THE SUPREME COURT

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

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

Between:

ABOSEDE OLUWATOYIN MEADOWS

Applicant/Appellant

and

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM,

IRELAND

and

THE ATTORNEY GENERAL

Respondents

JUDGMENT delivered the 21st day of January, 2010 by

Mr. Justice Hardiman.

Overview.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The foregoing summarises the general importance of this case.

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

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

Background facts relating to the Applicant and her circumstances.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Unchallenged nature of the foregoing decisions.

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

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

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

Female Genital Mutilation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The application to the Minister.

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

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

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

Similarities in the three applications.

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

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

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

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

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

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

The proceedings.

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

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

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

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

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

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

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

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

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

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

The Minister's discretions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(h) Humanitarian considerations;

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

(j) The common good; and

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

Legal and constitutional context.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Keane C.J. held that:

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

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

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

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

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

The criteria for judicial review.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

English Controversies on "Anxious Scrutiny".

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

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

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

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

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

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

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

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

Anxious consideration: Trojan horse or Russian doll?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Anxious consideration: Form and substance.

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

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

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

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

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

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

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

Nature of Judicial Review.

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

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

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

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

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

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

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

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

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

The grounds of difference.

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

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

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

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

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

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

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

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

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

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

And also:

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

And that he does not disclose:

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

Or:

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

It is then concluded that:

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

The next critique is that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The most relevant Irish Authority.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion.

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