THE HIGH COURT

2009 Record No: 763/ JR

JUDICIAL REVIEW

Between:

I.S. (AN INFANT ACTING BY HER MOTHER AND NEXT FRIEND A.S.)
AND
A.S. (AN INFANT ACTING BY HER MOTHER AND NEXT FRIEND A.S.)
AND
A.S.

Applicants

-and-

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

Respondents

-and-

HUMAN RIGHTS COMMISSION

Notice Party/ Amicus Curiae

OUTLINE WRITTEN SUBMISSIONS OF THE HUMAN RIGHTS COMMISSION

THE HIGH COURT

2009 Record No: 531/ JR

JUDICIAL REVIEW

Between:-

O.A-B. (AN INFANT ACTING BY HIS FATHER AND NEXT FRIEND O.O.A-B.) AND E.A-B. (AN INFANT ACTING BY HER FATHER AND NEXT FRIEND O.O.A-B.) AND O.O.A-B. AND E.A.A

Applicants

-and-

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

Respondents

and-

HUMAN RIGHTS COMMISSION

Notice Party/ Amicus Curiae

OUTLINE WRITTEN SUBMISSIONS OF THE HUMAN RIGHTS COMMISSION

THE HIGH COURT

2009 Record No: 528/ JR

JUDICIAL REVIEW

Between:

A.F. (AN INFANT ACTING BY HER FATHER AND NEXT FRIEND O.F.) AND
A.F. (AN INFANT ACTING BY HER FATHER AND NEXT FRIEND O.F.) AND
A.F. (AN INFANT ACTING BY HER FATHER AND NEXT FRIEND O.F.) AND
A.F. (AN INFANT ACTING BY HER FATHER AND NEXT FRIEND O.F.) AND
O.F. AND A.F.

Applicants

-and-

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

Respondents

and-

HUMAN RIGHTS COMMISSION

Notice Party/ Amicus Curiae

OUTLINE WRITTEN SUBMISSIONS OF THE HUMAN RIGHTS COMMISSION

THE HIGH COURT

2009 Record No: 511/ JR

JUDICIAL REVIEW

Between:-

F.S.O
(A MINOR ACTING BY HIS FATHER AND NEXT FRIEND, S.E.O.)
AND

H.S.O. (A MINOR ACTING BY HIS FATHER AND NEXT FRIEND, S.E.O.)
AND
S.E.O.
AND
P.S.O.

Applicants

-and-

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

Respondents

and-

HUMAN RIGHTS COMMISSION

Notice Party/ Amicus Curiae

OUTLINE WRITTEN SUBMISSIONS OF THE HUMAN RIGHTS COMMISSION

Introduction

1. This submission is filed by the Human Rights Commission as *amicus curiae*, pursuant to the Order of this Honourable Court made on the 13th January, 2011, which granted the Commission leave to appear in these proceedings pursuant to section 8(h) of the *Human Rights Commission*

Act 2000. Section 8(h) empowers the Commission to apply to the High Court and to the Supreme Court to be joined as *amicus curiae* in proceedings that pertain to the human rights of any person and to appear as such on foot of an Order of the Court. The term "human rights" is defined in the Act of 2000 as meaning:

> *(a) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution, and*
> *(b) the rights, liberties or freedoms conferred on or guaranteed to, persons by any agreement, treaty or convention to which the State is a party.*'

2. A primary issue in these proceedings is whether judicial review provides adequate protection to a person whose fundamental rights are interfered with by an administrative decision.

3. By fundamental rights are meant the personal rights guaranteed by the Constitution, the European Convention on Human Rights[1] and/ or other conventions to which the State is a party.

4. Some fundamental rights are 'absolute' rights, such as the right not to be subjected to torture, inhuman or degrading treatment.[2] But most are 'qualified' rights, such that a restriction on, or interference with, the right may be permissible provided that it is in accordance with law and proportionate.
5. The Supreme Court has recently reiterated that decisions which impinge on constitutional rights must be proportionate.[3] The Commission's respectful position is that the requirement of proportionality means that such a decision must be subject to a full examination by a person or tribunal independent of the decision-maker in order to ensure that the

[1] Hereafter 'the ECHR'.
[2] Guaranteed as an unenumerated right under Article 40.3 of the Constitution (*State (C.) v. Frawley* [1976] 1 IR 365) and expressly by Article 3 of the ECHR.
[3] *Meadows v. Minister for Justice, Equality and Law Reform*, Supreme Court, 21st January, 2010 [2010] IESC 3, and hereafter '*Meadows'*.

decision was reached in accordance with law and is proportionate. If the only means of examination is by way of High Court judicial review, as is the case with a challenge to the validity of a deportation order, then the court must examine the *effect* of the decision to issue the order and not just the *procedure* by which it was reached. Outcome is equally, if not more important, than process. As Lord Hoffman put it when considering the legality of an interference with a person's right to freedom of religion:

> *In domestic judicial review, the court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer. But article 9 [of the ECHR] is concerned with substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under article 9(2)?*[4]

6. In *Meadows v. Minister for Justice, Equality and Law Reform*[5], Fennelly J recognised that, where fundamental rights are concerned, judicial review was not confined to examining procedure but could permit an examination of the substance of a decision. The learned judge referred to the much-cited passage in *Chief Constable of the North Wales Police v. Evans* in which Lord Brightman stated almost 30 years ago that: "*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."*[6]. Fennelly J commented:

> *"This passage which emphasises the decision making process is not, however, wholly applicable to judicial review on the grounds of unreasonableness which potentially relates to the substance of the decision and not merely the procedure leading to it. It lays down*

[4] *R (SB) v. Governors of Denbigh High School* [2007] 1 AC 100, at paragraph 68.
[5] See fn. 3 above.
[6] [1982] 1 WLR 1155, per Lord Brightman at 1173.

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".[7]

7. If the court cannot fully examine the decision to issue a deportation order and the evidence upon which it is based, and then go on to determine whether the decision strikes a proportionate balance between the competing rights and interests at play, then those persons whose fundamental rights are impinged by the deportation order are deprived of effective protection. Where those rights are impaired disproportionately by the deportation order, it is respectfully submitted, the court would fail in its duty to provide a remedy, as permitted and required by Articles 34.3.1 and 40.3 of the Constitution, if it was unable to quash the order and remit the matter to be reconsidered by the Minister. In such a case, the court would not tell the Minister what his or her decision must be – that would be to 'step into his or her shoes'. But it must have the power to tell the Minister what his decision cannot be. That is not novel – it is the remedy of *certiorari*. An administrative decision which disproportionately violates a person's fundamental rights cannot be allowed to stand.

8. The Commission very respectfully disagrees with the restrictive interpretation of *Meadows* which has been adopted by the High Court in *O v. Minister for Justice, Equality and Law Reform*[8] and *F. (a minor) v. Minister for Justice, Equality and Law Reform*[9], the kernel of which is as follows: *The duty to balance proportionately the opposing rights and interests of the family on the one hand and the interests the State seeks to safeguard on the other, lies with the Minister. The High Court is not entitled or obliged to re-examine the case with a view to deciding whether, in its own view, the correct balance has been struck.* It is submitted that, in the absence of any other review mechanism in a deportation case, the High Court is obliged to examine the competing rights and interests and

[7] At paragraph 35 of the judgment.
[8] High Court, 1st October, 2010, [2010] IEHC 343.
[9] High Court, 2nd November, 2010, [2010] IEHC 386.

determine whether the balance struck by the Minister is correct in the sense of being proportionate. If the common law rules of judicial review do not permit this, it is the Commission's respectful view that they prohibit an applicant from effective judicial protection and are therefore unconstitutional. However, for the reasons set out below, it is submitted that judicial review not only allows for a proportionality determination but requires it.

9. The Commission has been provided with the submissions filed by the applicants and will endeavour to avoid duplicating their references to case law. The Commission has not received the respondent's submissions so, regrettably, may overlap with parts of them.

Context

10. The deportation orders, which are the subject matter of these proceedings, have been issued in respect of the parents (and in one case the siblings (Sarumi) of Irish citizen children. In general, such orders lead to one of two outcomes. The Irish citizen child either follows his or her deported parents and is deprived of the right to reside, grow up in and be educated in the State. Or, the child remains in the State but is deprived of the company of one or both of his or her parents. Either outcome is of the utmost gravity, and potentially life-defining for the child. To deny a child the company of one, or both of his or her parents, unless it is in the child's best interests, is to violate one of the most fundamental of a child's rights.[10] Alternatively, to deny an Irish child the right to grow up in the State is to deprive him or her of one of the core rights as a citizen. The child is forced to grow up in another country and is denied *inter alia* the following: the right to be reared and educated in the State and to grow up amidst its history, culture, heritage and language; the opportunity to gain State-sponsored qualifications; and the right to feel a full part of the State as a citizen who grew up in the State. The return of the child on reaching adulthood cannot

extinguish the absence of childhood in the State: *O and L v. Minister for Justice, Equality and Law Reform*[11], per Fennelly J at pp. 181-185; *ZH (Tanzania) v. Secretary of State for the Home Department*[12], paragraphs 32-33.

11. As already stated, a deportation order can only be challenged by judicial review in the High Court. There is no other independent tribunal which can review the validity of a deportation order. This contrasts with many other types of administrative, or quasi-judicial, decisions which have specially constituted appeal tribunals. Examples are the Social Welfare Appeals Office, An Bord Pleanála and the Refugee Appeals Tribunal. It is notable that a decision to issue a deportation order – which imposes on the deportee a life-long ban on re-entry to the State and can have far-reaching and irreversible consequences, particularly for Irish children – is not amenable to an easily-accessible appeal before an independent body.

The Commission's position

12. In summary, the Commission respectfully submits the following:

(i) judicial review, in a deportation case, must allow for a proportionality assessment where the deportation order interferes with an individual's fundamental rights;

(ii) whilst proportionality is described by the Supreme Court as falling within '*Keegan/O'Keeffe* unreasonableness', it requires an examination which is different to an irrationality assessment (as the European Court of Human Rights recognised in *Smith and Grady v. United Kingdom*[13]);

(iii) a proportionality assessment can only be completed by an examination of the competing rights and interests at play in the decision in issue, and a determination of whether the interference with the individual's

[10] The right is expressly recognised by Article 24.3 of the Charter of Fundamental Rights of the European Union.
[11] [2003] 1 IR 1
[12] UK Supreme Court, 1st February, 2011, [2011] UKSC 4.
[13] 29 EHRR 493.

fundamental rights is, on the facts of the particular case, kept to a minimum and justified by the decision-maker's objective;

(iv) the burden of showing that a decision is proportionate falls on the decision-maker;

(v) where the decision involves the constitutional rights of a child, those rights must be regarded as of primary importance among the competing rights and interests;

(vi) relevant international legal instruments, and their application, should inform the protection of fundamental rights under the Constitution.[14]

13. In *Smith and Grady v. United Kingdom*, the European Court of Human Rights distinguished between an irrationality test and a proportionality assessment. It held that the ambit of 'irrationality' in English law at that time (15 years ago) was ineffective for the protection of 'qualified' rights under the European Convention.[15] Prior to the majority Supreme Court judgments in *Meadows*, many thought that *Keegan/O'Keeffe* unreasonableness was confined to a narrow irrationality test. But the judgements of Murray CJ and Denham and Fennelly JJ all emphasise the principle of proportionality as an essential element of judicial review where fundamental rights are involved. *Keegan/O'Keeffe* unreasonableness is sufficiently flexible to embrace a proportionality determination.

14. It is submitted that in such a determination the Court is not only required to review the evidence upon which the decision was reached, in order to see if it has a valid evidential base, but also to determine whether the consequential interference with the individual's rights is proportionate to the decision-maker's objective.

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[14] See the Appendix to these Submissions.

[15] *Smith and Grady v. United Kingdom* 29 EHRR 493, paragraphs 129-139. A failure to assess proportionality in housing cases which engaged Article 8 rights in England was recently held by the European Court of Human Rights to amount to a failure to provide an effective remedy, contrary to Article 13 of the Convention: *Kay v. United Kingdom* , Application Number *37341/06,* 21st September, 2010.
In *Vilvarajah v. United Kingdom*, Application Numbers 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, 30th October, 1991, the European Court of Human Rights held that English judicial review was capable of providing adequate protection in respect of the 'absolute' right under Article 3 of the Convention:see paragraphs 117-127.

15. Further, it is submitted that, where the case concerns a deportation order, if new evidence emerges after the issuing of the order, and this is put before the court, that the court must consider such evidence in order to assess the effect of implementation of the order and, if appropriate, stay such implementation until the new evidence has been considered fully by the Minister. The circumstances of the family at the time the case is heard by the court must be fully considered. It is at that point in time that the family is looking for judicial protection of its fundamental rights. This is consistent with the approach and outcome in *Fajujonu v. Minister for Justice*[16], in which the Supreme Court ordered that the decision to deport the parents of three Irish children be re-considered by the Minister due to the passage of time.

Proportionality and deportation orders

16. In the most recent Supreme Court judgment involving an Irish child's right to the company of his or her foreign national parents in the State, *Oguekwe v. Minister for Justice, Equality and Law Reform*[17], Denham J., speaking for a five-judge court, stated:

> *16. On judicial review of a decision of the Minister to make an order of deportation, the court does not exercise and substitute its own discretion. The court reviews the decision of the Minister to determine whether it is permitted by law, the Constitution, and the Convention.*[18]

17. In respect of the rights and duties flowing from Article 40.3 of the Constitution, Denham J. stated in *Oguekwe*:

> *59. Having considered judgments in* A.O. & D.L. v. Minister for Justice *[2003] 1 I.R. 1, in the context of Article 40.3.1 and the personal rights of*

[16] [1990] 2 IR 151.
[17] [2008] 3 IR 795 and hereafter *'Oguekwe'*.
[18] At paragraph 85.

the citizen, the High Court held that if the Minster was to take a decision to deport the parent of an Irish born citizen child which is consistent with the State guarantee in Article 40.3.1 "to respect" and "as far as practicable … to defend and vindicate" the personal rights of the citizen child, that the decision making process must include the following elements:-

> *"(i) it must consider the facts relevant to the personal rights of the citizen child protected by Article 40.3 of the Constitution, if necessary by an appropriate inquiry in a fair and proper manner; and*
>
> *(ii) it must identify the grave and substantial reason at the relevant time, which requires the deportation of the non-national parent of the Irish citizen; and*
>
> *(iii) it must demonstrate that the respondent considers deportation, having regard to each of the above, to be a reasonable and proportionate decision."*

60. I would agree and affirm para. (i) above, though perhaps state it now in slightly different words:-

> *"(i) It must consider the facts relevant to the personal rights of the citizen child protected by Article 40.3 of the Constitution, if necessary by due inquiry in a fair and proper manner."*

61. As to para. (ii) I am satisfied that the decision making process should identify a substantial reason *which requires the deportation of a foreign national parent of an Irish born citizen. The test is whether a substantial reason has been identified requiring a deportation order. The term "grave" is tautologous, and while it reflects the serious nature of a "substantial" reason, it is not an additional factor to "substantial", and there is the danger that it could be so construed.*

62. As to (iii), the Minister is required to make a reasonable and proportionate decision.

18. Thus the Minister's decision must satisfy at least two requirements: it must be reasonable and proportionate. They are distinct (cf. Denham J.'s

reduction of the phrase ‘grave and substantial’ in the preceding paragraph).

19. It follows from the foregoing that a court, on judicial review, when considering a decision which involves a child’s fundamental rights, is required to examine *inter alia* whether the Minister’s decision is:

(a) permitted by law, e.g. within jurisdiction and reached in accordance with fair procedures;

(b) reasonable, in the sense that it has a valid evidential basis;

(c) proportionate, such that it impairs the Irish child’s rights under the Constitution as little as possible and has due regard for those rights, which include:

(i) the right to grow up and be educated in the State

(ii) the right to the company of his or her parents and

(iii) the right to have due regard accorded to the child’s welfare in the sense of what is in the child’s best interests;

(d) compliant with Article 8 of the European Convention of Human Rights, i.e. if the decision will constitute an interference with a person’s private or family life, then:

(i) is the proposed decision being taken in accordance with law?

(ii) does the proposed interference pursue a legitimate aim *i.e.* one of the matters specified in article 8.2? and

(iii) is the proposed interference necessary in a democratic society *i.e.* is it in pursuit of a pressing social need and proportionate to the legitimate aim being pursued?[19]

20. It is submitted that this constitutes a clarification of the position in *O and L v. Minister for Justice, Equality and Law Reform*[20], which was the first deportation case involving the parents of Irish children to come before the Supreme Court after the Oireachtas confined the manner in which the validity of a deportation order could be challenged to judicial review only. The earlier case of *Fajujonu v. Minister for Justice*[21] had been brought by way of plenary summons.

21. In *O and L*, a narrow approach to the ambit of judicial review was expressed in the judgments of Keane CJ (at 39-40) and Hardiman J (at 164-5), whilst Denham J stated (at 61) that she awaited full argument on "*the degree of review in cases where a decision of a public authority may interfere with a fundamental right of a person*".

22. Murray J (as he then was) stated (at 92) that "*[n]o issue was raised concerning the principles to be applied in scrutinising the lawfulness of the respondent's decision and the established principles as to rationality fall to be applied"* but nevertheless referred to the principle of proportionality stating:

> *In deciding whether there is such good and sufficient reason in the interests of the common good for deporting the non-national parents, the respondent should ensure that his decision to deport, in the circumstances of the case, is not disproportionate to the ends sought to be achieved.*

23. Fennelly J in his dissenting judgment stated (at 203):

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[19] *Oguekwe*, paragraphs 71-2.
[20] [2003] 1 IR 1 and hereafter *'O and L'*.
[21] [1990] 2 IR 151

It seems to be assumed that the normal standard for judicial review of such decisions should be that usually applied to administrative decisions in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation *[1948] 1 K.B. 223 as more fully developed in* The State (Keegan) v Stardust Compensation Tribunal *[1986] I.R. 642 and* O'Keeffe v. An Bord Pleanála *[1993] 1 I.R. 39. That is that the decision, in order to be quashed, must be so defective as to attract the description variously expressed by Henchy J. in the former case and summarised by Finlay C.J. at p. 70 of his judgment in the latter:-*

> *"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'."*

It appears to have been the view of Denham J., with whom Hamilton C. J. agreed, in Laurentiu v. Minister for Justice *[1999] 4 I.R. 26 (see p. 62 of her judgment) that review of deportation orders is to be conducted in accordance with these principles. Counsel for the respondent, when asked about this matter at the hearing, argued that it was not relevant to the present case. The matter was certainly not argued on these appeals and, to that extent, any further remarks about it must 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 test in other jurisdictions. In* R. (Mahmood) v. Secretary of State for the Home Department *[2001] 1 W.L.R. 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] 1 K.B. 223, one based on "anxious scrutiny" to a*

case involving interference with fundamental rights. In a case such as the present, the routine application of the unmodified test as expounded in the case of Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation *[1948] 1 K.B. 223, makes the decisions of the Minister virtually immune from review.*

24. It is submitted that the unanimous view of the Supreme Court in *Oguekwe* firmly established that a decision to deport the parents of an Irish citizen child must be 'proportionate' if it is to be lawful.

25. The question of whether the law of judicial review would hinder an Irish citizen child in obtaining judicial protection of his or her constitutional rights does not appear to have been canvassed during the hearing in the Article 26 reference in respect of section 5 of the Illegal Immigrants (Trafficking) Bill 1999. In that case, *In re Illegal Immigrants (Trafficking) Bill 1999*[22], the Supreme Court held that the strictures in section 5 of the Bill were in accordance with the Constitution but it did so on the basis that the section applied to foreign nationals and not to citizens. The possibility that Irish citizen children might find their Government expelling their parents from the State does not appear to have occurred to the Supreme Court or to any parties involved in the Article 26 reference. The Supreme Court stated:

... s. 5 of the Bill does not expressly or of itself divide persons into two classes or create a distinction between non-nationals and citizens. It is of course correct to say that the provisions of s. 5 apply only to challenges to the validity of decisions and other matters referred to in s. 5(1), which in turn are only capable of having direct legal effects for non-nationals. It is the relevant legislation, in particular the Refugee Act, 1996 and the Immigration Act, 1999, which determine to whom the decisions and other matters referred to in s. 5(1) of the Bill are to apply. Those decisions and other matters only concern non-nationals who are seeking asylum or refugee status within the State. By their very nature,

[22] [2000] 2 IR 360.

therefore, they apply only to non-nationals since there is no basis in national law (or international law) for a citizen to apply for asylum or refugee status within his or her own country. Furthermore, the distinction is not simply between non-nationals and citizens. The relevant decisions (and consequently any challenge to their validity) can only concern non-nationals, whose application for asylum or refugee status has yet to be finally determined or has been finally determined and refused.

26. As a consequence of the Article 26 reference, the constitutionality of section 5 is now immune from challenge. This, it is submitted, is even more reason why judicial review must include the proportionality requirement referred to in *Oguekwe* and in the majority judgments in *Meadows*.

<u>*Meadows* and the proportionality assessment</u>

27. In *Meadows*, the High Court (Gilligan J) certified, as a point of law of exceptional public importance, the following question:

> *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 <u>O'Keeffe v An Bord Pleanála</u> [1993] 1 I.R. 39?*[23]

28. Two aspects of *Meadows* should be emphasised. Firstly, it concerned an 'absolute' right, not a 'qualified' right. The applicant's case was that her deportation from the State would violate her right not to be exposed to torture, inhuman or degrading treatment. Secondly, the principal complaint by the applicant appears to have been that the decision-maker made no reasoned findings in respect of her claim to be at risk of torture, inhuman or degrading treatment. *Meadows* was not a case which involved an

[23] High Court, 19th November, 2003.

assessment of whether an interference with a qualified right was proportionate. Whilst the majority judgments, in answer to the point of law identified by the High Court, stated that principle of proportionality was an essential part of judicial review where fundamental rights were at issue, the facts of the case did not permit the application of the principle. Consequently, and of necessity, the principle was described in general terms.

29. Murray CJ expressly identified the principle of proportionality as part of the analysis of whether a decision 'properly flows from the premises on which it is based and ... might be considered at variance with reason and common sense' (underlining added). It is submitted that this means that, where fundamental rights are concerned, proportionality becomes an additional part of the reasonableness analysis. It does not mean that proportionality is itself confined to a narrow irrationality test. Murray CJ stated:

> *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).*

30. Denham J stated in *Meadows*:

> *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.*

31. In respect of proportionality, having also referred to the decision of Keane J. in the case of *Radio Limerick One Limited v. Independent Radio Television Commission*, Denham J. then referred to the following dictum from the decision of Costello J. in *Heaney v. Ireland*[24]:

> *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*

[24] [1994] 3 IR 593

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*.

She went on to state:

I would adopt an approach to the proportionality test similar to that of Costello J.

32. Denham J.'s overall conclusion was stated in paragraph 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] IR 642. This has been set out previously in the judgment but for clarity I restate it here:*

Henchy J. stated at p658: -

> *"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 object 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.

33. Fennelly J stated in *Meadows*:

67. ... 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.

34. It is submitted that Denham J's requirement that a decision which interferes with a person's constitutional rights be such as 'to impair the right as little as possible' and be 'proportional to the objective', and Fennelly J's statement that 'the court will 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' are the touchstones by which an examination of proportionality should be carried out.

35. They require that the court must examine the facts upon which the decision-maker based the decision; the fundamental rights of the individual concerned and the gravity of the rights (e.g. their place in the hierarchy of rights); the degree of interference with such rights; and, the countervailing interests of the decision-maker. Crucially, the court must then determine whether the impairment of the right is minimised as far as practicable, proportional to the decision-maker's objective, and sufficiently limited as to have due regard for the fundamental rights at stake. It is submitted that this requires the court to examine the balance struck by the decision-maker between the competing rights at issue and determine whether the interference with the individual's fundamental rights is permissible. This is not to usurp the decision-maker's function. It is to exercise the court's supervisory jurisdiction and ensure that an individual's fundamental rights find judicial protection. In the absence of any other independent tribunal which can review the respondent's decision, the court must examine fully whether the interference with the individuals' rights is proportionate.

Article 13 of the European Convention on Human Rights

36. It is submitted that the approach to proportionality of the European Court of Human Rights should inform how the principle is applied under the Constitution. As stated by Fennelly J. in *Meadows*, Article 13 of the ECHR requires that an effective remedy is available where administrative decisions arguably interfere with ECHR rights.

37. The European Court of Human Rights has held that measures which affect ECHR rights, including those protected by Article 8, must be subject to some form of adversarial proceedings before an independent body competent to review the reason for the decision and the relevant evidence.[25]

[25] *Liu v Russia*, Application Number 42086/05, 6th December, 2007, para 59, citing *Al-Nashif v. Bulgaria*, application number 50963/99, paragraphs 123 and 124, 20th June, 2002, and *Lupsa v. Romania*, application number 10337/04, paragraphs 33 and 34.

38. This requires an analysis of the facts relied on by the decision-maker as justification for the decision, and a full examination of these facts and whether they form the basis of a proportionate decision: cf. *McCann v. United Kingdom*[26].

39. It is submitted that the burden is on the decision-maker to prove that the interference brought about by the decision is in accordance with law and proportionate. The European Court of Human Rights has held that the reasons in Article 8(2) of the ECHR, which may justify an interference, are "*to be interpreted narrowly, and the need for them in a given case must be convincingly established*".[27]

40. The right to an effective review arises where there is an arguable case that fundamental rights will be violated. In *Human Rights Law and Practice*, Lester and Pannick, 3rd edition, 2009, LexisNexis, the learned authors state:

> *"... article 13 guarantees two things: (a) the right to have an effective adjudication upon any arguable claim that a Convention right has been breached; and (b) the right to effective remedy if such a Convention right is established. It follows then that there can be a breach of article 13 in the absence of any other breach. Moreover, article 13 contains only minimum procedural safeguards. The rest of the Convention sometimes imposes higher standards."*[28]

41. The State has chosen to stipulate that judicial review is the only avenue available to challenge a deportation decision, by section 5 of the Illegal Immigrants (Trafficking) Act 2000, and this is immune from constitutional challenge. If a full proportionality determination cannot be made by the High Court, then the State is likely to be in violation of Article 13 of the

[26] Application Number 19009/04, 13th May, 2008.
[27] *Miaiilhe v. France* (1993) 16 EHRR 332, paragraph 36.
[28] At paragraph 4.13.1.

ECHR, in conjunction with Article 8. In *McFarlane v. Ireland*[29], a case involving the right to an expeditious trial under Article 6 of the ECHR, the Grand Chamber of the European Court of Human Rights concluded that the Government had *"not demonstrated that the remedies proposed by them, including an action for damages for a breach of the constitutional right to reasonable expedition, constituted effective remedies available to the applicant in theory and in practice at the relevant time."* The Grand Chamber held that there was a violation of Article 13, in conjunction with Article 6.1.[30] The conclusion to be drawn from *McFarlane* is that theoretical constitutional remedies are insufficient to meet Article 13 requirements.

42. As already referred to above, in *Smith and Grady v. United Kingdom* the European Court of Human Rights held that the "irrationality" test in English judicial review at that time was so narrow as to deprive an individual of an effective remedy under Article 13 of the Convention where that individual's Article 8 rights were interfered with.[31]

43. Where a case involves a qualified ECHR right, the House of Lords has since held that English law now requires that the courts must examine the decision itself, as distinct from the manner in which it was reached, in order to assess its proportionality: *R (SB) v. Governors of Denbigh High School*.[32]

44. All information before the court, even if it post-dates the decision in issue, must be considered and weighed by the court. In *Maslov v. Austria*,[33] the Grand Chamber of the European Court of Human Rights stated:

> *92. The Court is not convinced by the Government's argument, drawn from Article 35 § 1 of the Convention, to the effect that developments which occurred after the final domestic decision should not be taken*

[29] Application Number 31333/06, 10th September, 2010.
[30] At paragraphs 128-129.
[31] *Smith and Grady*, paragraphs 129-139.
[32] [2007] 1 AC 100, paragraphs 29-31 and paragraphs 63-8.
[33] Application Number 1638/03, 23rd June, 2008.

into account. It is true that the requirement to exhaust domestic remedies is designed to ensure that States are only answerable for their acts before an international body after they have had an opportunity to put matters right through their own legal system (see Akdivar and Others v. Turkey*, judgment of 16 September 1996,* Reports *1996-IV, p. 1210, § 65). However, such an issue will only arise in the event that a significant lapse of time occurs between the final decision imposing the exclusion order and the actual deportation.*

93. In this connection the Court would point out that its task is to assess the compatibility with the Convention of the applicant's actual expulsion, not that of the final expulsion order. Mutatis mutandis*, this would also appear to be the approach followed by the European Court of Justice which stated in its* Orfanopoulos and Oliveri *judgment that Article 3 of Directive 64/221 precludes a national practice whereby the national courts may not take into consideration, in reviewing the lawfulness of the expulsion of a national of another Member State, factual matters which occurred after the final decision of the competent authorities (see paragraph 43 above). Consequently, in such cases it is for the State to organise its system in such a way as to be able to take account of new developments. This is not in contradiction with an assessment of the existence of "family life" at the time when the exclusion order becomes final, in the absence of any indication that the applicant's "family life" would have ceased to exist after that date (see paragraph 61 above). Even if it had done so, the applicant could still claim protection of his right to respect for his "private life" within the meaning of Article 8 (see paragraph 63 above).*

94. The Government indicated in this respect that proceedings allowing for a review of whether the conditions for an exclusion order still pertained could be instituted either at the applicant's request or at the initiative of the authorities acting of their own motion. It follows that in the present case it was open to the domestic authorities to make a new assessment.

45. The approach in *Maslov* requires that the court must be able to focus not only on whether the decision-maker made material factual errors or acted irrationally or disproportionately *at the time* of making his decision, but must also be able to take account of any intervening circumstances which occurred after the decision was made and prior to the judicial hearing. This is consistent with the Supreme Court's approach *Fajujonu*, albeit that that was a case which was brought by way of plenary summons.

Other international legal instruments

46. The Commission respectfully submits that relevant international legal instruments, and their application, should inform the protection of fundamental rights under the Constitution, and refers to the Appendix to these submissions in that regard.

47. Of particular relevance to deportation cases involving the foreign parents of Irish citizen children is the UN Convention on the Rights of the Child, to which the State is a signatory. The Convention provides, inter alia:

> *Article 3*
>
> *1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*
>
> *2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*
>
> *3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in*

the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

48. In the Commission's respectful view, it is imperative that the child's best interests are a paramount consideration in any balancing exercise carried out between the family's rights and the State's interests. In *M.A. v. Minister for Justice, Equality and Law Reform*[34], the High Court (Peart J) stated:

> *19. ... Counsel has also referred to the case law of the European Court of Human Rights in relation to the concept that, in considering the principle of proportionality, the child's best interests must be given primary consideration and has referred in particular to the judgment of that court in* Sommerfeld v. Germany *(Unreported, European Court of Human Rights, 8th July, 2003), which emphasises the necessity to strike a fair balance between the interests of the child and those of the parents and that in the balancing process, "particular importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents". It should be noted that the principle that the court must have regard to the child's best interests in deciding any matter in which the rights of a child are at issue is already well recognised in our own jurisprudence, particularly in the area of family law.* Sommerfeld v. Germany *is not an asylum case, but is a case in which the father of a child born out of wedlock was seeking access to that child in spite of the child's wishes not to have contact with him. It is not of any particular relevance to the present case, except to the extent that it emphasises the European Court's concern that a child's best interests should be treated as paramount - not a novel concept to the courts here. Indeed the principle is also reflected in article 3 of the United Nations Convention on the Rights of the Child 1989.*

A restrictive approach to *Meadows* fails to provide effective protection

49. The application of *Meadows* has been the subject of judicial examination in the High Court in several deportation cases. A narrow approach has

[34] [2007] 3 IR 421 at 430.

been applied which, it is very respectfully submitted, fails to provide for an adequate proportionality examination. In *O v. Minister for Justice, Equality and Law Reform*,[35] the court stated:

> *53. The Court is not concerned with the merits of the Contested Order but with the legality of the process by which it has been reached. The making of the decision to deport under s. 3 of the Act of 1999 is the exclusive function of the Minister and the onus of establishing that it is legally flawed remains with the applicant. This fundamental characteristic of the Court's function in judicial review is not altered by the fact that the infringement of the principle of proportionality is invoked. The Court cannot simply substitute its own assessment of what is proportional for that of the Minister. If the decision to deport is shown to "flow from the premises" that is, to be tenably based on the facts and factors before the Minister and considered by him, the Court cannot intervene. To put it another way, unless the balance struck as proportional by the Minister is fundamentally at variance with reason and common sense, his decision cannot be struck down as unlawful.*
>
> *...*
>
> *65. Accordingly, if on an application for leave made on notice to the decision-maker, a substantial ground for the grant of leave is to be made out based upon an alleged lack of proportionality it is insufficient, in the judgment of the Court, merely to disagree with the balance struck in the impugned decision; or to assert that the result is untenable because greater weight or significance should have been given to some factors or less to others. It is at least necessary to demonstrate the existence of some specific factor which was material to the balancing exercise made which is demonstrably wrong or absent; or to identify some consideration which has been relied upon as material and which is irrelevant or has been improperly considered.*

[35] High Court, 1st October, 2010, [2010] IEHC 343.

50. In *F. (a minor) v. Minister for Justice, Equality and Law Reform*,[36] the Court stated:

> *It is not enough, in the view of the Court, to simply assert that the Minister ought to have given greater weight to some factors or less to others. The onus of establishing the unlawfulness of the decision lies with the applicant. The duty to balance proportionately the opposing rights and interests of the family on the one hand and the interests the State seeks to safeguard on the other, lies with the Minister. It is the Minister who must assess and decide by reference to all of the matters he is required to consider under the statutes and in light of all of the information and representations put before him, whether the latter interests should prevail or not. Contrary to the implication of the argument made by counsel for the applicants, the High Court is not entitled or obliged to re-examine the case with a view to deciding whether, in its own view, the correct balance has been struck. To do so would be to substitute its own appraisal of the facts, representations and circumstances for that of the Minister. As the Supreme Court made fully clear in the* Meadows *case, the test to be applied in assessing whether an administrative decision of this nature is irrational or unreasonable (including unreasonable by virtue of disproportionality,) remains that established in the* Keegan *and* O'Keefe *cases. Accordingly, the function of the Court is to consider the manner in which the evaluation has been made by the Minister as apparent from the order, the covering letter and the contents of the File Note, and ask itself in paraphrase of the terms formulated by Henchy J.: "Does the conclusion to deport the applicant flow from the premise upon which it is based; or does it, by reason of some flaw or failure in the way in which the balancing exercise was apparently approached, result in a conclusion which 'plainly and unambiguously flies in the face of fundamental reason and common sense?'"*

[36] High Court, 2nd November, 2010, [2010] IEHC 386.

51. For the reasons stated above, it is submitted that the majority judgments in *Meadows* establish that where fundamental rights are concerned, proportionality becomes an additional part of the reasonableness analysis – proportionality is not confined to a narrow irrationality test (see paragraph 27 above). It provides clarification that the courts, in judicial review, have full jurisdiction to examine and determine whether an administrative decisions is a disproportionate interference with a person's fundamental rights.

52. In the alternative, if the restrictive view as articulated in *O* and *F* above is correct, it is submitted that the law of judicial review does not provide an effective remedy for an Irish child whose parents are being deported from the State. Such a restrictive view allows the Minister to make a deportation order and, provided that he has not mis-stated the facts, to be immune from any assessment as to whether the balance he has struck between the child's rights as a citizen and the State's public policy interests is a proportionate one. By way of example – a case could arise where an Irish citizen child has resided in the State, since birth, with his foreign national mother. He is 15 and about to take his Junior Certificate. His mother has had an impeccable record of conduct in the State until recently when she was convicted of an offence of shoplifting €50 worth of goods. The Minister has decided to deport her in the interests of public order and the prevention of crime, and she has 14 days within which to leave the State. In the Minister's decision, the facts of the case are accurately recounted. On the restrictive view enunciated in *O* and *F*, it appears that, in the absence of any factual error by the Minister, the Court is prohibited from determining whether the balance struck is proportionate. If that is the law, it is the Commission's respectful submission that it is unconstitutional and in breach of Article 13 of the ECHR.

Michael Lynn

Friday, 4th March, 2011

APPENDIX

INTERPRETATION OF THE CONSTITUTION IN LIGHT OF INTERNATIONAL STANDARDS

1. The Commission submits that, when considering the constitutionality of statutory provisions or executive acts, analysis should be informed by the provisions of international Conventions ratified by the State.

2. In the event of any conflict between the provisions of an international convention and any provision within the domestic legal framework, effect must of course be given to the domestic provisions.[37] Nonetheless the Courts have on a number of occasions shown a willingness to *consider* the terms of international human rights instruments with a view to informing their understanding of the applicable constitutional standards. For example, in *State (Healy) v Donoghue*,[38] the Supreme Court had regard to the terms of Article 6 of the ECHR when considering the scope of the right to legal aid under Irish law and was willing to have regard to an unincorporated international instrument in the context of its interpretation of the constitutional guarantee of the right to a trial in due course of law as protected in Article 38 and of the guarantees set out in 40.3 of the Constitution. The Court saw the acknowledgement of the right to legal aid under the ECHR as significant in its confirmation of the generally recognised existence of such a right.

3. In *O'Leary v Attorney General*,[39] Costello J considered the constitutional status of the presumption of innocence in the context of the guarantee of a trial in due course of law pursuant to Article 38 of the Constitution, by reference to Article 6(2) of the ECHR, Article 11 of the UN Universal

[37] To do otherwise would be to ignore the rule embodied in Article 29(6) of the Constitution that no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas and would also amount to disregard of Article 15.2.1º which confers the sole and exclusive law making power in the State upon the Oireachtas - per in *Re Ó Laighléis* [1960] IR 93.
[38] [1976] IR 325.
[39] *Ibid*.

Declaration on Human Rights, Article 8(2) of the American Convention on Human Rights and Article 7 of the African Charter of Human Rights. In *Rock v Ireland*[40] and *Murphy v I.R.T.C.*[41] the principle of proportionality (and the parameters of that principle), as expounded in the jurisprudence of the ECtHR, was adopted and employed in a domestic context prior to the incorporation of the ECHR. The principle of proportionality was referred to in the judgments in *Heaney v Ireland* [42] and *In re the Employment Equality Bill 1996.*[43]

4. Indeed, unincorporated international law provisions may have indirect effect through the operation of a presumption of compatibility of domestic law with international obligations. In *State (DPP) v Walsh*,[44] Henchy J expressed the view that our domestic laws are generally presumed to be in conformity with the then unincorporated ECHR. The notion of such a presumption was endorsed by O'Hanlon J, in support of his view that the provisions of the ECHR, then unincorporated, ought to be considered by Irish judges when determining public policy: *Desmond v Glackin (No.1).*[45] Reference was made to the Convention on the Rights of the Child in *Nwole v Minister for Justice*,[46] when considering aspects of the asylum application process as it applied to minors. [47]

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[40] *Rock v Ireland* [1997] 3 IR 484.
[41] *Murphy v IRTC* [1999] 1 IR 12. In both cases, the Supreme Court adopted Costello J's formula regarding the principle of proportionality in *Heaney v Ireland* [1994] 3 IR 593 in which he referred to the test frequently adopted by the ECtHR as set out, for example, in *Times Newspapers Ltd v UK* (1979) 2 EHRR 245.
[42] *Heaney v. Ireland* [1994] 3 IR 593.
[43] *In re Employment Equality Bill* [1997] 2 IR 321.
[44] *DPP v. Walsh* [1981] IR 412 to the effect that our laws are generally presumed to be in conformity with the then unincorporated European Convention on Human Rights.
[45] *Desmond v Glackin* [1992] 2 ILRM 490. In *O Domhnaill v Merrick* [1984] IR 151, Henchy J noted the submission that the Statute of Limitations 1957, enacted after the State ratified the European Convention on Human Rights, should be deemed to be in conformity with the Convention in the absence of any contrary intention, and should be construed and applied accordingly. However, Henchy J did not express a concluded opinion on the point as the application of the Convention had not been argued. McCarthy J in his judgment stated (at p.166) "I accept, as a general principle, that a statute must be construed, so far as possible, so as not to be inconsistent with established rules of international law and that one should avoid a construction which will lead to a conflict between domestic and international law".
[46] *Nwole v Minister of Justice* High Court (Finlay Geoghegan J) 31st October 2003, at p.12.
[47] *Ibid,* Finlay Geoghegan J went on to consider the terms of Article 12 of the Convention on the Rights of the Child, which entitles children capable of forming their own views "the

5. In *Bourke v Attorney General*,[48] the Supreme Court, when interpreting the meaning of the term "political offence" in section 50 of the Extradition Act 1965, placed reliance upon the meaning attributed to same in the European Convention on Extradition, and also upon the *travaux preparatoires* thereof.[49] In *McCann v The Judge of Monaghan District Court & Ors*[50] Laffoy J took into account both provisions of the ECHR and International Covenant on Civil and Political Rights in declaring the legislation governing enforcement of civil debt as being unconstitutional.

6. The approach advocated by the Commission corresponds with the practice often adopted by the ECtHR wherein the Court has considered the provisions of relevant international law provisions when considering the meaning and parameters of rights protected under the ECHR. One clear example is *Chapman v United Kingdom*[51] where, in considering the relevance of Article 8 of the ECHR to the circumstances of a woman, a gypsy, who argued that the actions of the relevant public authorities interfered with her pursuit of her right to pursue a nomadic lifestyle, the Court considered the Council of Europe Framework Convention on the Protection of National Minorities and also certain measures adopted by the institutions of the European Union. In *Glor v. Switzerland,*[52] the ECtHR found that discrimination based on disability status came within the scope of Article 14 of the ECHR, considering inter alia, the principles espoused in the UN Convention on the Rights of Persons with Disabilities.

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right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child". It also contained provision for the child having an opportunity to be heard in any judicial and administrative proceedings affecting the child. Finlay Geoghegan J concluded that (at p.13) "this would appear to require, at a minimum, an inquiry by or on behalf of the respondent in respect of any minor applicant for a declaration of refugee status as to the capacity of the minor and the appropriateness of conducting an interview with him or her".

[48] *Bourke v Attorney General* [1972] IR 36.

[49] This may be seen as an example of the principle of statutory construction referred to by the House of Lords in *Garland v British Rail* [1983] 2 AC 751 at 771 "that the words of a statute passed after a treaty has been signed and dealing with the subject matter of the international obligation of the State are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation and not to be inconsistent with it."

[50] HR unreported, 18 June 2009.

[51] *Chapman v. the United Kingdom* (2001) 33 EHRR 399.

[52] Judgment 30 April 2009. Judgment only available in French at time of writing.

7. It is submitted that the Courts have shown a willingness to use non-binding instruments to inform the understanding of specific and consistent constitutional provisions. The international instrument may be seen both as a buttress and a guide to existing constitutional guarantees. The Commission is of the opinion that it is entirely appropriate that the Constitution and the guarantees thereunder should be informed by international treaties ratified by the State, where possible, and endorses the above approach in the herein appellant's case. In this regard, it is noted that the State's submissions herein appear to state that the right to personal liberty under the Constitution and ECHR are consonant (see paragraph.18 of the State's submissions) with which the Commission would respectfully agree.

THE HIGH COURT

2009 Record No: 763/ JR

JUDICIAL REVIEW

Between:

I.S. (AN INFANT ACTING BY HER MOTHER AND NEXT FRIEND A.S.)
AND
A.S. (AN INFANT ACTING BY HER MOTHER AND NEXT FRIEND A.S.)
AND
A.S.

Applicants

-and-

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

Respondents

-and-

HUMAN RIGHTS COMMISSION

Notice Party/ Amicus Curiae

OUTLINE WRITTEN SUBMISSIONS OF THE HUMAN RIGHTS COMMISSION

THE HIGH COURT

2009 Record No: 531/ JR

JUDICIAL REVIEW

Between:-

O.A-B. (AN INFANT ACTING BY HIS FATHER AND NEXT FRIEND O.O.A-B.) AND E.A-B. (AN INFANT ACTING BY HER FATHER AND NEXT FRIEND O.O.A-B.) AND O.O.A-B. AND E.A.A

Applicants

-and-

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

Respondents

and-

HUMAN RIGHTS COMMISSION

Notice Party/ Amicus Curiae

OUTLINE WRITTEN SUBMISSIONS OF THE HUMAN RIGHTS COMMISSION

THE HIGH COURT

2009 Record No: 528/ JR

JUDICIAL REVIEW

Between:

A.F. (AN INFANT ACTING BY HER FATHER AND NEXT FRIEND O.F.) AND
A.F. (AN INFANT ACTING BY HER FATHER AND NEXT FRIEND O.F.) AND
A.F. (AN INFANT ACTING BY HER FATHER AND NEXT FRIEND O.F.) AND
A.F. (AN INFANT ACTING BY HER FATHER AND NEXT FRIEND O.F.) AND
O.F. AND A.F.

Applicants

-and-

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

Respondents

and-

HUMAN RIGHTS COMMISSION

Notice Party/ Amicus Curiae

OUTLINE WRITTEN SUBMISSIONS OF THE HUMAN RIGHTS COMMISSION

THE HIGH COURT

2009 Record No: 511/ JR

JUDICIAL REVIEW

Between:-

F.S.O
(A MINOR ACTING BY HIS FATHER AND NEXT FRIEND, S.E.O.)
AND

H.S.O. (A MINOR ACTING BY HIS FATHER AND NEXT FRIEND, S.E.O.)
AND
S.E.O.
AND
P.S.O.

Applicants

-and-

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

Respondents

and-

HUMAN RIGHTS COMMISSION

Notice Party/ Amicus Curiae

OUTLINE WRITTEN SUBMISSIONS OF THE HUMAN RIGHTS COMMISSION