

**UNAPPROVED**  
**THE SUPREME COURT**

**419/2003**

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

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

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

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

**(TRAFFICKING) ACT 2000**

**BETWEEN**

**ABOSEDE OLUNWATOYIN MEADOWS**

**APPLICANT / APPELLANT**

**AND**

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

**RESPONDENTS**

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

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

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

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

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

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

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

### **The Appeal**

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

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

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

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

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

### **Facts and Circumstances of the Case**

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

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

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

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

### **Decision of the Refugee Appeals Tribunal**

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

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

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

“The second ground given by the applicant as giving rise to a well founded fear of persecution if she were returned to Nigeria related to the issues of a forced marriage and female genital mutilation. I accept without question the evidence of Ms D’Arcy that female genital mutilation is an abhorrent practice and amounts to a form of torture.

It was submitted that the applicant’s father was the dominant person in the household and was a rural man who would insist on an arranged marriage and

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

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

That decision was communicated to the appellant by letter dated 9<sup>th</sup> August 2001.

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

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

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

- (b) That her entitlement to remain temporarily in the State had expired.
- (c) That the Minister proposed to make a deportation order in respect of the appellant pursuant to s. 3 of the Immigration Act 1999.
- (d) That the appellant was entitled to make written representations to the Minister, in accordance with s. 3 of the Act of 1999, setting out any reasons as to why she should be allowed to remain temporarily in the State.

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

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

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

### **FGM**

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

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

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

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

“I am directed by the Minister for Justice, Equality and Law Reform to refer to your current position in the State and to inform you that the Minister has decided to make a deportation order in respect of you under s. 3 of the Immigration Act, 1999 a copy of the order is enclosed with this letter.

In reaching this decision the Minister has satisfied himself that the provisions of s. 5 (Prohibition of Refoulement) of the Refugee Act 1996 are complied with in your case.

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

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

"Ms Meadows also claims that within her culture the act of circumcision is performed on females shortly after their marriage ... . Her father wished her to undergo this act after her marriage to Mr. Alhaji Salisu's son .... His death scuppered these plans. Ms Meadows claims that she offered to pay her father the sum of money that the dowry would have brought the family if he were to allow her to attend university and marry whomever she chose .... Again the death of Mr. Salisu's son was to prove fortuitous .... However, the cultural nature of the practice in Nigeria determines that the mothers of young daughters are able to veto treatment if they propose it.

Although FGM is reputed to take place in Nigeria efforts have been made to stamp out its practice. The Government have publicly opposed FGM and representatives in Parliament have described the practice as "barbaric". According to the country of origin information FGM is considered a

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

The memorandum concludes with the following recommendation to the Minister:

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

### **Section 3 of the Immigration Act 1999**

The relevant provisions of s. 3 are as follows:

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

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

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

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

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

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

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

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

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

(a) the age of the person;

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

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

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

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

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

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

(h) humanitarian considerations;

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

(j) the common good; and

(k) considerations of national security and public policy,

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

### **Section 5 of the Refugee Act 1996**

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

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

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

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

### **The Test for Judicial Review**

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

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

### **The Keegan Case**

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

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

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

Finlay C.J., then went on to state

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

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

He concluded by stated:

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

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

Henchy J., for his part, and with whom Finlay C.J., expressed his “complete and precise agreement” referred (at 658) to judicial review of a decision on the grounds of unreasonableness as being “whether the conclusion reached in the decision can be said to flow from the premises. If it plainly does not, it stands to be condemned on the less technical and more understandable test of whether it is fundamentally at variance with reason and common sense”.

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

### **The O’Keeffe Case**

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

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

“In dealing with the circumstances under which the Court could intervene to quash the decision of an administrative officer or tribunal on the grounds of unreasonableness or irrationality, Henchy J., in that judgment set out a number of such circumstances in different terms.

They are:-

1. It is fundamentally at variance with reason and common sense.
2. It is indefensible for being in the teeth of plain reason and common sense.
3. Because the Court is satisfied that the decision maker has breached his obligation whereby ‘he must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision’.

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

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

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

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

The foregoing citations set out the essence of the principles which were applied in those two cases by this Court when judicially reviewing the administrative decisions in question.

### **The Test for Judicial Review**

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

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

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

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

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

In exercising its jurisdiction to judicially review acts or decisions of the other branches of the Government the Courts must, of course, respect the powers and functions conferred on the executive and the parliament by the Constitution and by law. As I stated in *T.D. & Ors v. Minister for Education and Others* “judicial review permits the Courts to place limits on the exercise of executive or legislative power not to exercise it themselves.”

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

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

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

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

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

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

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

In reviewing the rationality or otherwise of the decision it remains axiomatic that it is not for the Court to step into the shoes of the decision maker and decide the issue on the merits but to examine whether the decision falls foul of the principles of law according to which the decision ought to have been taken.

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

In examining whether a decision properly flows from the premises on which it is based and whether it might be considered at variance with reason and common sense I see no reason why the Court should not have recourse to the principle of proportionality in determining those issues. It is already well established that the Court may do so when considering whether the Oireachtas has exceeded its constitutional powers in the enactment of legislation.

The principle requires that the effects on or prejudice to an individual's rights by an administrative decision be proportional to the legitimate objective or purpose of that decision. Application of the principle of proportionality is in my view a means of examining whether the decision meets the test of reasonableness. I do not find anything in the dicta of the Court in *Keegan* or *O'Keeffe* which would exclude the Court from applying the principle of proportionality in cases where it could be considered to be relevant. Indeed in *Fajujonu v. Minister for Justice* [1992] I.R. 151 to which I will refer in more detail shortly, this Court made express reference to the need of the Minister to observe the principle of proportionality when deciding whether to permit the immigrants in that case reside in the State.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In *Lobe & Ors v. the Minister for Justice, Equality and Law Reform* [2003] IESC 3 relying on the statements of Walsh J., and Finlay C.J., in *Fajujonu* I observed “In deciding whether there is such good and sufficient reason in the interests of the common good for deporting the non national parents the Minister should ensure that his decision to deport, in the circumstances of the case is not disproportionate to the ends sought to be achieved.”

On the particular facts in that case I concluded “It seems to me entirely reasonable to conclude that the circumstances relating to the applicants are not unique but on the contrary it is a situation that could apply or would apply to a substantial proportion of applicants for asylum. In these circumstances it seems to me entirely reasonable that the Minister would consider whether a refusal to make a deportation order in such circumstances could call in question the integrity of the immigration and asylum systems including their effective functions. This is a matter for him.”

The onus of course rests on an applicant to establish, where the principle of proportionality is relevant, that the decision is disproportionate. In the Lobe case I concluded “The Minister had a stark choice to make, either to deport or not to deport, there is no halfway house. No circumstances have been disclosed or shown to exist upon which one could consider the Minister’s decision to be disproportionate.” On the other hand I did not exclude that there may be cases where, in exceptional circumstances, the Court might require evidence of the manner in which the integrity of the immigration and asylum systems could be called in question but that was not required in that particular case. What I had in mind there was that a purely formulaic decision of the Minister may not in particular circumstances be a sufficient statement of the rationale or reasons underlying the decision.

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

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

### **English Cases and “Anxious Scrutiny”**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Section 5**

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

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

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

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

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

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

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

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

### **Section 3(6) Consideration**

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

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

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