronted with a significant incursion into the fundamental human rights of affected persons. The courts are by tradition and instinct very slow to interfere with decisions regarding technical or administrative matters.

65. It is natural, however, for any decision-maker to be the more hesitant, the more deliberate, the more cautious as the decision he or she is considering will the more gravely trench on the rights or interests of those likely to be affected. In *White v Dublin City Council* [2004] 1 I.R., the decision was whether or not a modification to a planning application which changed the extent of overlooking of a neighbour's property should be notified to the public. The Court held the planning officer's decision to be flawed because of his failure to appreciate the possibility that the neighbour would wish to object. The decision-maker will balance the need to make the particular decision against the effects of the decision, if made, on rights. The Minister, in his written submissions, adopts the following passage from my judgment in *O'Brien v Moriarty (No. 2)* [2006] 2 I.R. 415 at page 469:

*"The courts will, of course, always have regard to the context of a decision, the statutory purpose of the body concerned and its duties and, where appropriate, the need to have regard to the rights or interests of individuals or categories of individuals, whose interests it is the object of legislation to protect."*

66. The Minister puts the matter well in his written submissions: *"Where fundamental human rights are at stake, the Courts may and will subject administrative decisions to particularly careful and thorough review, but within the parameters of O'Keeffe reasonableness review."* At a later point, the position of the respondent Minister expressed his position as follows:

> *"As to the test of reasonableness, the Respondents have already made it clear that they have no difficulty whatever with the proposition that, in applying O' Keeffe, regard must be had to the subject-matter and consequences of the decision at issue and that the consequences of that decision may demand a particularly careful and thorough review of the materials before the decision-maker with a view to determining whether the decision was unreasonable in the O' Keeffe sense."*

The question is whether these considerations should lead to a modification of the *Keegan* or *O'Keeffe* test. The Minister strongly opposes the adoption of an entirely new threshold of review, whether that of *"anxious scrutiny", "most anxious scrutiny"* or otherwise, for some administrative decisions. He submits that the adoption of such a test would significantly alter the role of the Courts in judicial review and would effectively constitute the Courts as the ultimate appellate tribunal from a vast range of administrative decisions.

67. At one level all this is no more than semantics: what is irrational or unreasonable depends on the subject-matter and the context. Following the colloquial adage that a sledge-hammer is not necessary to crack a nut, a savage sanction should not be applied for a trivial offence. By parity of reasoning, the mere imposition of a fine, without disqualification, on the owner of a "doped" greyhound, which had won an important race, was held to be so unreasonable as to be perverse. (per O'Hanlon J in *Matthews v Irish Coursing Club* [1993] 1 I.R. 346) The appellant's written submissions advance the principle of proportionality, in particular the notion of least intrusive interference with constitutional rights, saying that this principle can operate within the confines of the *Keegan* or *O'Keeffe* test. I do not consider it necessary to change the test. Properly understood, it is capable of according an appropriate level of protection of fundamental rights. The test as enunciated by Henchy J and as explained by Finlay C.J. in *O'Keeffe* lays down a correct rule for the relationship between the courts and administrative bodies. Properly interpreted and applied, it is sufficiently flexible to provide an appropriate level of judicial review of all types of decision. The proposition of the respondents, quoted at paragraph 65, is a restatement, without using the word, of the principle of proportionality. The courts have always examined decisions in context against their surrounding circumstances.

68. Where decisions encroach upon fundamental rights guaranteed by the Constitution, it is the duty of the decision-maker to take account of and to give due consideration to those rights. There is nothing new about this. It is implicit in *East Donegal*. Where a right is not considered at all or is misdescribed or misunderstood by the decision-maker, the decision will be vulnerable to attack on the grounds of a mistake of law or failure to respect the

rules of natural justice. In such cases, it may not be necessary to establish that it is unreasonable. It may, however, affect fundamental rights to such a disproportionate degree, having regard to the public objectives it seeks to achieve, as to cross a threshold, and to be justifiably labelled as so unreasonable that no reasonable decision-maker could justifiably have made it. To use the language of Henchy J, it may *"plainly and unambiguously fl[y] in the face of fundamental reason and common sense."*

69. Where unreasonableness is alleged, the applicant will ask the court to examine the decision to see whether the decision-maker has complied with the duty to take account of and to give due consideration to any relevant rights or interests. There is an infinitely broad spectrum of decisions and of contexts and an infinite gradation of rights. There are constitutional rights, statutory and other legal rights, rights guaranteed by the Convention. In the last case, it is relevant that section 3 of the European Convention of Human Rights Act, 2003 places an obligation on every organ of the State to perform its functions in a manner compatible with the State's obligations under the provisions of the Convention. In the Convention context, we must be conscious that the Court of Human Rights is influenced by the effectiveness of legal remedies against administrative decisions, when it considers the effectiveness of a national remedy pursuant to Article 13.

70. If we were to adopt the criterion of *"anxious scrutiny*," it would follow that different standards of review would apply depending on whether the case was concerned with the protection of different types of right. That is the English "sliding scale" of review. 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. For example, it would be wrong and confusing to have two different standards of judicial review for planning decisions depending on whether the review was being sought by the applicant for permission (the owner of the land with constitutionally protected rights) or a third-party objector (with a merely legal right to object, as in *White v Dublin County Council)*. The holder of a licence may have a mere legal right, but still be entitled to expect not only fairness in any decision affecting his right to hold it but, in addition, that it will not be taken from him for trifling reasons. 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.

71. I prefer to explain the proposition laid down in the *Keegan* and *O'Keeffe* cases, retaining the essence of the formulation of Henchy J in the former case. I would say that a court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied, on the basis of evidence produced by the applicant, that the decision is unreasonable in the sense that it plainly and unambiguously flies in the face of fundamental reason and common sense. I use the word, "substantive," to distinguish it from procedural grounds and not to imply that the courts have jurisdiction to trespass on the administrative preserve of the decision-maker. This test, properly

applied, permits the person challenging the decision to complain of the extent to which the decision encroaches on rights or interests of those affected. In those cases, the courts will consider whether the applicant shows that the encroachment is not justified. Justification will be commensurate with the extent of the encroachment. The burden of proof remains on the applicant to satisfy the court that the decision is unreasonable in the sense of the language of Henchy J. The applicant must discharge that burden by producing relevant and cogent evidence.

72. 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.

**Applying the test; decision**

73. I turn finally to the deportation order made by the Minister in this case. Firstly, it needs to be emphasised that this case concerns a decision of the Minister pursuant to section 3 of the Immigration Act, 1999. The High Court order under appeal was one whereby the learned judge refused leave to apply for judicial review. Section 5(2)(b) of the Illegal Immigrants (Trafficking) Act, 2000 requires an applicant for leave to show *that "there are substantial grounds for contending that the decision……is invalid or ought to be quashed."* Keane C.J., in delivering the judgment of the Court in *In the Matter of Article 26 of the Constitution and…the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360 at page 394 *considered that test as follows:*

> *"The Oireachtas has imposed the "substantial grounds" requirement in other legislation including the Planning Acts, the Roads Act, 1993 (as amended by the Roads (Amendment) Act, 1998) the Irish Takeover Panel Act, 1997 and the Fisheries (Amendment) Act, 1997. In McNamara v. An Bord Pleanála (No. 1) [1995] 2 I.L.R.M 125, Carroll J. interpreted the phrase "substantial grounds" in the provisions of the Planning Act of 1992 as being equivalent to "reasonable","arguable" and "weighty" and held that such grounds must not be "trivial or tenuous". Although the meaning of the words"substantial grounds" may be expressed in various ways, the interpretation of them by Carroll J. is appropriate."*

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

75. The Minister makes a deportation order at the end of the asylum process. In this case, the appellant had been refused refugee status and the Minister informed her that her right to remain temporarily in the State in accordance with section 9(2) of that Act had expired. At the same time, he informed her of his intention to make a deportation order

and of her right to make representations. He was proposing to make the distinct decision which section 3 of the Act empowered him to make. It is the Minister and not the Refugee Appeals Tribunal that has power to expel a person from the State. As the Court pointed out in its judgment in *In the Matter of Article 26 of the Constitution and…the Illegal Immigrants (Trafficking) Bill, 1999*, cited above, at page 391, *"a non-national has a constitutional right of access to the courts to challenge the validity of a decision such as a deportation order."* The appellant had submitted to the Minister that she faced dangers coming within the scope of section 5 if returned to Nigeria. The question of whether her claims of likely exposure to these risks were well-founded was addressed by the Minister in the form of his statement that the provisions of section 5 (prohibition of refoulement) of the Refugee Act 1996 were *"complied with in her case,"* but not otherwise. The recommendation to the Minister had stated that it was *"found not to be an issue."*

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

77. I am satisfied that the second and more general aspect of the decision falls within the principle of the decision of this Court in *F.P. v Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 164. The reasons given for the decision of the Minister in that case, which are quoted in the preceding paragraph, were verbatim the same as in the present case. Insofar as the general reasons are concerned, it seems to me clear that the decision in *F.P.* should be followed. There is no ground for making any distinction between the two cases. In that case, as in this, the applicant had sought recognition as a refugee through the two stages of the asylum system and had been refused and had been informed that she had no continuing right to remain in the State. The following statement of Hardiman J, in delivering the unanimous judgment of this Court is equally applicable to what I have called the second aspect of the Minister's decision in the present case:

> *"In the circumstances of this case, the respondent was bound to have regard to the matters set out in s. 3(6) of the Act of 1999. In my view he was also clearly entitled to take into account the reason for the proposal to make a deportation order, i.e. that the applicants were in each case failed asylum seekers. If the reason for the proposal had been a different one, he would have been entitled to take that into account as well. He was obliged specifically to consider the common good and considerations of public policy. In my view he was entitled to identify, as an aspect of these things, the maintenance of the integrity of the asylum and immigration systems. The applicants had been entitled, in each case, to apply for asylum and to remain in Ireland while awaiting a decision on this application. Once it was held that*

*they were not entitled to asylum, their position in the State naturally falls to be considered afresh, at the respondent's discretion. There was no other legal basis on which they could then be entitled to remain in the State other than as a result of a consideration of s. 3(6) of the Act of 1999. In my view, having regard to the nature of the matters set out at sub-paras. (a) to (h) of that subsection, the decision could be aptly described as relating to whether there are personal or other factors which, notwithstanding the ineligibility for asylum, would render it unduly harsh or inhumane to proceed to deportation. This must be judged on assessment of the relevant factors as, having considered the representations of the person in question, they appear to the respondent. These factors must be considered in the context of the requirements of the common good, public policy, and where it arises, national security."*

78. However, it does not appear from the judgment of Hardiman J in the *F.P.* case that the appellants made any complaint of a risk of probable subjection to abuse of their personal or human rights on return to their countries of origin. Hardiman J explained at page 172 that the nature of the decision awaited emphasised that it *"was in the nature of an ad misericordiam application."* He went on to point out that the matters required to be considered *"were the personal circumstances of the applicant, described under seven sub-headings; his representations (which in practice related to the same matters) and "humanitarian considerations."* The judgment makes no mention of infringements of fundamental rights, of any risk of inhumane treatment or torture on return to the country of origin of the appellants. Allegations of infringement of such rights were necessarily made at earlier stages and, in particular, as part of the asylum process, but they played no part in the judgment of this Court. The judgment contains no discussion of section 5 or of prohibition of *refoulement.* Since the appellants were Romanian males, no issue arose regarding risk of exposure to FGM.

79. I have summarised at paragraph 17 above the material that was before the Minister in respect of the prevalence of FGM in Nigeria. None of this is referred to in the Minister's decision. As already stated the Minister limited himself to stating that he was *"satisfied……that the provisions of section 5 (prohibition of refoulement) of the Refugee Act 1996* [had been] *complied with"* in the appellant's case. This statement does not disclose the basis on which the appellant's complaint of risk of subjection to FGM was rejected. The Minister does not disclose whether he believes or disbelieves the appellant or what his views are regarding the extent or the existence of the risk of FGM in Nigeria or whether or not he believes the appellant is subject to the risk, or, if not, why not. It was, of course, for the Minister to assess and to weigh these matters, before making a decision which is his alone. It is clear that the allegations are of a serious character. It is instructive to consider the remarks on the subject of Lord Bingham and Lady Hale in a case decided much more recently than the High Court decision in this case, namely, *F v Secretary of State for the Home Department* [2007] 1 All ER 671, respectively at paragraphs 25 and 91 to 94. Lord Bingham stated, with citations, that *"…claims based on fears of FGM have been recognised or upheld in courts all round the world."* The difficulty posed by the form of the Minister's decision is not merely his failure to provide reason for

his decision, though that is undoubtedly the case, but that the decision is defective as a result. There is a complaint of a serious risk of exposure to what is arguably an infringement of life or freedom (as defined in section 5 of the Refugee Act, 1995) and nothing on the other side, nothing to explain how the Minister came to the conclusion that the appellant should, nonetheless, be deported. The Minister might have had any one of a range of reasons for his decision, but the court simply does not know. Hardiman J has discussed the issue of FGM in some detail and has referred to a number of policy considerations. But none of these matters were advanced in explanation of the Minister's decision.

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

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

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

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

84. I would grant an order to the appellant giving her leave to apply for judicial review of the decision of the Minister to deport her dated 12th July 2002, but strictly limited to that aspect of the decision which dealt with her complaint of *refoulement* contrary to the provisions of section 5 of the Refugee Act, 1996. The order should accordingly grant leave to apply for the relief sought at paragraph d), I and II of the Statement of Grounds on the grounds set out at paragraph e), 1, 3, 5, 7 insofar as they relate to section 5 of the Refugee Act, 1996 *(prohibition of refoulement).*