High Court of Ireland Decisions

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Judgment

Title:	Ford & anor -v- The Minister for Justice and Equality
Neutral Citation:	[2015] IEHC 720
High Court Record Number:	2014 416JR
Date of Delivery:	19/11/2015
Court:	High Court
Judgment by:	Eagar J.
Status:	Approved

THE HIGH COURT

JUDICIAL REVIEW

BETWEEN

ALISON FORD AND DAVID NWOKE

AND

THE MINISTER FOR JUSTICE AND EQUALITY

JUDGMENT of Mr. Justice Eagar delivered on the 19th day of November, 2015

1. On the 21st July, 2012, the applicants made an *ex parte* application for leave to apply by way of an app order of *certiorari* quashing the decision of the respondent of the 17th June, 2014 to refuse to grant a visa enter and reside in the State. On that date McDermott J., granted leave to the applicants to apply by way o the following relief:

> An order of certiorari quashing the decision of the respondent of the 17th June, 2014, to refu in the State to the second named Applicant.

Ground for relief

2. The applicants rely in effect on four separate grounds as follows:

> a. The respondent erred manifestly in law and acted unreasonably and irrationally in reachin visa in a manner entirely contrary to the provisions of Article 41 of the Constitution which pr applicants to reside together in the State, and provides that the State guards, with special c
>
> b. The respondent erred manifestly in law and acted unreasonably, irrationally and contrary conducting the entire assessment in the applicant's case on appeal from the standpoint that can be continued without the applicants living together at all and solely on the basis of the fi
>
> c. The consideration in the applicant's case is *prima facie* unlawful in circumstances where th bond has been misunderstood by the respondent.
>
> d. The proportionality assessment carried out by the respondent is unlawful where it does no requirement that the married couple reside together, and the decision is invalid as a consequ

Factual history

3. The affidavit of the first named applicant, she set out that she was the spouse of the second applicant. S born in the State on the 12th May, 1973. She was introduced to the second applicant by a mutual friend in applicant were in electronic communication (and this Court understands that this related to telephone com including Skype). The first applicant met with the second applicant in person in the United Kingdom in Janu the UK to visit, and she flew from Ireland to the UK to see him and they commenced a loving relationship. have been in a committed relationship and that after the second applicant returned to Nigeria in February relationship by way of electronic communication.

4. On the 1st October, 2013 the first applicant travelled to Nigeria and remained there until the 15th Octob applicants were married. The first applicant had travelled to Nigeria with the intention of marrying the seco description of Nigeria as an extremely dangerous place and that while she was there she was under consta applicant and his friends.

5. She accepts that it was her assumption that if she married the second applicant, that there would be no visa to enter the State. It was also her view that the visa would naturally be granted as the marriage could prepared to come to Ireland to live with her. She has three children and these children are Irish citizens an The two youngest children will be unable, for obvious reasons, to stop attending school and relocate to Nig moving to Nigeria as she is of the view that she would not be able to survive there.

6. In or around December 2013 / January 2014 the second applicant applied to the respondent to join the refused by the respondent by the decision dated 11th April, 2014. In the course of this judgment I will rev the respondent.

7. Following the refusal, both the first and second applicants applied for a review of the respondent's decis from Messrs. Trayers & Co., solicitors for the applicants, a review of the respondent' s decision was applied solicitors was a personal letter from the first applicant addressed "to whom it may concern", and I will reve

8. By letter dated 17th June, 2014 the second applicant was informed of the respondent's decision to refus

letter is exhibited, and I will revert to the letter in due course.

9. The first named applicant said she was surprised by this letter as it says that it was disregarding the pre in Nigeria and found that she could visit Nigeria instead.

10. By way of comment in her affidavit, she said that she finds it remarkable that the respondent has conc that can seemingly exist perfectly without the parties being together. She says this is not her understandin her intention to live with her husband, share her home with him, to have children with him, and to live wha would know and describe as normal married life.

11. She says this cannot be done over the phone, on the internet or on the basis of occasional visits. She s has not behaved in a reasonable way.

12. The respondent's statement of opposition was verified by the affidavit of Jackie Hannon, Higher Execut Justice and Equality. Ms. Hannon says that the respondent did not make a decision communicated by letter second applicant "to refuse the said application for a review" as averred by the first applicant at para. 7 of She said that the letter dated 17th June, 2014, comprised the notification of the outcome of the second ap made by letter dated 29th May, 2014) and that the said appeal was fully considered and that a full conside decision made. She states that the respondent took all relevant matters into account upon the second appl visa, and upon appeal, which was determined and notified by letter dated 17th June, 2014, she noted that consideration and assessment of the second applicant's application for a visa and subsequent appeal that t pertinent issues in this case". She said there appears to be no dispute arising on the facts as pleaded save necessarily accept the characterisation of those facts as averred by the first applicant in her affidavit, and s matter is one for legal submissions.

The first decision on the application for a visa

13. This document was dated 11th April, 2014 and signed by the Visa Office, Embassy of Ireland, Abuja, N under Article 8 of the European Convention on Human Rights" and it states that "the application has been Policy Document on Non-EEA Family Reunification ("the Policy Document") published by the Minister for Ju which is effective as of the 1st January, 2014. The policy document has been prepared in observance of Co parties and society in general". The letter states that it is accepted that to refuse the Join Spouse (non-EEA respect of the second named applicant will engage the right to respect for family life under Article 8 (1) of refusing the Join Spouse (non EEA / Irish national) visa application in pursuance of lawful immigration cont the right to respect for his private life under Article 8 (1) of the ECHR.

14. The letter of notification and the examination of the application on behalf of the Minister reads:-

> *"Dear Sir/Madam,*
>
> *I regret to inform you that your application for an Irish Visa has been refused by the Irish Na for the following reasons:*
>
> *FM:- There is no automatic right for non-EEA nationals who are (extended) family members term basis to Ireland*
>
> *ID:- Insufficient documentation submitted in support of the application:- Additional documer documentation has not been provided, namely:*
>
> *• Official marriage certificate. Please note that the current copy marriage certificate is not su standard FRN civil marriage cerficate & does not contain required information such as a certi*
>
> *• The visa reference must also provide evidence that she has not been married before (i.e.) may also be called "Certificate de Coutume" or "Certificate of Nulla Osta"_.*

PF:- The granting of the visa may result in a cost to public funds.

PR:- The granting of the visa may result in a cost to public resources.

An assessment under A8 of ECHR has been completed and is attached for your information.

This decision can be appealed within 2 months of the date of this letter. An appeal must be s
all the reasons for refusal to the Visa Appeals Officer to the address shown.

Appeals received by email or fax will not be processed.

All additional supporting documents should be submitted with your appeal. If you require an
please also include a photocopy of any such document.

Please quote your Visa Reference Number on your appeal.

Yours sincerely,

_____

Visa Section

Abuja

Visa Application Reference Number:

Visa Application: 15196602

Visa Applicant: Mr David NWOKE (19/02/1975)

Sponsor: "The first named applicant" (Irish National)

Consideration under Article 8 of the European Convention on Human Rights (ECHR)

The application has been examined in accordance with the Policy Document on Non-EEA Fam
Minister and which is effective as of 1 January 2014. The Policy Document has been prepare
ECHR rights of the parties and society in general.

Background

Ms. Ford is an Irish National who appears to have resided in Ireland her entire life. Mr. Nwok
resided in Nigeria his entire life. They married in Nigeria on 07 October 2013. Mr. Nwoke is a

Ms. Ford has three children from previous relationships, two of whom as under the age of 18
child from a previous relationship. Mr. Nwoke's child has not applied for a visa.

Private Life

It is accepted that to refuse the Join Spouse (non-EEA/Irish National) visa applications in res
engage the right to respect for family life under Article 8(1) of the ECHR.

It is submitted in refusing the Join Spouse (non-EEA/Irish National) visa applications in purs

not constitute a breach of the right to respect for his private life under Article 8(1) of the EC

Family Life

It is submitted that Article 8 does not oblige the Minister to respect the choice of residence o must also be taken of the circumstances of any family separation and the actual relationship family member who has long been separated from a person resident in Ireland or family me may have a weaker claim on reunification than one where the parties have until recent been

Ms. Ford and Ms. Nwoke state they have been involved in a relationship since January 2011. occasions for a total of 25 days (21/01/11 to 01/02/11 in UK & 01/10/013 to 15/10/13 in Ni together as a family unit. Mr. Nwoke has never met Ms. Ford's minor children.

With regard to financial support, Ms. Ford has provided two Money gram transfer forms. The amount of €31 to Mr. David Nwoke. The second is for €158 to 'Ithoan'. A note on the form s "David's sister as his passport was in the visa office". It is noted that these forms do not con demonstrate a transfer took place. Nonetheless, even if these forms are both accepted as ev they do not demonstrate regular financial support from Ms. Ford or that Mr. Nwoke is financ outlined in the Policy Document 'dependency' for the purpose of immigration must be of such living at a subsistence level by the family member in his/her home country impossible if that maintained. Financial support must be not just welcomed but must be essential for the on-g Dependency must be pre-existing and sustained prior to the making of the visa application.

Taking into account the circumstances of the family as outlined above, it is noted the family unit. Mr. Nwoke has met with Ms. Ford on just two occasions. There is no evidence of regula to the applicant or from the applicant to the reference. It is further noted the applicant enter time when the applicant did not have any entitlement nor could not have had any expectatio reside in the State with Ms. Ford. Both the applicant and his spouse would reasonable have they entered into the marriage.

Having considered all of the factors above it is submitted that there is no breach of Article 8 Human Rights. The same principles apply in respect of Article 41 of the Irish Constitution.

Economic well being of the state

As stated in the policy document (Policy Document on Non-EEA Family Reunification, Irish N Department of Justice and Equality, December 2013, available at: http://www.justice.ie/en/ citizen, in order to sponsor an immediate family member, must not have been totally or pred the Irish State for a continuious period in excess of 2 years immediately prior to the applicat period prior to applicant have earned a cumulative gross income over and above any State b

Ms. Ford's 2013 P60 demonstrates earnings of €6643. As she had not provided her P60s for is not possible to establish her total earning for the three year period prior to the visa applic Ford currently earns €169.54 per week. Her income is supplemented by a lone parent's payr states she is applying to amend this to a Family Income Support (FIS) payment as she is no

Considering the information provided with the application it is contended that Ms. Ford has f totally or predominantly reliant on benefits from the Irish State for a continuous period in ex the application. She has also failed to demonstrate cumulative gross income of not less than prior to the application.

Given Ms. Ford's level of documented income, it is asserted she has not demonstrated the a without recourse to public monies and services.

Balancing Rights

The application has been examined in accordance with the Policy Document on Non-EEA Fam
Minister and which is effective as of 1 Janaury 2014. The Policy Document has been prepare
ECHR rights of the parties and society in general.

I have considered the individual family circumstances in this case, and the rights arising. It i
together as a family unit. Mr. Nwoke has met with Ms. Ford on just two occasions. There is n
support from the reference to the applicant or from the applicant to the reference. The appli
Ford at a time when he did not have any entitlement nor could not have had any expectation
reside in the State with Ms. Ford. Both the applicant and his spouse would reasonably have k
they entered into the marriage.

I have considered if there are any insurmountable obstacles to the couple establishing family
acknowledged Ms. Ford is not a Nigerian citizen and would probably experience some difficul
Nigeria, no information has been submitted to show these obstacles are insurmountable. In
previously attained a Nigerian Visa and travelled to visit Mr. Nwoke in October 2012. In Omo
Others v. Norway, Appl/ No. 265.07), the court found that while the reference may experien
Nigeria, these obstacles were not unsurmountable. The court further noted "In any event, no
third applicants from coming to visit the first applicant for periods in Nigeria."

I have considered the Rights of Ms. Ford's minor Irish citizen children - "S" Ford Ashafa, DOB
04/07/08. No evidence has bgeen provided to indicate Mr. Nwoke has ever met with these c
them or if he plays any part in their lives. It is therefore reasonable to conclude that the app
children's best interests would be adversely affected by a decision to refuse his visa applicat

According to the European Court of Human Rights, as a matter of well established internatio
obligations, a State has the right to control the entry of non-nationals into its territory. The S
immigration control and to ensure the economic well-being of the country. In this regard, co
impact of granting visas to Mr. Nwoke on the health and welfare systems in the State. Also a
the Minister, Ms. Ford has not demonstrated sufficient funds to support the visa applicant wi
Although each case is considered on its individual merits, having regard to the rights of all th
given to how a decision to grant visas to Mr. Nwoke may impact on the decisions in other ca

Having considered the overall facts of this case, it is submitted that the factors relating to th
than those factors relating to the rights of the individual family. In weighing the rights of Mr.
rights of the State, it is submitted that a decision to refuse the visa applications in respect o
as the State has the right to uphold the integrity of the State and to control the entry, prese
subject to international agreements and to ensure the economic well being of the State.

This therefore exists as a substantial reason, associate with the common good which require
respect of Mr. David Nwoke.

V06

Visa Office

Embassy of Ireland

Abuja, Nigeria

11/04/2014

15. Mssrs. Trayers & Company, solicitors, requested an appeal against the decision to refuse the second ap
in the State. Enclosed with the solicitors letter was a personal letter from the first applicant: -

"Dear Sirs,

We are instructed to appeal your decision of the 11th April, 2014, refusing Mr. Nwoke a visa
Ford) in the State. We note that the decision sets out the following reasons for refusal:

1. FM: - No automatic right for non-EEA nationals who are (extended) family members of Iri
basis to Ireland.

2. ID: - Insufficient Documentation - No official marriage certificate and no evidence that ref

3. PF: - the granting of the visa may result in a cost to public funds;

4. PR: - the granting of the visa may result in a cost to public resources;

1. FM: - No automatic right for non-EEA nationals who are (extended) family members of Iri
basis to Ireland.

The applicant and reference are married and as such cannot be described as extended family
care and custody of her 2 minor children. The visa decision maker has erred in fact and in la
insurmountable obstacles to the reference relocating to Nigeria. It is submitted that it is unfe
minor children who are in full time education here or to abandon her children and move on h

It is submitted that the matter ought to be considered having regard to the reference's right
reference to Article 8 of the European Convention on Human Rights, and the principle of prop

Rights under Article 8 of the European Convention on Human Rights (ECHR):

1. Everyone has the right to respect for his private and family life, his home and correspond

2. There shall be no interference by a public authority with the exercise of this right except s
and is necessary in a democratic society in the interests of national security, public safety or
country, for the prevention of disorder or crime, for the protection of health and morals, or f
freedoms of others.

In AG (Eritrea) v Secretary of State for the Home Department [2007] EWCA Civ 801
found that while the threshold for Article 8 to be engaged requires the interference with the
or a family life to be real, it is not otherwise an especially high threshold.

It is respectfully submitted that the reference is an Irish citizen, and that she is therefore a l
Union Member State, and the effect of denying her husband a permission to reside in Ireland
order to maintain her family life. This is something that it is not possible for her to do. She is
Children who are in full-time education. It is arguable therefore that a refusal to permit the r
Ireland is in breach of the principles laid down in the Zambrano judgment (in so far as this ju
to citizen children but extend to residents of EU Member States) in so far as it would preclud
unity in the EU, and therefore has the potential effect of depriving the reference of the genu
rights attaching to her status as a long term resident of an European Member State.

While it is acknowledged that some consideration has been given to the Reference's Article 8
Constitution, appropriate consideration has not been given to the fact that the Reference can
Ireland to live in Nigeria. Ireland is not a residence of choice but a residence of necessity.

2. ID: - Insufficient Documentation - No official marriage certificate and no evidence that ref

Please find enclosed original marriage documentation including original certificate together w

she has never previously been married. We would be obliged for the return of original docum

3. PF: - the granting of the visa may result in a cost to public funds;

4. PR: - the granting of the visa may result in a cost to public resources;

The Applicant and Reference have confirmed that the Applicant is satisfied to accept Stamp 3 dependent of the Reference on stamp 3 conditions. If granted, he could not be a burden on t he would not be entitled to same.

We wish to point out that the reference is a worker in this State. Although she is presently in husband will have no entitlements should he be granted Stamp 3. Please find enclosed copy from reference.

The reference has sent money to her husband in Nigeria. This has been done through money either directly to Mr. Awoke or through his friends (as he was not in possession of his nation regard are enclosed herewith together with copy moneygram transfers.

Please note that although the parties have been in a relationship since January 2011, it has have resided as a family unit. They have been in constant communication by way of telepho telephone bills as evidence of same. Mr. Nwoke has met Ms. Ford's daughter in the UK and a herewith. Further personal photographs are enclosed and we could be grateful for the return

Please let us know if you require any further documentation or information in order to deter client or, if there are any other outstanding matters of concern, we would obliged if you wou being reached.

Thank you for your assistance.

Yours faithfully,

_____

Trayers & Company

Solicitors

20th May 2014

To Whom It May Concern

My name is Alison Ford and I'm and Irish Citizen and I'm appealing the decision to deny my in Ireland. As previously stated, I met David through a mutual friend of ours and after talkin him. After 3 months of communicating, he flew over to the UK where I met him along with a from the UK and living here in Ireland along with my daughter Carly Ford who at the time wa I was being taken for a ride or not.

I can bore you with loads of stories about how we met and all but what I want you to unders fell in love and being taken for a ride. Firstly, let me tell you a bit of myself. I'm 41 years old years old which I had to an Irish man, The rest of my kids I had to a Nigerian man who took years and I broke up with him after finding out he was cheating on me.

First off, my kids know my husband a lot because they speak on the phone on a daily basis a younger daughter asked everyday when Daddy David coming and get upset about it. She ca

Chief. My young boy needs a role model in his as their dad is unable to such. He needs a ma
well as his football and boxing. Denying me as well as my children the chance of happiness w
lives and feelings as of no concern to you which as of now; I'm beginning to feel is what you

Part of the reason I fell in love with him is the fact that he was the only man who has been h
UK proved a lot to me. I have never had a man spend his money and time to travel across a
weeks. This was one of the best times of life.

Let me counter a few points you made in the refusal letter. You said the forms were incompl
easily been sorted out by me. Sometimes, I have to wait for my husband to send me docum
the fact that you said some documents wasn't translated. I'm sure Nigeria is an English spea
need to translate the English language.

On the issue of finance, I know for a fact that I make enough to take care of myself and my
more than 21 years and it hasn't been a problem. My husband is not coming here to be a bu
hardworking man. He may not be employed at the moment but I known for a fact that when
gainful employment. My question now would be: would I not be entitled to be happy becaus
the country and I have never been financially unstable. I think I am entitled to my own happ
families. It's the least I ask for as an Irish Citizen.

Your letter also states that there were no reference in Ireland and no clear links to reference
you a reference. I am married to him I think that's reference enough. And regarding letter o
don't see how it could be expired. And I also sent photographs of proof that we were togethe
time limit of courtship before a relationship can be deemed legit. I like to think love conquer
that would not just marry somebody on a whim if I didn't think we would be together happil

I cannot relocate to Nigeria at this time because my kids are still in school. My son Sean is w
and a member of the Home Farm football club. He has a lot of potential to progress further t
be fair to uproot him from his current home in a new country and culture. He is also a boxer
UK.

I also have daughter in her first year in primary school and I cannot just take her out of sch
especially families like my parents and her Aunts and Uncles. Also their father would not allo
they know and understand. He would always be in their lives and he understands that my ha
the kids and he's in support of me getting married as well.

Also I have been to Nigeria and I understand that at this time, it is not a very stable country
attacks and kidnappings going on now especially girls getting kidnapped over their rights to
kids who would be mixed race in Nigeria would be a good idea mainly because they might ge

My husband has numerous friends here in Ireland and he would definitely have no problems
of Ireland. Also that would be helpful for him in finding employment.

I would just like my husband to join me and my family who are so looking forward to his arr
and he would not seek anything of f the state. So please just take into my consideration my
happy.

I hope this appeal comes through successfully for if not, this is an issue I am ready to give n
be happy and I am going to fight tooth and nail to make it a reality.

During a meeting with my lawyer recently, he informed me that a new directive was put in p
on family renunification and a certain amount needs to be earned to be able to bring a spous
considering the fact that people from other EU countries do not have to go through this proc
and it has no place in New Ireland. I have informed my lawyers that I'm willing to challenge
known to man. I believe this directive to infringe on my personal human rights regarding my

human being should be denied their right to a happy family life because of how much they e
anyone, we all make this country great in our little contribution. I believe if the lower earner
country would be unsustainable.

I leave you with good tidings.

Yours sincerely,

Alison Ford

16. On 17th June, 2014, the Visa Section of the Minister in Abjuga, Nigeria, wrote to the second applicant successful in these terms:

"Dear Sir,

I wish to inform you that your appeal against the refusal of your visa application has been ex
the Irish Naturalisation and Immigration Service.

I regret to inform you that this appeal has not been successful.

Your application has been re-examined by the Appeals Officer and having taken all documen
consideration, it was decided that the original decision to refuse the visa should be upheld.

The reasons for refusal are as follows:

PF:- The granting of the visa may result in a cost to public funds;

PR:- The granting of the visa may result in a cost to public resources;

The application was assessed in light of the Policy Document on Family Reunification and in l
European Convention on Human Rights and Fundamental Freedoms and under the Constitut
an addendum the letter dated 11th April, 2014 entitled 'Consideration under Article 8 of the
Rights (ECHR)' (hereinafter the 'Article 8 consideration').

I note that by letter dated 29th May, 2014 Trayers & Co. Solicitors refer to the case AG(Eritr
Home Department [2007] EWCA Civ 801 to argued that the threshold for the engagement o
especially high threshold'. In the circumstances of this particular case I am satisfied that the
recognises this and that the Article 8 consideration goes on to consider whether or not such
reference to second paragraph of Article 8. In addition, I also am satisfied that the visa offic
of the minor child, as made known to the visa officer.

I note that the decision of the 11th April, 2014 refers to their being no 'insurmountable obst
in order to establish family life elsewhere [1]. I would set aside the Article 8 Consideration not
2014 to the extent that it relies upon an 'insurmountable obstacles' test.

To be clear, I do not find that the refusal of your visa application may be justified on the gro
Nigeria. It is important to note that refusing this application in no way impairs the rights of I
children in the genuine enjoyment of the substance of their rights attaching to their status a
Ford and both children currently live in the State. Refusing your visa application will not obli

However, it is clear that a reason based on an 'insurmountable obstacles' test was not the o
that a refusal of the visa application was justified in light of Article 8 ECHR and was also in a

The Article 8 consideration takes into account the particular circumstances of the family life
Nwoke. The Article 8 consideration refers to the fact that Ms. Ford and Mr. Nwoke had never

not established that he is dependent on Ms Ford; that at the time when Ms Ford and Mr Nwo did not have any entitlement nor could he have had any expectation of any entitlement to e

In addition, the Article 8 consideration refers to the case of Darren Omoregie v. Norway whe

In any event, nothing should prevent the second and third applicants from coming to visit th
3

In this regard, it is apparent that the fact that Ms. Ford has visited Mr. Nwoke in the past wa noted in the Article 8 consideration: 'Ms. Ford previously attained a Nigerian Visa and travell 2013'). The Appeals Officer is satisfied that it is the case Ms Ford has visited Mr Nwoke in th established, either on the basis of the information submitted with the original application or possible in the future. As such, the Appeals Officer is satisfied that Ms Ford will, in the future periods in Nigeria.

In the circumstances of this case the Appeals Officer notes that it is in the interest of the co State to maintain control of its own borders and operate a regulated system for the control, national persons in the State. It is consistent with the Minister's obligations to impose those domestic and international legal obligations and in pursuit of the legitimate aims specific to t namely:

• the interests of economic well-being of the country; and

• for the protection of the rights and freedoms of others.

Taking into account the reasons as set out above (including the particular circumstances of t that Ms Ford has in the past visited Nigeria, and may do so again in the future) and weighing (as set out in the Article 8 consideration) the Appeals Officer is satisfied that the Article 8 co the interference is justified and that a refusal of this application would not constitute a violat

I note that Trayers & Co. Solicitors submit that:

The Applicant and Reference have confirmed that the Applicant is satisfied to accept Stamp dependent on the Reference on stamp 3 conditions. If granted, he could not be burden on th he would not be entitled to same.

I have reviewed the information concerning the income and financial resources available to M am have a very reasonable concern that without State support Mr Nwoke's presence in the S Ms Ford's family's financial resources and could respect therefore impact on Ms Ford's ability needs of her children. In this respect it is a relevant consideration that Ms Ford's family cont Officer is not satisfied that such a situation, if it were to arise, would be in the best interests regardless of Mr Nwoke's status were such a situation to arise it is t he case that, on the bas were no longer being met, a cost to public funds and public resources could arise (if not dire then indirectly). In addition, not all State benefits require the habitual residence conditions b Needs Payment and Urgent Needs Payment, which are payments under the Supplementary

Having re-examined your application and having taken all documentation and information pr decided that the original decision to refuse the visa should be upheld for the following refusa

PF:- The granting of the visa may result in a cost to public funds;

PR: - The granting of the visa may result in a cost to public resources;

The Article 8 Consideration notified to the applicant on 11th April, 2014 has been set aside o an 'insurmountable obstacles' test. The remainder if the reasoning and the conclusion of the

it finds that a refusal of this application is justified in light of Article 8 ECHR and is also in ac
been upheld.

Only one appeal per application is permitted.

Yours sincerely,

_____

VO9

Visa Section

Abuja

17 June 2014"

Submissions on behalf of the applicants

17. Colm O'Dwyer S.C., with Ian Whelan B.L., appeared on behalf of the applicants and made the following

a. The decision of the respondent essentially dictates that the marriage may exist from afar named applicant visiting her husband in Nigeria. The respondent accepts that the first name Nigeria but refuses to allow the second named applicant to come to Ireland and live with his

b. Counsel cited the decision of Hogan J., in *X.A. (An infant suing by her mother and next fri Minister for Justice Equality & Law Reform, Ireland and The Attorney General*
the Minister to refuse to revoke a deportation order which had been made in relation to an a in Ireland in March, 2009 and made an application for asylum. The application for asylum wa upheld by the Refugee Appeals Tribunal. An application for subsidiary protection was also ref originally made in October, 2010. J.P.A is an Irish citizen who has resided most of her life in the time of the judgment was aged about three years. She was the result of another relation aware that Ms. A was pregnant and that Mr. A. was the father of the child. Mr. A. had failed t Immigration Bureau and was deported on 7th February 2011. A number of issues were exam of the unborn child, and then the Court dealt with the rights of Ms. A under Article 41.

c. In this regard, Hogan J. said:-

"There can be no suggestion that the family rights protected by Article 41 are in some way a rights thereby conferred cannot be regarded as being purely theoretical, the essence and su at all times."

Hogan J. then quoted the decision of Cooke J. in *Ugbelese* [2010] 4 I.R. 233, 241:-

"In other words, the personal and Convention rights of the child and of the family are not ab or be subordinated to, the public interest of the State in the common good in controlling its investigation and consideration, a reasonable and proportionate decision is made that there with those rights."

Hogan J. then proceeded to consider the relevant factors which must be weighed in the balance to ensure and proportionate":-

i. It was said that Mr. A.'s links with Ireland were weak. He was born in Nigeria and lived the Ireland in early 2009 in order to seek asylum. When his asylum application was rejected he would be permitted to remain here. Measured against that, however, is the fact that he is ma the father of an Irish citizen.

ii. He also pointed out that Mr. A. got married in September 2010 in circumstances where his This is a factor which he and his wife must have been aware

iii. His wife's links with Nigeria were particularly weak.

iv. He also made the point that a deportation order is in principle permanent in its effects, sa
Minister in the exercise of her discretion under s. 3 (11) of the Immigration Act, 1999, and f
Minister's decision must always respect the essence and substance of the right of the marrie

v. He concluded:-

"A decision which, in practice, compels the couple to life more or less permanently apart is,
interference by the State with a core principle valued and protected by Article 41. Such a de
requires compelling justification…

… While the necessity to uphold the common good and the integrity of the asylum system m
nonetheless imperative that the respective rights of the applicants and the interests of the S
Minister."

d. He applied these principles to the facts of the case, and said:-

"All of this is to underscore the reality of what is currently proposed, namely, that the A. fam
less permanently. As this very application exemplifies, it is true, of course, that Mr. A. can a
revoked under s. 3(11) of the 1999 Act. Nevertheless, as things stand, it is not clear to me h
have any real inter-personal contact or how their marriage could actually survive what may
is sobering to reflect that the couple's daughter - who was admittedly born several months a
never actually get to see her father during her childhood. Again, this is somewhat different f
Court of Human Rights in Omoregie, where the deportation order in question lasted a maxim

e. He then went on to quote from Clark J. in *U. v. Minister for Justice, Equality and Law Reform*
whose facts were not dissimilar to the present one. Here Clark J. observed:-

"The choice the wife now faces is whether to remain in Ireland and raise her son here withou
with him and raise their son together there. This is a choice faced by many couples who com
different parts of large countries. Married inter-racial or inter-religious couples often face cho
sacrifices in relation to their choice of residence, standards or beliefs. Adults who marry mus
without seeking the answers in constitutional rights which are neither guarantees nor immun
of social order and the common good. The Court is satisfied that the applicants have not esta
insufficient regard to the wife's constitutional rights when deciding not to revoke the deporta
husband."

f. Hogan J. took a different view in *X.A*. and said:-

"it is a pure fiction to say that Ms. A. has a choice worth speaking of. … Yet the matter here
heart of our system of constitutional protection that, absent a binding Supreme Court decisio
cannot regard myself as bound by the views expressed by Clark J. in U."

g. He continued that:

"The essential point here is that the Constitution protects the fundamentals of marriage and
essence of that relationship. It is not indifferent to the plight of those who have been forcibly
adapting freely the language of a famous Bach chorale, it sees to it that these rights are ava
hours of deepest need. That is the very reason why these rights are deemed to be fundamen
of government to ensure that these constitutional rights are taken seriously so that, in the w
Attorney General [1950] IR 67, 81, they are given "life and reality".

Hogan J. quashed the decision of the Minister.

h. Counsel on behalf of the applicants accepted that this involved a deportation order but submitted that th
application before her with due regard to the constitutional rights involved, and has not given appropriate
the applicants. He stated that the decision challenged is the one which upholds the findings of the first inst
Article 8 rights on the family rights involved but sets aside the "insurmountable obstacles" test employed t
prima facie irrational as the entirety of the decision at first instance is predicated on there being no insurm
applicant living in Nigeria. He submitted that the severance of this finding required the undertaking of a ne
affirmation of the findings reached on foot of the old one where such a fundamental severance has been de
decision of Hogan J., *E.A. and P.A (an infant suing by his father and next friend E.A.) v. Minister for Justice*
Attorney General [2012] IEHC 371. The facts of this case related to an asylum application by a man who h

Sudan (but was actually from Nigeria), and when this was found to be untrue, he said that his father was f
also a Nigerian national. An application for subsidiary protection was rejected. He was deported from the S
entered on the 5th December, 2010. Hogan J. identified that one consideration was that Mr. A. had engage
Minister and his officials and his outrageous conduct might have mainly disentitled him to any prospective
must shut its eyes to his illegal and deceitful conduct in the higher interest of protecting the welfare and in

> *"While the preservation of the integrity of the asylum system and, indeed, the integrity of th*
> *importance, in matters of this kind the court must, where possible, give primacy to the cons*
> *and company of his parents in the manner envisaged by Article 42.1 of the Constitution."*

He then went on to consider the arguments based on *Ruiz-Zambrano* [2011] E.C.R. I-000. This involved ch
case was taken against Belgium. He then dealt with the constitutional rights of the child. Having reviewed
Hogan J. referred his own judgment in *I. v. Minister for Justice Equality & Law Reform* [2011] IEHC 66

> *"Turning to the substantive issue, it is clear that the constitutional rights of the family are no*
> *by the Supreme Court in AO and DL v. Minister for Justice [2003] 1 I.R. 1. Yet it is also clear*
> *the fact that the parents in that case had indicated that they would take the young dependen*
> *that the parents were deported or, at least, that the Minister had assumed that they would d*
>
> *… Yet it seems equally plain that AO and DL does not directly concern a case of the present*
> *the deportation of his father to Nigeria would be to deprive an Irish citizen child of the oppor*
> *with his father, not least in circumstances where his mother has been given refugee status i*
> *unrealistic to expect her to travel to Nigeria."*

i. He quoted then from a decision of Clark J, in *O. S. And T. S. (A minor, suing by his mother and next frie*
Equality and Law Reform [2011] 10 JIC 1303].] where Clark J. quashed the Minister's decision. In that cas
who had married in the state in early 2003. The wife had received status by virtue of the fact that she had
The husband, who had entered the state illegally and had unsuccessfully applied for asylum was suddenly
marriage even though the wife was pregnant again. In 2009 the couple applied to have the deportation ord
to revoke the deportation order and Clark J. quashed the Minister's decision, saying:-

> *"The Court is driven to the conclusion that the identification of the constitutional rights involv*
> *circumstances was not followed by a true examination of those circumstances nor did that ex*
> *requirements restated by Denham J. (as she then was,) in Oguekwe v. the Minister for Justic*
> *the obligation to " weigh the factors and principles in a fair and just manner to achieve a rea*
> *A fair and just consideration would have included an assessment of the length of time the fa*
> *whether the children were at school here. While those facts are not determinative of rights c*
> *to be considered when balancing the constitutional rights of a citizen child with those of the*
> *interpretation of such rights and to arrive at a proportionate decision. In the language of the*
> *to be struck between the competing interests of the individual and of the community as a wh*
>
> Again this involved the issue of a citizen child and a deportation order.

j. Finally counsel for the applicant referred to the decision of MacEochaidh J. in *Gorry & Anor. v. Minister fo*
decision given on the 30th January, 2014. The facts of this case were that the first-named applicant, a Nig
asylum in Ireland and in respect of whom a deportation order was made in June 2005. In 2006 she met th
an Irish citizen and they decided to marry. The applicants said in that case that they received advice from
they should marry in Nigeria and then apply for a visa for the second-named applicant to enter the State.
15th September, 2009 and were married on the 19th September, 2009. The first-named applicant applied
applied for a revocation of the deportation order in December, 2009. This was refused on the 13th Februar
the second-named applicant went to Nigeria to visit his wife. He found the visit very difficult because of the
returned to Ireland on the 20th March, and on the 23rd March the second-named applicant suffered a hear
contacted his local T.D. to seek help and advice. The T.D. contacted the respondent's office, and it was indi
named Applicant to make a further application for the revocation of the deportation based on the new med
stated that the second-named Applicant could not come and live in Nigeria because of his health condition.
Immigration Services informed the first-named applicant that the Minister had refused to revoke the depor

k. MacEochaidh J. then quoted from Article 8 on the European Convention on Human Rights and reviewed

had been part of the decision. He then reviewed the authorities and stated:-

> *"I fully agree with the decisions of the House of Lords and the Court of Appeal of England an the contest between State rights and family rights, and in particular, to decide whether a na State should join his or her partner in a third country is not assessed by reference to an insu rather by applying the age-old and most reliable of legal standards in administrative law: is join the removed or excluded spouse in his or her country of residence?"*

He then cited Article 41 of the Constitution, and said:-

> *"Numerous decisions have indicated that an Irish and non-Irish married couple do not have Ireland simply by virtue of marriage and that the State is not obliged to respect the residenc A.A. v. The Minister for Justice, Equality and Law Reform [2005] 4 I.R. 564 at p.570: "It is c applicants do not have an absolute right to reside in this jurisdiction as a family, notwithstan family rights which they hold as a married couple" per Clarke J.)."*

He also quoted from *Cirpaci v. Minister for Justice, Equality and Law Reform* [2005] IESC 42 decision was given by Fennelly J. Again this involved a deportation order being sought to be quashed to en State. The marital couple were an Irish citizen wife and a Romanian citizen husband who had married in Ro deportation of the husband. Fennelly J. stated:-

> *"At one extreme an Irish citizen might contract a marriage, valid under the laws of a remote Could such a person, within days of the marriage, insist, to the point of demanding that the irrelevant, that his or her new spouse be granted a visa admitting him or her to reside in the be an Irish citizen, who had lived abroad for many years, perhaps for his or her entire worki citizen, an undoubted right to return to reside in Ireland on retirement or earlier. It is not ne question whether that person would have the right to be accompanied by his or her foreign s part, I have no doubt that such a right exists. It would not, of course, be absolute. The forei criminal. It is enough to say that, in the most benign of such circumstances, the Minister wo exercising the statutory powers applicable to such situations, to give favourable consideratio permitted to be accompanied by his or her spouse."*

18. MacEochaidh J. stated that it was clear from these judgments that the Courts have ruled in favour of th residency to non Irish persons married to its citizens. It is also clear from the jurisprudence that marriage may engage the rights of residence in the State which could only be denied for contravening proper purpos previously of Hogan J. in *S(P) and E(B) v Minister for Justice and Equality.*

19. MacEochaidh J. then referred to *Pok Sun Shum v Ireland* [1986] ILRM 593 which he described as "a ca father of a Chinese family was required to leave the State and his wife sought a declaration that she was " husband] within the State".

20. MacEochaidh J. then stated:

> *"Having reviewed all of these decisions, my view is that an Irish national married to a non-Ir to reside in Ireland with that other person, subject to lawful regulation. The right is not abso case to accept the country of residence chosen by such a couple. Though I believe such a pr circumstances will engage the right. The couple who marry on a whim in a drive-in church in evening, may well find that their circumstances do not trigger the respect for marriage reflec the Constitution and a consequential right to reside in the State."*

21. MacEochaidh J. also stated:

> *"The starting point in any consideration where a mixed Irish and non-Irish nationality couple have a prima facie right to do so by virtue of Article 41 of the Constitution. It is recalled that guard with special care the institution of marriage. The circumstances of the marriage will in If engaged, the State is entitled to supervise the right by requiring an entry visa for the non-*

He continued that:-

> *"Insofar as the consideration of the couple's Article 41 rights were made referable to the con Article 8 of the European Convention on Human Rights, I have already indicated that the inc rights and therefore that error is infused into the consideration of the couple's constitutional*

In those circumstances he made an order quashing the decision of the respondent to affirm the deportatio applicant.

Submissions by counsel for the respondent
22. Counsel for the respondent produced a booklet of authorities which included the cases of
J.) and *Osheku v Ireland* 1986 IR 733 (Gannon J.)

23. Counsel for the respondent Ms. Helen Callanan S.C., submitted that it was apparent from the applicant
principal complaint of the applicants which can be said to apply to the ground advanced in the statement o
does not assess the application before her with due regard to the constitutional rights involved and the law
weight to the rights of the applicants." Counsel submitted that this contention is fundamentally flawed whil
considerations under Article 8 of the ECHR and Article 41 of the Constitution were based, was identified at
instance decisions and subsequently the appeal decision as being the primary basis upon which a considera
constitutional rights were assessed. She quoted the decision of the Supreme Court in *Meadows v The Minis
Reform* [2010] IESC 3 where Murray C.J., stated that:

> *"an administrative decision affecting the rights and obligations of persons should at least dis
> which the decision is taken. That rationale should be patent from the terms of the decision o
> terms and its context. Unless that is so then the constitutional right to access to the Courts t
> administrative decision judicially reviewed could be rendered either pointless or so circumscr
> ineffective."*

24. Counsel for the respondent quoted Article 41 and said that there was no express statement in Article 4
married persons have a prima facie right to reside together (whether in the State or otherwise) and a spec
relied upon stems from the jurisprudence of the Superior Courts. Counsel quoted Fennelly J. in
challenge to a deportation order but it was submitted the same principles apply to a consideration of the q
the State with any Article 41 family life rights of the non national and an Irish citizen are proportionate to t
also pointed to the notice of appeal from the second named applicant where the rights under Article 8 of th
Rights were underlined and that there was no suggestion that Article 41 had greater rights.

25. Counsel also submitted that the second named applicant has confirmed that he is satisfied to accept a
dependant of the first named applicant. A stamp 3 is a permission for the person to remain in Ireland on c
employment, does not engage in any business or profession and does not remain later than a specified dat

Responses by counsel for the applicant
26. Counsel for the applicant indicated that the second applicant was a qualified welder although this was n
had been supplied to the Minister. The application at first instance had been refused on two grounds:

1. The insurmountable obstacle,

2. That the granting of the visa may result in a cost to public funds and a cost to public reso

The decision on appeal held that the granting of the visa may result in a cost to public funds and a cost to
reason on which the application was refused for the applicant. Counsel argued that the decision of the appe
proportionate exercise of the balancing that must be carried out by the respondent. Counsel argued that th
considerably weaker than the circumstances of the applicants in the *Gorry* decision in that the applicant pa
might be described as an "appreciable time" either before or after the marriage. The evidence before the C
not lived together at all and she submitted that the circumstances of the applicants' were at the first point
rather than the latter end.

Discussion
27. Unlike the system in United Kingdom of statutory instruments and immigration rules, the Irish governm
without legislation. This requires the courts to intervene and interpret the decision of the legislature.

28. It is clear that the policy document on Non EEA Family Reunification was just a policy document. It was
refuse a Join Spouse (Non EEA - Irish National) visa application in respect of the second applicant will enga
under Article 8(1) of the ECHR. It further submits that in refusing the Join Spouse (Non EEA - Irish Nationa
lawful immigration control did not constitute a breach of the right to respect for his private life under Articl
heading "Family Life" it was submitted that Article 8 does not oblige the Minister to respect the choice of re
account must also be taken of the circumstances of any family separation and the actual relationship betwe

the relevant point that a family member who has been long separated from a person resident in Ireland or never lived together may have a weaker claim on reunification than one where the parties have until recen officer then indicates that the applicants state that they have been involved in a relationship since January on just two occasions for a total of 25 days. They have never resided together as a family unit and the sec named applicant's minor children.

29. With regard to financial support, the visa officer stated that the first applicant has provided two money applicant and the second is for €158. The second transfer was sent to the second applicant's sister as his p officer says that even if these forms are both accepted as evidence of transfers they do not demonstrate re applicant or that the second applicant is financial dependent upon the first applicant.

30. The officer also stated that it was further noted that the second applicant entered marriage with the fir second applicant did not have any entitlement nor could have had any expectation of any entitlement to en the first applicant. Both applicants would reasonably have been aware of this at the time they entered into having considered all of the factors above it is submitted there is no breach of Article 8 of the European Co the same principles apply in respect of Article 41 of the Constitution.

31. Economic well being of the State

The visa officer quotes from the policy document:

> *"An Irish citizen in order to sponsor an immediate family member, must not have been totall from the Irish State for a continuous period in excess of two years immediately prior to the a year period prior to this application have earned a cumulative gross income over and above €40,000.00."*

32. The officer goes on to note that the first applicant's 2013 P60 demonstrates earnings of €6643.00. As s for 2011 and 2012 it has not been possible to establish her total earnings for the three year period prior to submitted the first named applicant currently earns €169.54 per week, her income is supplemented by Loa The first named applicant states that she is applying to amend this to a Family Income Supplement Payme contends that the first applicant had failed to demonstrate that she is not totally or predominantly reliant o continuous period in excess of two years immediately prior to the application. It also fails to demonstrate t less than €40,000 in the three year period prior to the application. Given the first named applicant's level o that she has not demonstrated the ability to provide for another adult without recourse to public monies an

33. Balancing rights

The visa officer at first instance indicated that the application has been examined in accordance with the p observance of constitutional and ECHR Rights of the parties and society in general. The officer noted;

> 1. The family have never lived together as a family unit.
>
> 2. The first applicant had met with the second applicant on two occasions.
>
> 3. There is no evidence of regular financial support from the first applicant to the second app the first applicant.
>
> 4. The second applicant entered into marriage with first applicant at a time when he did not any expectation of any entitlement to enter into and reside in the State with the first applica
>
> 5. Both the second applicant and his spouse would reasonably have been aware of this at th

34. He then dealt with the issue of insurmountable obstacles to the couple establishing family life in Nigeri *Norway,* Appl. No. 265/07, Council of Europe: European Court of Human Rights, 31 July 2008, where the E while the reference may experience some difficulty in developing life in Nigeria these obstacles were not in

35. He also considers the rights of the first applicant's minor Irish citizen children and states that no evide
the second applicant had ever met with these children or provided financial support to them or if he plays
reasonable to conclude that "the applicant has not established that his children's best interests would be a
refuse to grant his visa application." This appears to make no sense unless the visa officer is referring to th

36. In this regard the notice of appeal and the letter from the first applicant accompanying this letter addr
Clearly as well as telephone calls there were other social media outlets used by the first applicant and her
by way of Skype. The visual image of the second applicant would be available to be seen and to be engage
is noted that the issue of modern social media has not been addressed in either of the policy documents re

37. The officer then quotes from the European Court of Human Rights and says:

> *"that as a matter of well established international law and subject to its Treaty obligations a*
> *of non nationals into it's territory. The State has a right to pursue immigration control and to*
> *the country. In this regard consideration has being given to the impact of granting visas to t*
> *welfare systems in the State. Also according to information available to the Minister Ms. Ford*
> *funds to support the visa application without further access to state benefits. Although each*
> *merits having regard to the rights of all those concerned consideration is also given to how a*
> *applicant may impact on decisions in other cases.*

38. It appears that the Minister is concerned that if the second applicant is granted a visa or visas that this
officer says that considering the overall facts of the case, that the factors relating to the rights of the State
relating to the rights of the individual family. The application for the visa was refused, with a cover letter st
for non EEA nationals who are (extended) family members of Irish citizens to migrate on a long term basis
may result in a cost to public funds and granting of the visa may result in a cost to public resources. The c
assessment under Article 8 of the ECHR has been completed and is attached.

39. Thus the visa officer refused the application on three grounds:

a. Insurmountable obstacles,

b. Granting of a visa may result in cost to public funds,

c. Granting of a visa may result in a cost to public resources.

Notice of appeal

40. The notice of appeal from Messrs. Travers & Company, solicitors emphasises;

1. That the applicants are married and as such cannot be described as extended family mem

2. That the visa decision maker had erred in fact and in law in concluding that there are no i
applicant relocating to Nigeria.

3. It is submitted that it was unfeasible for the first applicant to relocate her minor children
to abandon her children and to move on her own to Nigeria.

4. It is submitted that the matter ought to be considered having regard to first applicant's ri
by reference to Article 8 of the European Convention on Human Rights and the principle of p

5. That the first applicant is an Irish citizen and she is therefore a long term resident of a Eu
effect of denying her husband a provision to reside in Ireland would require her to leave the
life. This is something that is not possible for her to do.

6. In relation to the granting of the visa resulting in the cost to public funds and public resou
confirm that the second applicant is satisfied to accept the stamp three residency in the Stat
applicant on stamp three conditions. It is granted on the condition that he would not be a bu

funds as he would not be entitled to same.

7. The letter also notes that although the parties have been in a relationship since January, 2 couple to reside as a family unit. Also the enclosed were a substantial number of telephone l communication by phone.

41. Attached to the notice of appeal was a letter from the first applicant. She asserts in this letter that she a "naïve little girl." She has three children one of whom is twenty-one years old. She asserts that her childr speak on the phone on a daily basis and also use Skype. She also asserts that her young son needs a role unable to be such. She says that on the issue of finance she knows that she has made enough to take care being doing this for more than twenty-one years. She says that the second applicant is not coming here to hard working man although he is not employed at the moment. She also says that she is entitled to her ow her families. She also states that she cannot relocate to Nigeria at this time because her kids are still in sc footballer and a member of Home Farm Football Club and could have the potential to progress further to pr who has represented Ireland in the United Kingdom. She confirms that she has been to Nigeria and says th that girls have been kidnapped over the right of education. She asked the Minister to take into consideratio to be happy.

42. The decision at first instances of the refusal of the visa application was examined by the appeals officer by letter dated the 17th June, 2014. Again the appeals officer indicates that the application was assessed i respect of rights under the European Convention of Human Rights and Fundamental Freedom and under th

43. The appeals officer says that he is satisfied that the refusal of the visa application constitutes an interfe the ECHR. He is also satisfied that the original decision recognises this and that the Article 8 consideration interference could be justified by reference to the second paragraph of Article 8. He is also satisfied that th best interests of the minor children, as made known to the visa officer.

44. The details in relation to the minor children were communicated to the appeals officer by way of a lette from Messrs. Trayers & Co and the visa officer had not got the benefit of the statement of the first named a her minor children's contact via social media with the second name applicant.

45. The appeals officer said that he did not find that the refusal of the visa application could be justified on applicant may relocate to Nigeria and then says that the Article 8 consideration takes into account the part in existence between the applicants. The Article 8 consideration refers to the fact that the applicants have applicant had not established that he is dependent on the first applicant and that at the time when the first marriage the second applicant did not have any entitlement or nor could he have any expectation of any en State. He also refers to the case Omoregie. The appeals officer is satisfied that the first applicant will in the applicant for periods in Nigeria. The appeals officer notes that it is in the interests of the common good to maintain control of its own borders and operate a regulated system for the control processing and monitor State. It is consistent with the Minister's obligations to impose those controls and is in conformity with all t obligations and in pursuance of the legitimate aims specific to the facts of this case, namely in the interest country and for the protection of the rights and freedoms of others.

46. The appeals officer notes that taking into account the reasons as set out above including (the particula case and the fact that the first named applicant has in the past visited Nigeria and may do so again in the the right of the State (as set out in Article 8 consideration) the appeals officer was satisfied that the Article that the interference is justified and a refusal of this application would not constitute a violation of Article 8

Issues

47. He furthers notes that Trayers & Company, solicitors submit that the second applicant is satisfied to ac as a dependent. He has reviewed the information concerning the financial resources available to the first n Ireland. He has a reasonable concern that without state support the second applicant's presence in the Sta first named applicants family financial resources and could therefore impact on the first applicant's ability t of her children. It is a relevant consideration that the first applicant family contains two minor children. He as the granting of the visa may result in a cost to public funds and the granting of the visa may result in a

48. This Court notes that having regard to the State's membership of the European Union there exists the movement of workers is a fundamental principle of EU law, enshrined in Article 45 of the Treaty on the Fun national can gain employment in another EU Member State, can work there without needing a permit to re there, even after the employment is finished and enjoy equal treatments with nationals and access to emp other social and tax advantages. Further when an EU national is working abroad in another EU country, far reside and work in that country regardless of their nationality. These rights apply to EU citizens who in the workers, and subject to some exceptions, it is clear that the first applicant could, if she obtained employme entitled to seek to have her husband, the second applicant join her in that EU country (other than Ireland)

The Irish Nationality and Citizenship Act 1956 (as amended) provides for both acquisition of citizenship upo (as amended) provides that;

> *"(1) A person who is an alien at the date of that person's marriage to a person who is, or wh Irish citizen (otherwise than by naturalisation or by virtue of this section or section 12) shall virtue of the marriage, but may do so by lodging, not earlier than three years from the date which the person last mentioned became an Irish citizen (otherwise than as aforesaid), whic prescribed manner with the Minister, or with any Irish diplomatic mission or consular office, nuptial citizenship: provided that—*
>
> *(a) the marriage is subsisting at the date of lodgment of the declaration, and*
>
> *(b) the couple are living together as husband and wife and the spouse who is an Irish citizen when the declaration is being lodged."*

49. It is clear that the requirement of living together for a three year period prior to acquiring Irish citizens

The first applicant's letter to the appeals officer
50. As mentioned above, the notice of appeal by Messrs. Trayers and Company, solicitors was accompanied applicant. She describes the daily telephone calls between her and the second named applicant, and this w phone bills. This included phone calls, Facebook contact and in particular Skype contact. Skype contact also younger children and the first applicant in her letter describes the relationship which was developing betwe second applicant. This letter and these issues do not appear to have been considered in the appeals officer communication is far different from the image in identified in Gorry. That is an image, proffered by MacEoc Vegas having met each other the day before. In my view there was an onus and an obligation on the appe letter of appeal from the solicitors but also and in particular the letter written by the first applicant and con

No immigration rules
51. In the absence of legislation and statutory instruments the courts are left with the policy documents an jurisprudence.

The jurisprudence of the Superior Courts
52. Some of the earliest judgments of the Court were:

1. *Pok Sun Shum v. Ireland* and

2. *Osheku v. Ireland.*

53. Costello J. in *Pok Sun Shum v. Ireland* said:

> *"It is accepted on the plaintiff's behalf that the court cannot act in any way as a court of app accepted by the defendant that the discretion given by the section is not an unfettered one; exercised by the Minister in accordance with the powers granted on him by the Oireachtais a fairly in accordance with the principles of natural justice."*

54. In *Osheku & Ors v. Ireland* Gannon J. stated that the interests and good of the State necessitates that entry of aliens, their departure, their activities and their duration of stay within the State. The protection o permits restrictions on the exercise of an individual's personal rights and consequently such rights are not

independently of the overall provisions of the Constitution. Accordingly the State's fundamental rights coul
Constitutional rights of the members of a family. (emphasis added). In each case the issue was one of dep
considered by the Supreme Court in *Cirpaci*. Judgment of the Supreme Court was delivered by Fennelly J.
Court as follows:

> *"The legitimate interest of the State in the control of immigration frequently conflicts with cl*
> *reunification. This has been recognised for more than twenty years by the European Court o*

Again the case of Cirpaci involved the refusal to revoke a deportation order. In the course of his judgment

> *"Turning then to the major arguments in the case, I do not think there is an unbridgeable ga*
> *respective counsel regarding the basic considerations affecting the exercise of the Minister's*
> *legitimate interest of the State in giving effect to its immigration policy and respect for famil*
> *the Constitution or the European Convention."*

Later, Fennelly J. says

> *"It is legitimate for the Minister to have regard to the duration of the marriage relationship w*
> *family rights in question. In the course of argument, a number of hypothetical cases were ex*
> *citizen might contract a marriage, valid under the laws of a remote jurisdiction, while on hol*
> *within days of the marriage, insist, to the point of demanding that the brevity of the marital*
> *her new spouse be granted a visa admitting him or her to reside in the State?" (This Court's*

For the other extreme Fennelly J. continued:

> *"At the other extreme would be an Irish citizen, who had lived abroad for many years, perha*
> *Such a person has, as a citizen, an undoubted right to return to reside in Ireland on retireme*
> *pose the constitutional question whether that person would have the right to be accompanie*
> *many years. For my own part, I have no doubt that such a right exists. It would not, of cour*
> *might be a notorious criminal."*

Fennelly J. referred to the balancing the competing considerations summarised by Lord Phillips in a passag
Secretary [2001] 1 WLR at p. 840 in which Lord Phillips stated

> *"(1) A state has a right under international law to control the entry of non-nationals into its*
> *obligations.*
>
> *(2) Article 8 does not impose on a state any general obligation to respect the choice of resid*
>
> *(3) Removal or exclusion of one family member from a state where other members of the fa*
> *necessarily infringe article 8 provided that there are no insurmountable obstacles to the fam*
> *origin of the family member excluded, even where this involves a degree of hardship for son*
>
> *(4) Article 8 is likely to be violated by the expulsion of a member of a family that has been l*
> *circumstances are such that it is not reasonable to expect the other members of the family t*
>
> *(5) Knowledge on the part of one spouse at the time of marriage that rights of residence of*
> *against a finding that an order excluding the latter spouse violates article 8.*
>
> *(6) Whether interference with family rights is justified in the interests of controlling immigra*
>
> *(i) the facts of the particular case and*
>
> *(ii) the circumstances prevailing in the state whose action is impugned."*

The judgment of Fennelly J. in *Cirpaci* sums up the jurisprudence of the courts in relation to immigration m

Article 8 of the European Convention on Human Rights.

55. Complaint is made by counsel for the applicant that the decisions of the respondent were based almost
There is barely a mention of the provisions of Article 41 of the Constitution and I now propose to consider

56. The Constitution is the fundamental law of Ireland. It guarantees certain fundamental rights. Articles 4
Article 41 is headed "The Family".

Article 41

> *"1.1 The State recognises the Family as the natural primary and fundamental unit group of S possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.*
>
> *1.2: The State, therefore, guarantees to protect the Family in its constitution and authority, and as indispensable to the welfare of the Nation and the State."*

The European Convention on Human Rights, as amended by number of Protocols, considers that this decla and effective recognition and observance of the rights therein. In considering that one of the aims of the C greater unity between its members and that one of the methods by which that aim is to be pursued is the human rights and fundamental freedoms.

57. Article 8 provides:-

> *"Right to respect of private and family life*
>
> *1. Everyone has the right to respect for his private and family life, his home and his correspo*
>
> *2. There shall be no interference by a public authority with the exercise of this right except s and is necessary in a democratic society in the interests of national security, public safety or country, for the prevention of disorder or crime, for the protection of health or morals, or for freedoms of others."*

58. The European Convention on Human Rights Act 2003 represents the interpretive model of incorporatio 2 in the interpretation of laws under the interpretation of laws provides:-

> *"2.—(1) In interpreting and applying any statutory provision or rule of law, a court shall, in s rules of law relating to such interpretation and application, do so in a manner compatible wit Convention provisions."*

Section 3 provides:-

> *"3.—(1) Subject to any statutory provision (other than this Act) or rule of law, every organ o in a manner compatible with the State's obligations under the Convention provisions."*

It appears to this Court that in balancing the rights of the State with the rights of the applicants, the respo Article 41 of the Constitution and Article 8 of the European Convention on Human Rights. It appears to me to consider one only. Whilst mention is made briefly of the constitutional rights of the Constitution in both provisions of Article 8 of the European Convention on Human Rights. It is interesting that the notice of app solicitors, also deals with Article 8 of the European Convention on Human Rights.

59. The judicial review proceedings in this case are particularly novel as almost all the decisions in this are Clearly the second named respondent is not in the same position as a person who has entered the State a "over-stayer".

60. However in considering the task of the Minister in balancing potential competing interests in a proporti the provision of the most recent decisions of this Court in *Gorry, X. A. (a minor) & Ors v and EA and PA (a friend BA)*. In each of these cases the Judges of the High Court have emphasised the family rights protecte Hogan J. has emphasised that the rights thereby conferred under Article 41 cannot be regarded as being p substance of which must be respected at all times. And in particular Hogan J. in X.A states that:

> *"the Minister's decision must always respect the essence and substance of the right of the m decision which, in practice, compels the couple to life more or less permanently apart is, by interference by the State with a core principle valued and protected by Article 41. Such a de requires compelling justification: see, e.g., my own judgment in S. v. Minister for Justice, Eq 92. While the necessity to uphold the common good and the integrity of the asylum system nonetheless imperative that the respective rights of the applicants and the interests of the S Minister."*

It appears to me that in this case the appeals officer did not pay sufficient attention to, or consider approp

Decision
61. The appeals officer:

> 1. Failed to have regard to the letter from the first applicant setting out the contact between named applicant particularly with regard to the most recent developments of social media
>
> 2. The appeals officer did not consider appropriately the provisions of Article 41 of the Const definition compelled the couple to live more or less permanently apart and which is a very si with the core principle valued and protected by Article 41.

62. In these circumstances the Court will grant an order of certiorari quashing the decision of the appeals o applicant and direct that the application be considered anew by the appeals officer.

63. It is of course better for the applicants to consider what submissions need to be made to the appeals o application for a visa.

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1 This matter has considered several times, including by the UK Court of Appeal in R (Mahmood) v. Home S Court of Human Rights in Appl. No. 54273/00 Boulif v. Switzerland 2nd August 2001

2 In this regard it is relevant to note that the couple could not have been aware of the precarious nature o status if he were to apply for a visa and/or some right of residence and that on no occasion were the coupl Nwoke would be granted a visa or any right of residence in Ireland.

3 Appl. No. 265/07 Darren Omeregie v. Norway, 31st July, 2008

4 Citizens Information, Exceptional and urgent needs payments, available at:
http://www.citizeninformation.ie/en/social_welfare_payments/supplementary_welfare_schemes/exception
17th June, 2014)