Neutral Citation: [2014] IEHC 62

THE HIGH COURT

JUDICIAL REVIEW

[2009 No. 966 J.R.]

BETWEEN

F.E. (A MINOR ACTING BY HER FATHER AND NEXT FRIEND M.E.) AND, B.E. (A MINOR ACTING BY HIS FATHER AND NEXT FRIEND M.E.) AND, M.A.E. (A MINOR ACTING BY HIS FATHER NEXT FRIEND M.E.) AND M.E. AND E.E.

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on 14th day of February, 2014

1. The court has already given its judgment on this application for an order of *certiorari* by way of judicial review quashing the deportation order issued against M.E. on 27th August, 2009. A declaration was also sought that the legal and/or constitutional rights of the applicants and/or their family rights under the European Convention on Human Rights had been infringed. Leave to apply for judicial review had been granted on 16th February, 2011 (Hogan J.) on a single ground that:-

> "The decision of the respondent to make a deportation order against the fourth named applicant on the basis that the legitimate aim of the state to prevent crime and disorder constituted a substantial reason associated with the common good which required his deportation, having regard to the conviction recorded against him, was disproportionate in the all the circumstances, in that it infringed the applicants' constitutional and Convention rights."

2. The circumstances and background to the case are fully set out in the judgment of the court and the application was refused for the reasons set out in the judgment.

3. The applicants now seek leave to appeal this judgment to the Supreme Court pursuant to the provisions of s. 5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000, which provides that leave cannot be granted unless the 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 be taken.

4. Written submissions were furnished by both parties on this application for a certificate, and were elaborated upon in oral argument, but the court is not persuaded that the test laid down under s. 5(3)(a) has been met.

5. The point upon which a certificate is sought is as follows:-

> "1. Whether in applying the test or principle reaffirmed by the Supreme Court in the case of *Meadows v. the Minister for Justice, Equality and Law Reform* in an application to quash a decision made by the respondent to deport a non-EU national who was the parent of minor Irish citizens, the High Court was correct in law in exercising its jurisdiction in judicial review on the basis that:-
>
> • It is not sufficient that an application merely asserts that the decision is irrational, unreasonable and disproportionate and invites the court to reassess the balance of reasonableness as between the interests of the state and the rights and interests of the applicant and the child or family concerned;
>
> • The court is entitled to require the applicant to identify the particular error, omission or other flaw in the Respondents' reasons or assessment of the case which is claimed to render the decision irrational, unreasonable or disproportionate."

This point is the same as a point of law certified under s. 5(3)(a) in the case of *Lofinmakin (An infant acting by her father and next friend Akintola Lofinmakin) & Ors (Applicants) v. the Minister for Justice, Equality and Law Reform & Ors (Respondents)* [2011] IEHC 116 by Cooke J. following a refusal of leave to apply for judicial review in that case.

6. Section 5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000, provides:-

> "The determination of the High Court of an application for leave to apply for judicial review…or of an application for such judicial review shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case except with the leave of the High Court which leave shall only be granted where 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."

7. McMenamin J. in *Glancre Teoranta v. An Bord Pleanála* [2006] IEHC 205 in considering the principles to be applied to a consideration of an application for a certificate stated:-

> "1. The requirement goes substantially further than that a point of law emerges in or from the case. It must be one of exceptional importance being a clear and significant additional requirement.
>
> 2. The jurisdiction to certify such a case must be exercised sparingly.
>
> 3. The law in question stands in a state of uncertainty. It is for the common good that such law be clarified so as enable the courts to administer that law not only in the instant, but in future such cases.

5. The point of law must arise out of the decision of the High Court and not from discussion or consideration of a point of law during the hearing.

6. The requirements regarding "exceptional public importance" and "desirable in the public interest" are cumulative requirements which although they may overlap to some extent require separate consideration by the court (*Raiu*).

7. The appropriate test is not simply whether the point of law transcends the individual facts of the case since such an interpretation would not take into account the use of the word "exceptional".

8. Normal statutory rules of construction apply which mean, *inter alia*, that "exceptional" must be given its normal meaning.

9. "Uncertainty" cannot be "imputed" to the law by an applicant simply by raising a question as to the point of law. Rather the authorities appear to indicate that the uncertainty must arise over and above this, for example in the daily operation of the law in question.

10. Some affirmative public benefit from an appeal must be identified. This would suggest a requirement that a point to be certified be such that it is likely to resolve other cases."

8. It is now submitted that this Court in its judgment approached the question of proportionality incorrectly by requiring the applicants to show that important matters were not considered at all in the respondent's determination, or that the decision was irrational or unreasonable. It is claimed that the applicants should not be required to identify particular or specific errors in the proportionality determination and that a decision to deport may be found to be disproportionate in circumstances other than where the decision is deemed to be irrational or unreasonable according to the principles set out in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642, and *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. Furthermore, it is said that the court's application of the principles set out in *Meadows v. Minister for Justice* [2010] 2 I.R. 701 by the Supreme Court was incorrect.

9. This Court in its application of the *Meadows* principles applied what is acknowledged to be the repeated and consistent interpretation by the High Court of that decision as expressed by Cooke J. in *I.S.O.F. v. Minister for Justice, Equality and Law Reform (No.2)* [2010] IEHC 457, in which he stated as follows:-

> "Where the validity of an administrative or quasi judicial decision comes before the court on judicial review, the Court's starting point is the decision itself; the basis upon which it has been reached and the process by which it has been decided. It does not have before it an appeal against the decision, much less a merits-based appeal by way of re-adjudication of the original issue. Its jurisdiction is based upon the content of the decision and the law applicable thereto. Where the challenge to the decision is based upon the assertion that it has the effect of intruding disproportionately upon the fundamental rights of those affected by it, it is the duty of the court to assess whether the applicant demonstrates that it is disproportionate in the sense of being irrational or unreasonable according to the Keegan/O'Keeffe test. It does so by reference to the evidence, information and documentation available to or procurable by the decision maker at the time. It does not take account of new information or evidence which has become available since the decision was made. (In the case of a deportation order the remedy in that regard lies in an application for revocation under s. 3(11) of the Immigration Act 1999, a decision which is itself susceptible to judicial review for proportionality where necessary.) In the judgment of the Court no material difference exists between the evaluation of proportionality as regards the interference with "qualified rights" (as in the present case) and "absolute rights" (as in the case of Meadows). If constitutional rights are in issue (whether absolute or qualified) it is the function and duty of the High Court to vindicate them. The same can be said for rights entitled to protection under the European Convention of Human Rights and the need for the High Court, in compliance with Article 13 of the Convention, to provide an effective remedy for that protection… It remains the case however… that judicial practice in the exercise of the judicial review function is capable of adapting to accommodate the need to examine the substantive content of a decision having impact on fundamental rights in order to evaluate the lawfulness of its encroachment on those rights without thereby supplanting the administrative decision with a new decision of its own… By examining the substance of the effect of an interference brought about by an administrative decision on fundamental rights of an applicant for judicial review in order to assess whether it goes beyond a lawful encroachment, the Court is not substituting its own view of what the decision ought to be but is testing it by reference to what is objectively reasonable and commonsense."

10. The applicants claim that they are entitled to request that the High Court itself assess the proportionality of the decision to deport rather than defer to the assessment of the respondent in the sense that the court will refrain from quashing a decision unless it can be said to be unreasonable or irrational as set out in *I.S.O.F.* It is contended that the principle of proportionality requires the reviewing court to assess the balance which the decision maker has struck and exercise its own judgment as to whether a decision affecting fundamental rights is disproportionate in its effects but should not constrain the court to uphold the respondent's assessment on proportionality provided it is not reached unreasonably or irrationally. It is submitted that an effective remedy requires the court to exercise its own judgment as to what, in the circumstances, is a disproportionate impact on those rights rather than to assess proportionality in a manner circumscribed by the common law rules applicable to judicial review.

11. This precise point was considered at length in *O.O.O.A. & Ors v. Minister for Justice, Equality and Law Reform* [2011] IEHC 78 in which a challenge was made to a deportation decision on the grounds that it was unreasonable and, therefore, disproportionate to expect a mother and her children to move to Nigeria to enjoy family life with the father who was facing deportation. It was contended that the Minister did not identify a "substantial reason" requiring the deportation of the father in accordance with the judgment of Denham J. in the Supreme Court in *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795. Furthermore, it was submitted that immigration control was not a reason of sufficient substance to outweigh the detriment that the deportation would inflict upon the applicant family, particularly following the decision in Meadows, which now required that proportionality be considered when reviewing the reasonableness of an administrative decision.

12. Clark J. noted that in the *Meadows* case Murray C.J. stated that:-

> "(When) 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."

The learned Chief Justice continued:-

> "When 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 also already well established that the court may do so when considering whether the Oireachtas has exceeded its constitutional powers in the enactment of legislation."

13. Clark J. reiterated that proportionality was a well established principle which had previously been applied by the Supreme Court in challenges brought by way of judicial review in deportation cases in *Fajujonu v. Minister for Justice* [1992] I.R. 151, and *A.O. & D.L. v. Minister for Justice* [2003] 1 I.R. 1. The learned judge noted that the principle of proportionality as applied in such cases as part of the reasonableness test was not a new concept introduced in the *Meadows* case. These judgments do not suggest that traditional common law rules in relation to the scope of judicial review have changed and importantly affirm that the judicial review court is not a court of appeal. She noted that *Meadows*:-

> "affirms that it is the Minister who retains the discretion and not the reviewing court as it is only the Minister who has responsibility for public policy in this area and it is for him to decide where that balance lies."

Indeed, Clark J. considered that *Meadows* was an unequivocal statement that the law relating to the deportation of the parents of citizen children and of judicial review remained unchanged.

14. It was emphasised in the *Meadows* case that the decision maker was entitled to a wide measure of discretion under section 3. Murray C.J. stated at para. 70 that:-

> "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."

15. Denham J. (as she then was) in *Meadows* when applying the relevant principles of judicial review to decisions affecting an applicant's fundamental rights stated, *inter alia*:-

> "(f) the court should have regard to the implied constitutional limitation of jurisdiction of all decision makers which affects rights, and whether the effect on the rights of the applicant would be so disproportionate as to justify the court in setting it aside on the ground of manifest unreasonableness."

The learned judge also noted that:-

> "[180] This test includes the implied constitutional limitation of jurisdiction of all decision making which affects rights and duties. *Inter alia*, the decision maker should not disregard fundamental reason or common sense in reaching his or her decision. The constitutional limitation of jurisdiction arises, *inter alia*, from the duty of the courts to protect constitutional rights. When a decision maker makes a decision which affects rights then, on reviewing the reasonableness of the decision:-
>
> (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on irrational considerations;
>
> (b) the rights of the person must be impaired as little as possible; and
>
> (c) the effect on rights should be proportional to the objective."

16. Fennelly J. noted that the two fundamental principles to be respected in rules for judicial review of administrative decisions were, firstly, that the decision is that of the administrative body and not of the court and the latter may not substitute its own view for that of the former. Secondly, the system of judicial review required that fundamental rights be respected. The issue in the case was whether the judicial review principles in the *Keegan* and *O'Keeffe* cases were suited to the task of ensuring that the fundamental rights of applicants were respected. The learned trial judge considered that it was unnecessary to change the test provided in *Keegan* and *O'Keeffe*. The test was capable of according an appropriate level of protection of fundamental rights. As quoted in the court's judgment in this case Fennelly J. stated:-

> "449. I would say that a court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied on the basis of evidence produced by the applicant, that the decision is unreasonable in the sense that it plainly and unambiguously flies in the face of fundamental reason and common sense. I use the word "substantive" to distinguish it from procedural grounds and not to imply that the courts have jurisdiction to trespass on the administrative preserve of the decision maker. This test properly applied, permits the person challenging the decision to complain of the extent to which the decision encroaches on rights or interests of those affected. In those cases, the courts will consider whether the applicant shows that the encroachment is not justified. Justification will be commensurate with the extent of the encroachment. The burden of proof remains on the applicant to satisfy the court that the decision is unreasonable in the sense of the language of Henchy J. (in Keegan). The applicant must discharge that burden by producing relevant and cogent evidence.
>
> 450. This does not involve a modification of the existing test as properly understood. Rather it is an explanation of principles that were already implicit in our law."

He reaffirmed that the judgment implied no view on how the application for judicial review in Meadows should be decided in the High Court "except insofar as it explains the applicable test for review on the ground of unreasonableness. It will be for the High Court to decide whether the applicant has provided sufficient evidence to discharge the burden which rests on her to show that the decision of the first respondent was, recalling once more the words of Henchy J. "fundamentally at variance with reason and common sense"".

17. The majority judgment in *Meadows* is clear that judicial review is not to be viewed as an appeal from the administrative decision and that the burden of proof remains upon an applicant to establish by cogent evidence that the challenged decision was unreasonable in that it was disproportionate in the sense explained in the judgments.

18. In *Donegan v. Dublin City Council & Anor* [2012] IESC, the Supreme Court considered the provisions of s. 62 of the Housing Act 1966, which required a District Court to make an order for possession of a local authority house if a number of formal proofs were established under the section. The occupier had no right or entitlement to raise any defence to this application other than by way of challenging the housing authority in respect of these proofs. The absence of a judicial discretion meant that the personal circumstances of the occupier had to be disregarded as being irrelevant. The proportionality or fairness of the making of the order was also irrelevant and could not be taken into account in the statutory scheme. The applicant challenged the making of a decision under s. 62 on the basis that it failed to provide an effective remedy for alleged breach of the applicant's family rights under Article 8 of the European Convention on Human Rights as required by Article 13 of the Convention. The Council contended that an effective remedy was available to the applicant by way of judicial review having regard to the jurisdiction of the court to consider the "proportionality" of the decision at the judicial review stage. However, no facts were or could have been considered by the District Court on an application for a warrant. It was submitted that personal or family circumstances could be considered in judicial review proceedings in assessing the proportionality of the decision even though these facts would, for the first time, be canvassed and considered by way of judicial review in the High Court. The Supreme Court was satisfied that the factual issues in the case as to whether the son of the family was a drug addict or a drug pusher, or whether he was residing in the house for a particular period, were not issues to be determined for the first time on an application for judicial review. Although the High Court could set aside a decision unlawfully made, that would inevitably leave the basic issues of fact unresolved. The court could not make its own findings of fact and substitute a decision based on those findings for that made by the decision maker. McKechnie J. (delivering the unanimous decision of the court) noted that any challenge by way of judicial review to the District Court warrant, absent a patent failure to comply with the section itself, was bound to fail and the court could not enter into an assessment of the facts and personal circumstances behind the application in the course of a judicial review.

19. The traditional scope of the remedy was reaffirmed by the Supreme Court. McKechnie J. stated:

> "130. The Council have submitted that the Supreme Court decision in Meadows…has noticeably changed the scope of judicial review, and that, therefore, notwithstanding that such remedy may not have been a sufficient safeguard in the past, it is now clear that it is. In particular, it is argued that *Meadows* has incorporated a consideration of proportionality in judicial review, where an administrative decision bears on constitutional or Convention rights.
>
> 131. In this regard the decision of Murray C.J. at p. 723 should be noted:-
>
> > '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…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 where it could be considered relevant.'
>
> It is clear from this statement, that although some extension of judicial review for reasonableness is envisaged so as to take account of the proportionality of the action, it is to be done on the basis of *Keegan* and *O'Keeffe*, rather than as an entirely novel criterion. As Fennelly J. noted at p. 817 in the same case:-
>
> > 'Two fundamental principles must, therefore, be respected in the rules of judicial review of administrative decisions. The first is that the decision is that of the administrative body and not of the court. The latter may not substitute its own view for that of the former. The second is that the system of judicial review requires that fundamental rights be respected.'
>
> Thus, although some consideration of fundamental rights may be entered into in judicial review, this in no way affects the traditional position that such remedy cannot be used as a rehearing or otherwise to determine conflicts of fact.
>
> 132. In light of the comments already made as to the adequacy of judicial review, I would not find that *Meadows* has substantially altered that position in this regard."

20. The approach in *I.S.O.F.* was also applied in *Orji v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Cooke J., 1st October, 2010) and in *F. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 386 in which Cooke J. stated:-

> "Contrary to the implication of the argument made by counsel for the applicants, the High Court is not entitled or obliged to re-examine the case with a view to deciding whether, in its own view, the correct balance has been struck. To do so would be substitute its own appraisal of the facts, representations and circumstances for that of the Minister."

Cooke J. reiterated that it was the duty of the court to assess whether the applicant had demonstrated that the decision was disproportionate in the sense of being irrational or unreasonable according to the *Keegan/O'Keeffe* test.

21. The applicants rely upon the decision of Hogan J. in *P.S. & B.E.* [2011] IEHC as authority for the proposition that the Meadows decision permitted an assessment by the High Court of the proportionality of the respondent's interference with the constitutional rights of the applicants' simpliciter. There is no discussion of the *Meadows* decision in *P.S. & B.E.* It is clear that the learned judge in that case assessed the evidence adduced on behalf of the applicants relating to the material which was before the Minister at the time the decision was made to deport B.E. and concluded that the decision involved an "entirely unrealistic and totally unbalanced assessment" of the prospects of P.S. visiting his wife in Nigeria. The applicant husband lived on disability payments, suffered from intellectual disability and bi-polar disorder, was dependent on the daily support of a religious order to enable independent living in the community and was assessed twice a month by an educational psychologist. The decision was held to be disproportionate and "unreasonable in law". I do not accept that this decision is at variance with the decision of this Court in the application of the *Meadows* principles.

22. Though the applicants on this application rely upon the decision of Hogan J. in *Efe & Ors v. Minister for Justice, Equality and Law Reform & Ors (No.2)* [2011] IEHC 214, it is clear that the learned judge in that case adopted what he regarded as "the succinct and comprehensive summary of the present law contained in the judgment of Cooke J." in *I.S.O.F. v. Minister for Justice, Equality and Law Reform (No.2)* concerning how the Meadows decision ought to be applied to a challenge by way of judicial review in deportation cases. As noted by Hogan J. *I.S.O.F.* was a decision in which a certificate of leave to appeal to the Supreme Court in order to clarify aspects of *Meadows* was refused by Cooke J..

23. The applicants also rely upon the decision of Clark J. in *S(B) & Ors v. Minister for Justice, Equality and Law Reform* [2011] IEHC 417 and contend that the learned judge looked at the affect of the decision of the respondent on the constitutional rights of the applicants' family and weighed whether it was proportionate viz a viz the protection of the integrity of the State's immigration system. In that case the applicants challenged the decision by the Minister to revoke a deportation order made under s. 3(11) of the Act on the basis, *inter alia*, that the respondent had failed to consider the right of the citizen children to the care and company of their father who was the subject of the deportation and failed to consider the different circumstances which existed following the deportation six years earlier. The learned judge stated at para. 32:-

> "The format of the consideration of the application gives little assurance of any appreciation that this was not a challenge to his deportation or that B.S. was not seeking to remain on humanitarian grounds but rather, that he wished the Minister to lift the lifelong exclusion from Ireland which followed the deportation order. The existence of this constitutionally protected family in Ireland was not recognised as a fundamental change of circumstances since he was deported in early 2003. Considering the completely fresh set of facts presented with the entirely new identified constitutional rights, it is almost inconceivable that the Minister is standing over the near mechanical recital of those submissions received. Those identified constitutional rights deserved a more significant recognition in the purported balancing exercise which followed. It cannot be a sufficient examination of a child's constitutional rights to say that they are not absolute that each child is entitled to Nigerian citizenship and that the child, T., was of an adaptable age when those children at nine and six were Irish citizens living in Ireland since their birth with their mother who had been here for ten years."

It was held that this was not a true examination of the circumstances advanced and was not in accordance with the principles set out in the Supreme Court judgment in *Oguekwe*. Furthermore, it was held that the main ground for setting aside and quashing the respondent's decision was that he simply misunderstood or mischaracterised the nature of the application. This is not only consistent with the proper application of the principles in *Meadows*, but is in accordance with the learned judge's view as to the affect of the *Meadows* decision as set out in detail in her judgment in the *O.O.O.A.* case already discussed.

24. Hogan J. in *Efe* held that the constitutional rights of the applicants were adequately vindicated by the common law rules of judicial review following the *Meadows* decision. He also concluded that the *Meadows* principles satisfied the requirements of Article 13 of the European Convention on Human Rights and that there was no basis for granting a declaration that the rules of judicial review were unconstitutional because they did not provide an effective remedy sufficient to satisfy the requirements of Article 13.

25. In the *Illegal Immigrants (Trafficking) Bill 1999* [2000] 2.I.R. the Supreme Court in finding that s. 5 of the Bill was not repugnant to the provisions of the Constitution noted that all of the matters (including deportation orders) fell to be decided in an administrative process by persons authorised by law to do so:-

> "It is not the function of the courts to decide such matters anew on their merits but to determine the validity of the decision taken as a question of law."

26. In this case a number of matters were advanced to this Court as to why the decision to deport the applicant was disproportionate. These were:-

> (i) That the deportation order required him to remain outside the state indefinitely resulting in a permanent disruption of family life which engaged the rights under Articles 41and 42 of the Constitution.
>
> (ii) The best interests of the children were not served by the making of the deportation order;
>
> (iii) It was unreasonable to expect the applicant wife and children to move to Nigeria to be with M.E.;
>
> (iv) E.E. would be left to look after the children alone in the state without the support of her husband;
>
> (v) The children were not of an adaptable age and it was not in their best interests that their father be deported;
>
> (vi) If the children were required to live in Nigeria they would suffer disadvantages in their upbringing there rather than in Ireland and would not be able to avail of the same level of education and other opportunities (including health protection) as would be available in this State;
>
> (vii) The deportation order was unreasonable because the applicant had been convicted of an offence in respect of which a relatively short term of imprisonment had been imposed, which he had served and following which he had a clean record and had not come to the adverse attention of the authorities up to the time of the making of the order.

27. The court examined all of the matters advanced by way of criticism of the deportation order as disproportionate in the context of the fundamental rights of the applicants under the Constitution and Article 8 of the European Convention on Human Rights and determined that the applicants had not discharged the onus of proof required to establish that the decision was unreasonable in the sense that it was disproportionate within the meaning of the *Meadows* case.

28. As repeatedly stated by the Supreme Court, judicial review is not a form of appeal and the onus of proof lies upon the applicant to demonstrate that the impugned decision is fundamentally flawed. In this case the court has determined that the applicants have failed to do so. It was clearly incumbent upon the applicants to demonstrate by reference to the impugned decision the factors which establish the disproportionality for which they contended. As already indicated, the applicants advanced such factors but the court rejected the challenge for the reasons set out in the judgment.

29. To that extent, this case is distinguishable from the case in which the point of law was certified in *Lofinmakin (an infant) v. Minister for Justice, Equality and Law Reform* [2011] IEHC 38 by Cooke J. That was an application for leave to apply for judicial review in which an order of *certiorari* was sought quashing a deportation order made against a Syrian businessman who had visited the country on temporary visas on previous occasions in order to visit his wife and children. The challenge was based on a total of twenty six grounds, five of which were later abandoned. Four other grounds failed to specify with adequate precision the exact illegality or other flaw in the deportation order which it was sought to quash.

30. The main ground relied upon was that the applicants were entitled to an effective remedy under Article 13 of the European Convention on Human Rights and that judicial review did not provide such a remedy because of "common law constraints". The applicants sought a declaration that the judicial review remedy was ineffective and incompatible with the state's obligation under Article 13 of the Convention. However, the applicants had not pleaded that their fundamental rights had been violated by the

deportation order and that the violation could not be adequately remedied by appropriate reliefs based on the infringement of their rights under the Constitution or otherwise under national law. This was a condition precedent to seeking a declaration of incompatibility under s. 5 of the European Convention on Human Rights Act 2003, and in accordance with the decision of the Supreme Court in *Carmody v. Minister for Justice, Equality and Law Reform* [2009] IESC 71. An application to amend the statement of grounds to allow these issues to be canvassed was refused. Apart from the fact that the amendment would prejudice the respondents in their conduct of the case, the court considered that the matter had already been answered by Clark J. in *N.B. & Ors v. Minister for Justice and Law Reform* (Unreported, High Court, 30th July, 2010, at paras. 39 – 60). The court indicated that it was not necessary to rule again on that issue but outlined its reasons why this was so extensively at paras. 19 to 51 of the judgment.

31. Cooke J. noted that:-

> "21. The Supreme Court has also made it clear in cases such as *Dimbo v. Minister for Justice, Equality and Law Reform* [2008] IESC 26 and *Oguekwe v. Minister for Justice, Equality and Law Reform* [2009] 3 I.R. 795, that where the Minister is considering whether to make a deportation order in circumstances where its effect will impinge upon fundamental rights of the applicant and his or her family members, he has an obligation to consider a wide range of matters (" the factual matrix"), including the personal and family circumstances of the persons concerned and the potential interference with their rights. (See, in particular paragraph 85 of the judgment of Denham J. in *Oguekwe*). The Minister must have a substantial reason for making the deportation order and all relevant factors and principles must be weighed in a fair and just manner so as to arrive at a reasonable and proportionate decision. That is the test of the validity of the decision to make the deportation order. While the High Court on judicial review does not substitute its own view as to whether a deportation order ought to be made or not, it can consider its lawfulness by reference to that test and set it aside if the result achieved in balancing those considerations is so clearly lacking in proportionality as to render its unreasonable or irrational. The so called "common law constraints" do not therefore preclude the High Court in the exercise of its judicial review function from assessing the substantive lawfulness of the decision in that regard."

32. The court also concluded that the case law of the European Court of Human Rights did not support the applicants' argument that the only "effective remedy" under Article 13 in respect of a deportation order, which it was contended unlawfully interfered with the protection of family and private life rights under Article 8 of the Convention, could be a judicial remedy offering a *de novo* re-adjudication of the merits of the deportation decision and that such a remedy was unavailable from the High Court within the constraints of O. 84. Cooke J. noted:-

> "39. …as already pointed out earlier in this judgment, the Supreme Court in *Meadows* has confirmed the entitlement and duty of the High Court in reviewing the lawfulness of a deportation order which encroaches upon the constitutional rights and Convention protection of a deportee and his family members, to examine the substantive reasons put forward by the Minister in justification of the balance sought to be struck between those personal rights and the aims or interests of the state sought to be safeguarded and to satisfy itself that the resulting decision is not unreasonable or irrational because the balance struck is disproportionate in its encroachment on those rights."

33. Cooke J. in a judgment delivered on 25th March, 2011, granted a certificate of leave to appeal to the applicants in *Lofinmakin* on grounds which are identical to those which this Court is now invited to certify. The learned judge stated that the proposed ground was based upon the finding in *Lofinmakin* in an application for judicial review of a narrative decision that it is not sufficient that the court be invited to re-evaluate the substantive decision which is challenged and, in effect, to substitute its own view of the merits of the application which the contested decision determines. The learned judge stated at para. 7 that:-

> ". . . The court is motivated to grant the certificate because of the very large number of cases in which reliance is sought to be placed by applicant parties upon the law as stated by the Supreme Court in its judgment…in *Meadows*. Although the court had endeavoured in its judgment to outline its own understanding of the state of the law following that judgment as regards the test of rationality or reasonableness in law of decisions of this character, a very large number of cases are currently pending before the High Court in the asylum list in which it is asserted that the Meadows judgment is authority for the proposition that the High Court has jurisdiction and an obligation to examine the substantive merits of the challenged decision of the respondent and, where appropriate, to effectively substitute its own evaluation of the representations made to the Minister against deportation where the court considers the Minister's decision to be disproportionate in the balance struck."

He noted that the issue transcended the circumstances of that case and potentially affected many others. He concluded that the issue of proportionality may extend to other quasi judicial or administrative decisions affecting constitutional rights and would be of exceptional public importance for that reason. He was, therefore, disposed to grant a certificate. The case late became moot and did not proceed [2013] IESC 49.

34. It is clear that Cooke J. considered the law in the matter to be settled and, indeed, had refused to certify a similar point in the *I.S.O.F.* case. Furthermore, his certification predates the decision of the Supreme Court in *Donegan* which effectively affirmed the decision in *Meadows* and, in my view, supports the approach in the various decisions of the High Court on this issue which have sought to apply the *Meadows* decision in the asylum immigration area. In my view the continued assertion that the High Court has a jurisdiction and obligation to examine the substantive merits of a challenged decision and effectively substitute its own deportation decision when the court considers the Minister's decision to be disproportionate is, in the light of present authorities, incorrect and does not give rise to a point of law of exceptional public importance that requires resolution by the grant of a certificate.

35. I am not satisfied that any of the cases cited in argument support the proposition advanced by the applicants.

36. The applicants in *Lofinmakin* did not identify a precise basis upon which the alleged disproportionate nature of the decision in that case could be challenged. It was clear that generalised grounds were unacceptable as a basis upon which to seek leave. Cooke J. emphasised the imprecise nature of the grounds advanced. In this case the precise ground was formulated by Hogan J. in granting leave to apply for judicial review namely that, having regard to the conviction recorded against the applicant, the decision to make a deportation order against him was disproportionate in that it infringed his constitutional and conventional rights. That precise ground provided a framework within which to advance the criticisms of the decision to which I referred earlier. Thus, the nature of the question formulated in *Lofinmakin* cannot be transposed simpliciter to the single ground in this case which was not a simple assertion that the decision was unreasonable and disproportionate and, in fact, identifies the particular error which is claimed to render the decision flawed. Therefore, I am not satisfied that the question submitted requires to be answered to enable the court to reach its decision. Furthermore, a point of law certified under s. 5(3)(a) must be determined, not in the abstract, but within the context and on the basis of the facts and circumstances of the particular case.

37. For all of the above reasons, the court is not satisfied to certify that the decision in this case involves a point of law of exceptional public importance or that it is desirable in the public interest that an appeal should be taken to the Supreme Court. I am satisfied that the legal point in the form of the question posed does not arise in this case. I am not satisfied that the common law rules in respect of judicial review or their adequacy as an effective remedy under Article 13 of the European Convention on Human Rights or the Constitution are in a state of uncertainty. The standard applicable to judicial review concerning the issue of proportionality and *de novo* hearings has been addressed fully by the Supreme Court in the *Meadows* case and subsequently, in the *Donegan* case. Those principles have been applied consistently in the High Court. The applicants cannot simply impute or create uncertainty concerning a point of law by repeatedly raising one which in the courts view has already been decided. In any event, I am not satisfied that the question as framed arises out of the court's decision in this case.