Neutral Citation Number: [2009] IEHC 107

THE HIGH COURT

2006 278 JR

BETWEEN

R.O.L. AND L.S.

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

THE ATTORNEY GENERAL

RESPONDENTS

AND

THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT of Mr. Justice McCarthy delivered on the 5th day of March, 2009

1. The applicants are both Nigerian citizens. The second applicant has apparently lived legally in this jurisdiction since or on or about the 2nd May, 2000, having arrived here at the age of seventeen in 1997. Her entitlement to be present in the jurisdiction falls to be renewed annually. The first applicant arrived in the jurisdiction on or about the 16th July, 2001 and thereupon applied for asylum. That application was unsuccessful and ultimately on 7th February, 2005 the Minister for Justice made a deportation order in exercise of the powers conferred upon him by s. 3(1) of the Emigration Act, 1999. Subsequent to that order, the applicant commenced proceedings in this court, apparently in relation thereto and I am informed that those proceedings were compromised: I have no knowledge of the terms thereof. I infer, however, that it was agreed that the first applicant should be afforded an opportunity to make fresh representations for leave to remain in the jurisdiction, notwithstanding the fact that his application for refugee status had been refused. One infers that the settlement must have contemplated that the Minister would retake the decision to refuse leave to remain or else such fresh representations would have been pointless. Presumably if the Minister reconsidered his earlier decision, he would revoke the deportation order.

2. In any event representations were made in writing on behalf of the applicant to the Minister on 29th December, 2005. These were duly considered by the Minister, who on 20th January, 2006 affirmed the earlier deportation order (or to put the matter another way, refused to revoke it and afford leave to remain to the first applicant). The decision was communicated to the first applicant's solicitors by letter dated the 17th February, 2006. In any event on 20th February, 2006 further representations were made by his solicitors on behalf of the first applicant to the Minister. This pertained to the fact that the second applicant had a consultation with a gynaecologist at the National Maternity Hospital on 6th April, 2006 in respect of fertility treatment, then apparently being undergone by her. The Minister replied to that letter on 22nd February pointing out that the first applicant's medical condition had been taken into consideration when the deportation order was affirmed by him. The letter of 20th February, 2006 merely, of course, provided information pertaining to a given appointment – the

representations in writing of 29th December, 2005 gave relatively full information to the Minister in relation to that issue and the letter of 20th February adds nothing beyond informing the Minister of the fact of an appointment in respect of on-going medical treatment already made known to him. It is beyond me, for what it is worth, however, why this information (so far as it is of any significance) was not brought to the attention of the Minister until the letter of 20th February since the appointment was made on or about the 24th January, 2006. The fact of the medical appointment in respect of medical treatment of the kind in question, of course, adds nothing of substance what the first applicant already choose to tell the Minister, in as much as one assumes that it is inherent in any such treatment that one might consult from time to time with one's doctors.

3. In any event my colleague Hanna J., on 7th March, 2007 afforded the applicants leave to seek inter alia the following reliefs, namely:-

> 1. An Order of Certiorari by way of an application for judicial review quashing the decision of the Respondent re-affirming the deportation order relating to the first named Applicant and notified to the first named Applicant no earlier than 20"` February, 2006;
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> 2. A Declaration by way of an application for judicial review that the respective decisions of the Respondent communicated by letter dated 17th February 2006 is ultra vires;
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> 3. A Declaration pursuant to section 5(1) of the European Convention on Human Rights Act, 2003 that the rule of law governing the scope of judicial review relating to deportation decisions set out in O'Keeffe v An Bord Pleanála is incompatible with the European Convention on Human Rights in that the test so afforded fails to constitute an effective remedy for the purposes of Article 13 of the said Convention;
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> 4. The grounds upon which the court afforded leave to seek that relief are as follows, namely:-
>
> > 1. The Respondent acted in violation of the Applicants rights to respect for the family life as protected by Article 8 of the European Convention on Human Rights.
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> > 2. It is disproportionate to affirm the deportation order.
> >
> > 3. The Respondent took into account irrelevant considerations and/or failed to take into account relevant considerations.
> >
> > 4. The Applicant's human rights will be compromised by the impugned decisions herein such that they are entitled to a judicial examination of the decisions, the reasoning behind the decisions and the evidence upon which the decisions are based. Insofar as this Honourable Court is restricted to confining itself to the "O'Keeffe test" in reviewing the said decisions, such a review is inadequate and contrary to the rights guaranteed by the European Convention on Human Rights such as to indicate incompatibility with the said Convention, and, if appropriate, the Applicants seek a declaration of incompatibility pursuant to section 5(1) of the European Convention on Human Rights Act 2003.

5. A statement of opposition dated 18th May, 2007 has been delivered and it consists in a full traverse of the applicants averments.

6. The first issue which was argued before me pertained to the test to be applied by the court exercising its jurisdiction of judicial review of administrative action. As we know, an administrative decision may be held ultra vires, firstly, in the event of certain errors of law, on the basis of breaches of the constitutional rights of the party (in a case such as the present) (including a failure to apply the principles of constitutional justice), thirdly on the grounds of irrationality. A fourth ground has been separately propounded, namely, what is shortly termed "proportionality", confined to cases where it might be contended that the right of a party will only be proportionate to some other desiradum or right. It seems to me that in many cases, any error under the latter head may constitute a breach of a party's constitutional right or, perhaps, a convention right. The test to which I refer arises, of course, only when one is seeking to impugn a decision on the grounds of irrationality and this is relevant here because it is inter alia alleged that the impugned decisions "are unreasonable, irrational and arbitrary".

7. In my decision in B.J.N. v. The Minister for Justice and Others, (Unreported, High Court, 18th January, 2008) and, to a lesser extent in Kamil v. The Refugee Appeals Tribunal and Others (Unreported, High Court, 28th August, 2008). I address the issue of such test. As was stated in the former case:-

> *"The traditional test or threshold for grant of judicial review (in this context) is stated by Finlay C.J. in O'Keeffe v. An Bórd Pleanála [1993] 1 I.R. 39, approving Henchy J. in The State (Keegan) v. Stardust Compensation Tribunal, [1986] I.R. 642 as follows:-*
>
> (a) It is fundamentally at variance with reason and common sense.
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> (b) It is indefensible for being the teeth of plain reason and commonsense.
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> (c) Because the court is satisfied that the decision maker has breached his obligation whereby he 'must not flagrantly reject or disregard fundamental reason or commonsense in reaching his decision'".

8. I was referred in the argument in both of my decisions to Z. v. The Minister for Justice, [2002] 2 I.L.R.M. 215 and A.O. and D.L. v. The Minister for Justice, [2003] 1 I.R. 124. In the latter it was pointed out by Fennelly J. that the view of Denham J., with whom Hamilton C.J. agreed, in Laurentiu v. The Minister for Justice, [1999] 4 I.R. 26 was that review of deportation orders was to be conducted in accordance with the "O'Keeffe's principles". He stated, obiter, that (as I put it in B.J.N.):-

> *"Where, as was the position in the instant case, constitutional rights were at stake, such a standard of judicial scrutiny 'must necessarily fall well short of what it is likely to be required for their protection' and he referred to the apparent modification of the traditional test in such cases in England…".*
>
> In concurring with Fennelly J., McGuinness J. expressed the view that:
>
> *"The standard of judicial scrutiny as set out (in the O'Keeffe case) may fall short of what is likely to be required for (their) protection…"*

9. The alternative test (which I, at any rate, conceived to be unrelated to that laid down in O'Keeffe), it is that variously known as that of "anxious scrutiny" or "careful scrutiny" or, the further alternative, "heightened scrutiny". In Z. McGuinness J. said that she found it difficult to interpret these or in similar phrase and that in point of law it was difficult to define the difference between mere scrutiny and such supposedly different tests. She said, however, that pending full argument in another case, she considered sufficient that the applicant's judicial review application received careful scrutiny under the established standards relating to unreasonableness. That of course is what one endeavours to do here.

10. It is appropriate also to refer to the decision of the Supreme Court in Baby O. v. The Minister for Justice, [2002] 2 I.R. 169 (at p. 80) where Keane C.J. in relation to the relevant test, said

> *"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. The Stardust Victims Compensation Tribunal, [1986] I.R. 6421 and O'Keeffe v. An Bord Pleanála, [1993] I.R. 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".*

Whilst I first considered the so called "anxious scrutiny" or "careful scrutiny" or "heightened scrutiny" test in B.J.N. In the course of argument in Kamil v. Refugee Appeals Tribunal and Another, (Unreported), 27th August, 2008 I was referred by counsel to two decisions which had not previously been brought to my attention, being the decisions of McGovern J. in Itare v. The Minister for Justice, Equality and Law Reform, (Unreported, 2nd March, 2007) and Che v. The Minister for Justice, Equality and Law Reform, (a decision of the same date) to the effect that the Court should apply, not only the O'Keeffe test but the "anxious scrutiny" test "as well". As I pointed out in Kamil, I took the view that I ought to apply my own previous decisions in accordance with the principles elaborated by Parke J. in Irish Trust Bank Limited v. Central Bank of Ireland, [1976] I.R. 50 pertaining to the circumstances in which a court of co-ordinate jurisdiction is at liberty not to follow or apply a previous decision of the same court. I respectfully disagree with the view taken by my colleague McGovern J. in Kamil and propose here to follow and apply my own previous decisions.

11. Reference has also been made to the decision of Charleton J. in Fr. N. and Others v. Minister for Justice Equality and Law Reform (Unreported, High Court, Charleton J., 24th April, 2008), where he said, as I pointed in Odemema v. The Minister for Justice, Equality and Law Reform, (Unreported, 28th November, 2008) that the multiplicity of written decisions on judicial review on refugee matters display "strong evidence" for the proposition that the court has exercised "a heightened level of scrutiny when compared to other forms of judicial review that concern administrative decision makers" and further stated that he did not think that it would be fair to the principle of the primary importance of human rights merely to ask whether or not the decision "flew in the face of fundamental reasoning and common sense". I took the view then, and I take it now, that Charleton J.'s observations in this regard do not necessarily indicate that he adopts as correct the so called "anxious scrutiny" test (as I will call it for brevity sake): even if he does, however, as will be seen from my previous decisions and from what I have said above I take a different view. For the sake of completeness I might add that I have adopted the same approach in rejecting this new test, as

that which I have applied here in Mwiza v. Refugee Appeals Tribunal and Another, (Unreported, High Court, 22nd August, 2008), Kongue v. Refugee Appeals Tribunal and Others, (Unreported, High Court, 29th October, 2008), and Bucumi v. Refugee Appeals Tribunal and Others (Unreported, High Court, 29th October, 2008).

12. In oral argument Mr. O'Neill referred to Clinton v. An Bord Pleanála, (Unreported, Supreme Court, 2nd May, 2007) in which the judgment of the Court was delivered by Geoghegan J. It pertained an order in relation to the question of the exercise of a power to compulsorily acquire land, (whether by a local authority or An Bord Pleanála) he said that such power must be exercised: "in accordance with the requirements of the Constitution including respecting the property rights of the affected land owner by virtue in East Donegal Co-operative v. The Attorney General, [1970] I.R. 317" and, further, "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 irrational or was no contrary to fundamental reason and common sense". I do not think that this is to be regarded as positing a departure from the O'Keeffe test or can be taken to extend to overruling the test applied by the Supreme Court in cases pertaining to asylum or refugees. Mr. O'Neill has very skilfully (and I say this with respect) attempted to "square the circle" where "anxious scrutiny" and the O'Keeffe test respectively are concerned. He has sought to say that without departure from the latter the former may in some way be accommodated. I cannot see how this can be done. One test or the other is applicable and I am of the view that it is the latter. I should say also that Mr. O'Neill sought to suggest, on the basis of the extract from the judgment of Keane C.J. in Baby O. (above) that some tenuous link between the material on which the decision is based and the decision itself was insufficient but that a decision can be impugned unless the decision maker could "reasonably have arrived at the decision"; it is in those terms that Keane C.J. described the O'Keeffe test itself and I do not think that anyone was ever in any doubt that reasonableness was intrinsic to it. On this aspect of it, Mr. O'Neill made the point in his supplemental submission of 5th October, 2008, para. 1.8 that:

> "Any principle by which a court examines a decision with 'anxious scrutiny' does not involve a simple reversal of the O'Keeffe principles and does not per se involve the court in retaking the decision or drawing different inferences or quashing a decision because the court believes that the factors favouring a contrary decision were much stronger than those favouring the decision reached. Smyth J. noted in Mohse v. Minister for Justice and others (Unreported, High Court, 13th March, 2002), the "anxious scrutiny" test is an approach within the Wednesbury principles."

With this I respectfully disagree as the elements of that test as they have been elaborated in England.

13. In Agbonlahor v. Minister for Justice, Equality and Law Reform, [2007] IEHC 166 Feeney J. emphasized that the State was not generally obliged to permit an applicant to remain on the basis that his expulsion would render certain important public services unavailable to him and that there was a distinction between removing a person seeking international protection from the State to a place where he was at risk of being subjected to torture or inhuman or degrading treatment and a situation where, on the other hand, it was necessary to balance the rights of an applicant, who by reason of his or her medical or family circumstances was seeking to remain in the State, against the entitlement of the State to control its immigration policy. Such is the position here in relation to

Article 8 rights; I might break off here, for a moment, and say that notwithstanding the decision the European Court of Human Rights in Dickson v. United England (4th December, 2007) to the effect that the threshold set by United Kingdom law for satisfaction of a right on the part of a prisoner to have his wife artificially inseminated was:

> *"So high against it, that it did not allow a balancing of the competing individual and public interests and a proportionality test by the Secretary of State or by the domestic court in their case, as required by the Convention."*

The important public service (if it be so) of medical treatment for infertility, whether extending to the artificial insemination or otherwise, in my view would not engage Article 8, save in the circumstances of Dickson. Hence, the balancing process, if such an issue were to be considered under this head or using these principles by analogy, does not arise since no one possesses a right to such treatment in this jurisdiction and the entitlement of a prisoner has to be quite different from that of a couple who are childless, apparently for medical or natural reasons. There is no restriction of any kind upon them in obtaining such treatment in Nigeria, if it be available, should they continue their family life there. The fact that it may or may not be the case, that fertility treatment, whether extending to artificial insemination or otherwise, is available in Nigeria is, needless to say, neither here nor there.

14. Thus, in any balancing of rights, a rational decision maker would be entitled to ignore this factor completely since it does not engage any rights. It was taken into account, unnecessarily in my view, as part of the material before the Minister (in the balancing process) but any such factor would be grossly disproportionate to the State's exercise of immigration control in the common good. To be fair, Mr. O'Neill does not advance the startling proposition that persons might be entitled to remain in the State indefinitely to avail of such treatment but he suggests, in some way, that some short term ad hoc permission ought to be afforded to them. It is presumably the case, accordingly, as a matter of reason, that what he is seeking to suggest in his submissions is that it is irrational for a Minister not to retake or review a decision as to deportation (as contemplated by the comprise of the earlier proceedings) until, say, an appropriate period of time (which by definition the Minister can never know on the basis of the existing submissions or otherwise) has elapsed. The Minister in my view, either has lawful discretion to make the order or not and circumstances in which the order ought not to be executed (e.g. immediate subjection to violence or perhaps death on return to the jurisdiction of origin or, perhaps from risks to health, immediately life threatening) could not be applicable in this context. I believe that further or in the alternative the factor must be regarded, at best from the applicant's point of view, as de minimis to the decision and accordingly whether or not the Minister took it into account becomes irrelevant and cannot undermine the decision.

15. In N. v. The Secretary of the State for the Home Department, [2005] 2 A.C. 296, (in the speech of Lord Browne) it was pointed that the European Court of Human Rights has:

> *"Not been prepared to grant an absolute right for seriously ill persons to remain in the host country to get treatment provided they had managed to set foot there. The very far reaching consequences of such a right would give rise to positive obligations which the Court had not thought it right to impose upon the contracting States".*

16. Reference has been made, to R.Z. (Zimbabwe) v. The Secretary of State for the Home Department, (Unreported, 17th July, 2008). As Mr. O'Neill very properly concedes this arises only in the context of a disparity as between medical treatment in the host country and the country of origin where a particular disparity arises due to political affiliations.

17. I have been referred by the applicants to Rodrigues da Silva v. Netherlands, E.C.H.R. (31st January, 2006) and Slivenko v. Lavia, E.C.H.R. (9th October, 2003); these decisions are of assistance to the extent that they contain statements of principle as to the manner in which the State's entitlement to deport is exercisable pursuant to Article 8 of the Convention and it seems to me that the former judgment summarizes the position comprehensively as follows:

> *"39. The Court reiterates that in the context of both positive and negative obligations the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation. Moreover, Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see Gül v. Switzerland, 19 February 1996, § 38, Reports 1996-I). Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles to the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see Solomon v. the Netherlands (dec.), no. 44328/98, 5 September 2000). Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 (see Mitchell v. the United Kingdom (dec.), no. 40447/98, 24 November 1998, and Ajayi and Others v. the United Kingdom(dec.), no 27663/95, 22 June 1999)."*

I have been referred also to Konstatinov v. Netherlands, E.C.H.R, (26th April, 2007), but I trust that the law pertaining to the respect of family rights of the applicant has been sufficiently elaborated above.

18. I must also address the question of whether or not the conduct of the State in refusing to revoke the deportation order is such as to interfere with the right to respect for family life in a larger or more widespread sense and in that regard the decision of my colleague, Dunne J. in B.I.S. and Others v. The Minister for Justice, Equality and Law Reform, (Unreported, 30th November, 2007) is of assistance. She quotes with approval a passage from the speech of Lord Philips in the Queen Mahmood v. Secretary of State for the Home Department, [2001] 1

W.L.R. 840 in which he summarised the general principles applicable to decisions pertaining to family life as she follows:

> "(1) A state has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.
>
> (2) Article 8 does not impose on a State any general obligation to respect the choice of residence of married couples.
>
> (3) Removal or exclusion of one family member from a State where other members of the family are lawfully resident will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family members excluded, even where this involves a degree of hardship for some or all members of the family.
>
> (4) Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a State if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled.
>
> (5) Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8.
>
> (6) Whether interference with family rights is justified in the interests of controlling immigration will depend on
>
> (i) the facts of the particular case, and
>
> (ii) the circumstances prevailing in the state whose action is impugned."

19. Dunne J. also referred to Agbonlahor and in particular quoted with approval two passages therefrom, relevant to the present case as follows:-

> *"In considering immigration law under Article 8, the European Court has focussed on an analysis of the individual facts in each particular case to ascertain whether the individuals asserting breach of rights are in truth asserting a choice of the State in which they would like to reside, as opposed to an interference by the State with their rights under Article 8."*

and, further that:

> "It is also significant that in considering the issue of family life that it is appropriate to have regard to the lawfulness and length of stay as being significant factors in seeking to identify the exceptional cases where a State might be prevented from exercising the State's unquestioned entitlement to impose immigration control."

In my view, in the present case, what is sought to be asserted here is a choice by the applicants as to where they should reside. There is no right to such a choice.

20. Reference has been made here and was in B.I.S. to the R. (Razgar) v. Secretary of State for the Home Department, [2004] 1 A.C. 368 where Lord Bingham said:

> *"Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis".*

As pointed out by Dunne J. that passage was approved by Feeney J. in Agbonlahor and there is nothing before this court to indicate that the facts and circumstances of this case are such as to amount to one of the "minority of exceptional cases".

21. Reference was also made by Mr. O'Neill to Huang v. Secretary of State for the Home Department, [2007] 4 ALL. E.R. 15; he referred to this, lest it be conceived that the R. (Razgar) v. Secretary of State for the Home Department might be taken as authority for the proposition that some test of exceptionality was applicable. It will be noted that Huang was not brought to the attention of Dunne J. In any event Lord Bingham explained Razgar, thus (at para. 20, p. 29) as follows:-

> *"In an Article 8 case… the ultimate question for the appellate Immigration Authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudice as the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary for the appellate Immigration Authority, directing itself along the lines indicated in this opinion; it need now ask in addition whether or not the case meets a test of exceptionality. The suggestion that it should is based on… Razgor's case… he Lord Bingham (sic) was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the rules and supplementary directions but entitle to succeed under Article 8 would be a very small minority. That is still is his expectation but he was not purporting to lay down a legal test."*

This appears to me to be the position in Ireland, also.

22. Reference has also been made to the question of lapse of time or delay. It is not explicitly said that the refusal of the Minister to revoke the order is unlawful by reason of lapse of time alone, but it is suggested that this is a factor to which regard must be had in a balancing exercise; it is submitted that this is especially the case because the fact of the lapse of time would have diluted the extent to which the applicants might have accepted that their relationship was precarious or uncertain. I can only repeat that the status and history of the applicants in the State, as well as the fact of their relationship, were known to the Minister and there is no evidence to suggest that he failed to have regard to that factor. Consideration of that factor is intrinsically a part of consideration of the marital status of the parties. In any event, I am not at sure that lapse of time would have had the consequences in terms of the relationship which are now inferred. More to the point, however, I cannot see how this factor rendered irrational or unlawful decisions, otherwise proportionate and balanced or to put the matter in another way it is not a factor of such significance in the equation as to render it possible to impugn the decision on these grounds.

23. I think that in terms of such alleged lapse of time (if I might describe it as such) the precariousness of the position must be obvious if one analyses the

sequence of events. The first named applicant arrived in the State on 16th July, 2001 and sought asylum. The Refugee Applications Commissioner dealt with his application and he was notified of the decision of the Commissioner to refuse to recommend the conferral of refugee status upon him, on the 9th April, 2002. Prima facie, accordingly, he, at that stage, could have had no reasonable expectation of remaining in the State. Even though his application was merely pending at the time, he had married according to a muslin ceremony on 20th March, 2002 and on the date of his civil marriage on 24th July, 2002 his appeal to the Refugee Appeals Tribunal was pending. There cannot be any doubt accordingly as to the precariousness of his status both in and about the time of the muslin marriage and the civil ceremony. A sensible person would have postponed a marriage until the entire refugee process had been completed because if he was found to be unlawfully in the State, marriage could not be enjoyed in this jurisdiction, notwithstanding his wife's connection with it, save, as a matter of practicality, in very limited circumstances. In any event, he was notified of the refusal of the appeal on 29th July, 2002 and he was notified by the Minister of the Minister's proposal to make a deportation order on 16th September, 2002.

24. Thereafter representations were made on his behalf on 19th September, 2002, the 1st October, 2002 and 18th July, 2003. As is so common in cases of this kind, multiple representations were made. Following the Tribunal's decision, of course, he was in the hands of the Minister on an ad misericordiam basis, subject to consideration, of course, of the prohibition against refoulement and an appropriate balancing of his constitutional or Convention rights. The Minister made a deportation order on 7th February, 2005, I reject the proposition that he might have had any reasonable expectation that his position might be less precarious. I simply do not agree that one might anticipate, as a matter of human nature that the Commissioner, the Tribunal or the Minister would have a continuing hope of remaining in the jurisdiction; just because of lapse of time or it seems to me that precariousness or such a hope can only be inferred from fact. If I am wrong in this matter I think that one would hardly be able to say that such a relatively brief period, (approximately nineteen months) for a person illegally in the State could have had any real consequences in this connection, it might or might not be different if there had been a delay in adjudication and decision of the Commissioner or perhaps even the Tribunal. During the period between the application to the Minister on foot of notification of his proposal to deport and the order itself, no one could have been under any illusion but that he was in the jurisdiction on sufferance. Subsequently judicial review proceedings were commenced on 25th January, 2005 and the matter has taken its course in the courts since that time. The Minister had no relevant evidence of precariousness or its consequences, he acted reasonably in this regard.

25. Obviously one must read together the written recommendation to the Minister of the 11th January, 2006, prepared by Audrey G. Walsh, approved by D. J. Casey and affirmed by the Minister on 20th January, 2006 (as can be seen from his initials) as well as all preceding material placed before him. It seems to me that affording a complete respect to the constitutional or Convention rights of the applicants, as a family, the decision of the Minister was perfectly rational. One of the core matters is really in complaint here, accordingly, is the fact that the Minister's consideration on the occasion of the review was insufficiently elaborate in writing, and did not, in itself, prima facie, engage in what one might term debate by reference to explicit constitutional or Convention rights for the purpose of showing the factors put into the balance in reaching a proportionate decision (so far as rights existed). It seems to me that one cannot escape from the proposition that the Minister has no duty to engage in detail with an applicant or give reasons of an elaborate kind. It seems to me that in terms of constitutional

or Convention rights the Minister is entitled as a matter of comity between the judicial and executive branches of government, absent evidence of failure to do so, to have made in his favour the assumption that he has proceeded in his decision making in a constitutional manner and/or in the alternative a manner in conformity with his obligations under the Human Rights Act; of relevance here are the observations of Keane C. J. in Baby O. v. The Minister for Justice, [2002] 2 I.R. 169, in the context of refoulement, as to reasons, and I believe that it must be so in principle here too, where he said as follows:-

> *"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 refoulement does not arise. The first respondent's obligation was to consider the representations made on her behalf and notify her of the decision: that was done, and, accordingly, this ground was not made out".*

26. It is clear that all relevant matters under s. 3 of the Immigration Act, 1999 were considered.

27. I therefore hold and find that there was no error of law on the part of the Minister and that his decision was a rational exercise of his discretion which the court cannot interfere. For the avoidance of doubt, I further hold and find, without prejudice to the issue of whether or not it was necessary, that taking the documentation as a whole, it is perfectly clear what the reasoning of the Minister was. I therefore reject this application.