Neutral Citation Number: [2009] IEHC 500

THE HIGH COURT

JUDICIAL REVIEW

2009 629 JR

BETWEEN

T. M., J. M., G. M.

(A MINOR SUING BY HIS MOTHER AND NEXT FRIEND T. M.)

M. M. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND T. M.)

AND L. W.

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice John Edwards delivered on the 23rd day of November, 2009

Background to the proceedings

1. The first and second named applicants are wife and husband, respectively, and the third and fourth named applicants are their children. They are all Irish citizens. The first named applicant is a director of a company, Nua-Tech Limited, of which she is the founder, and which provides translation/interpreting services and training. The second named applicant is in fulltime employment in RTÉ. They own their own house and are financially secure.

2. The fifth named applicant is the mother of the first named applicant and the Grandmother of the third and fourth named applicants. She is a Chinese citizen. She is a widow and it is claimed that she is now dependent on her daughter and son-in-law (the first and second named applicants).

3. The fifth named applicant has travelled to and from the State on a number of occasions to visit her daughter, son-in-law and grandchildren and to help with the grandchildren. On 4th June, 2008, she entered the State on a C-visit visa and was given permission to remain in the State until 3rd September 2008. By letter dated 21st July, 2008, the first named applicant applied to the respondent for an extension of the fifth named applicant's permission to remain, and assured the respondent that she would not be a burden on the State. That application was refused and the refusal was communicated by letter of 5th of August, 2008, from a Ms. Eileen O'Reilly, of the General Immigration Division of the Irish Naturalisation and Immigration Services (INIS) section of the respondent's Department, to the first named applicant. This letter noted that the fifth named applicant, having previously applied for, and having been granted, a visa for the stated purpose of a short term visit to the State, was allowed to enter the State on 4th June, 2008, and was granted leave to stay for ninety days. The letter continued:

> "To preserve the integrity of the visa system, individuals in possession of this type of visa cannot have their permission to remain in the State extended. They must leave and reapply from outside the State, should they wish to return. They should include in their new visa application information outlining the purpose and duration of their intended stay.
>
> Following consideration of the individual circumstances of this case, including all of the matters known to us and which were adverted to in your letter, Ms W.'s position does not warrant an extension of her permission to remain."

4. On 8th August, 2008, the first named applicant wrote to the General Immigration Division of the respondent's Department and urged a reconsideration of the decision to refuse to extend the fifth named applicant's permission to remain. The letter pointed out that the fifth named applicant had been granted an extension in similar circumstances when she had visited in 2001. Further, it stressed that she had always adhered strictly to the time limits on her visa and had never overstayed without permission. Further, it stressed that she would not be a burden on the State, and evidence was enclosed as to the first and second named applicants' financial circumstances, and of the fact that the fifth named applicant had private health insurance. It pointed out that the respondent had discretion in the matter by virtue of s. 4(7) of the Immigration Act 2004, and that to require the fifth named applicant to return to China and make a new application from there would impose an undue hardship on her, having regard both to her age and the distance involved.

5. The renewed application was also refused on the same grounds as before. The refusal was communicated by a letter dated 4th September, 2008, from a Ms. Barbara McKelvey of the General Immigration Division of the INIS section of the respondent's Department, to the first named applicant.

6. On 6th of October, 2008, the applicants applied for, and were successful in obtaining the leave of the High Court to challenge the decision of the respondent to refuse to extend the fifth named applicant's permission to reside in the State on the grounds, *inter alia*, that the respondent had adopted and had applied an inflexible policy position such that his decision did not represent a genuine and a judicial exercise of the discretion vested in him. These proceedings were later

settled and were struck out on confidential agreed terms on 17th November, 2008.

7. While the terms of the settlement have not been disclosed to me, it is common case that on the day that the settlement was ruled, the fifth named applicant was granted a six-month permit allowing her to reside in the State on "Stamp 3 conditions" which meant that she was not permitted to work.

8. On 8th April, 2009, the Immigrant Council of Ireland (hereinafter ICOI), whose help had been enlisted by the applicants, wrote to Ms. Eileen O'Reilly, a senior official in the General Immigration Division of the INIS section of the respondent's Department, on behalf of the applicants, requesting an extension of the fifth named applicant's permission to remain, on the basis that she should be permitted to register "on Stamp 4 conditions for a five-year period in line with the permission to remain granted to family members of EU nationals who are exercising Treaty Rights in the State." The letter stated, *inter alia,* that:

> "Ms W. who has no remaining family members in China, wishes to remain in Ireland with her daughter, T.M., and her family. She has been dependent on her daughter and son-in-law, who have been supporting her, both emotionally and financially, since her husband died eight years ago. Additionally, both J. and T.M. rely on Ms. W. to help with caring for the couple's two children and they believe that it is in the best interests of their children and Ms. W. for her to be permitted to remain with them."

The letter again emphasised that the fifth named applicant would not be a burden on the State, and up to date evidence was enclosed as to the first and second named applicants' financial circumstances and of the fact that the fifth named applicant had current private health insurance. It then concluded:

> "We submit that failure to permit Ms W. to extend her permission to remain would discriminate [against] her unfairly in comparison to non-Irish European Union citizens who are exercising their right to reside in Ireland under Directive 2004/38/EC. Such citizens are entitled to have their dependent parents reside with them in the State.
>
> Furthermore, a refusal to allow Ms. W. to continue living with her family in Ireland would not be in compliance with the State's duties to protect the rights of families under Article 41 of the Constitution and/or Articles 8 and 14 of the European Convention on Human Rights."

9. The Court has received evidence that an important difference between "Stamp 3 conditions" and "Stamp 4 conditions" is that under the former, the temporary resident cannot work, whereas under the latter, he/she can work. Further, the term of a "Stamp 4" residence permit is usually much longer than the term of a "Stamp 3" residence permit. While, as will be seen when I review the parties' respective arguments, counsel for the respondent has laid considerable emphasis on the entitlement of a person with a "Stamp 4" residence permit to work, it has been urged on me by counsel for the applicants that the primary motivation behind the application made on behalf of the fifth named applicant in this case for a "Stamp 4" residence permit, was to get a longer term permission for her "in line with the permission to remain granted to family members of EU nationals who are exercising Treaty Rights in the State", and that it has never been contemplated by any of the applicants, including the fifth named applicant herself, that she would seek or attempt to work in Ireland. The Court is satisfied to accept that this is so.

10. No immediate reply was received and the ICOI sent two reminders to the respondent's officials dated 12th of May, 2009, and 17th May, 2009, respectively. Both reminders drew attention to the fact that the fifth named applicant's permission to remain would, unless extended, expire on 17th May, 2009.

11. By a letter of 29th May, 2009, from Ms. McKelvey to the ICOI the application on behalf of the fifth named applicant for an extension of her permission to remain in the State was refused. The letter stated, *inter alia*:

> "Following consideration of the individual circumstances of this case, including all of the matters known to us and which were adverted to in your letter, Ms L.W.'s position does not warrant an extension of her permission to remain.
>
> In the light of the above, the application for an extension of permission to remain in the State in respect of Ms L.W. is refused. (Please see the attached Consideration Documents.)"

It further directed that the fifth named applicant should make arrangements to leave the State on or before 18th of May, 2009, (however, as that date had, by this stage, already passed, the court interprets this demand as requiring that she should do so immediately) and that upon leaving the State, she should, by 17th June, 2009, produce to the General Immigration Division of the INIS section of the respondent's Department evidence of her departure (*e.g.* a copy of the Chinese re-entry stamp on her Passport). Finally, it warned that in the event of a failure by the fifth named applicant to comply with these directions, the General Immigration Division would issue her with a notification under s. 3(4) of the Immigration Act 1999, (i.e. a proposal to deport her) and, further, that a failure to provide evidence of her departure from the State might be taken into account when considering any future visa applications.

12. The "Consideration Documents" referred to as being attached to the letter consisted, in fact, of one single two and a half page document entitled 'Application for Renewal of Permission (pursuant to s. 4(7) of the Immigration Act, 2004)', although this does, admittedly, refer internally to the letter of 8th April, from the IMOC, on the fifth named applicant's behalf, and to all of the enclosures that accompanied it. The document in question commences by setting out the name, address, date of birth, and nationality of the fifth named applicant. It then sets out the background to the case, including the circumstances of, and the basis for, her most recent entry into the State; the nature of the application then to be considered (i.e. for an extension of her permission to remain "on Stamp 4 conditions for a five-year period in line with the permission to remain granted to family members of EU nationals who are exercising Treaty Rights in the State"); a list of the documents submitted with the application, and the case made on her behalf, and the specific considerations highlighted by the IMOI. The court is satisfied that all of these things were fairly and accurately set out. It then states:

"It is noted that:

a. The purpose of Ms. L.W.'s journey was to visit the State. This was achieved when Ms. W. was granted leave to land on 4th June, 2008, and given permission to remain for ninety days.

b. Currently, under Irish Immigration legislation, there is no provision for an Irish National to bring in a non-EU national as their dependent to reside permanently in the State.

In accordance with the immigration laws of the State, Ms. L.W. is required to leave the State on or before 18th May, 2009, on expiry of her current permission to remain. However, once outside the State, there is nothing to prevent her from applying for a further visit visa for the purposes of re-entering the State for a specified period.

Recommendation

All representations made on behalf of Ms. L.W. in support of her application for an extension of permission to remain have been fully considered. Ms. L.W.'s position is not one which would warrant an extension of her permission to remain.

Therefore, I recommend that Ms. L.W.'s application for extension of permission to remain in the State be refused."

13. The letter of 29th May, 2009, was not received until 4th June, 2009. On 9th June, 2009, Ms. Hilkka Becker, in-house solicitor with the IMOI, wrote to Ms. McKelvey stating, *inter alia:*

"We request that the decision to refuse the extension of Ms. W.'s residence permit be reversed by return post, and at the latest, within 7 days from the date of this letter (failing which), we will have no option but to apply for the judicial review of the Minister's decision."

The first named respondent seems to have treated this letter as a request for reconsideration, but in any event, by letter of 19th June, 2009, a further refusal issued, in terms that:

"As per our letter of 29th May, 2009, and following consideration of the individual circumstances of this case, including all of the matters known to us and which were adverted to in your letter, Ms. L.W.'s position does not warrant an extension of her permission to remain."

In the light of the above, the application for an extension of permission to remain in the State in respect of Ms L.W. is refused."

These proceedings were then commenced by the applicant. In the meantime, the fifth named applicant did return to China and while there, applied for what is known as a "D-Reside Visa" to enable her to return to Ireland and reside with the other applicants as part of their family unit, pending the determination of her judicial review proceedings. She was not, in fact, granted a "D-Reside Visa", but instead, was granted a "C-Visit Visa". As the court understands it, a C-Visit Visa is a short-stay visa issued to a person who is intending to stay for ninety days or less for the purpose of tourism, visiting family or a friend, doing business, attending a conference, transit, and certain other purposes, whereas a D-Reside Visa is a long-stay visa that may be issued to those hoping to reside here for the purposes of employment, study, or to join, and reside on a long term basis with a spouse/partner/parent already residing here, as well as to certain other categories of persons. However, and this is an important point, a visa of either type is merely a permission to land and present oneself at the frontier of the State. Neither type of visa of itself confers any right of residence in the State.

The Applicants' Claim

14. The applicants seek leave to apply for an order of *certiorari,* an order of *mandamus* and certain other relief by way of judicial review, primarily with a view to having the respondent's decision of 27th May, 2009, to refuse to extend the fifth named applicant's permission to reside in the State quashed, in the first instance, and then to compel a reconsideration and re-determination of the application in question. The grounds upon which they seek such relief are pleaded in paragraphs 5(a) to 5(f) inclusive of the draft Statement of Grounds accompanying their application, and may be summarised as follows:

The applicants contend that the respondent acted unlawfully in:

• Failing to have proper regard to the respondent's executive power to grant and extend permission to reside in the State to foreign nationals and/or in failing to properly exercise the discretion vested in him in that regard.

• Failing to have proper regard to the statutory discretion created by s. 4 of the Immigration Act 2004, and to exercise that discretion, and failing to exercise that discretion lawfully and judicially.

• Allowing his discretion to be fettered by the application of a fixed and inflexible policy.

• Failing to exercise his discretion in a manner consistent with the applicants' rights under the Constitution, and in particular, their right to respect for their family life, as protected by Article 41 of the Constitution.

• Failing to exercise his discretion in a manner consistent with the European Convention on Human Rights and Fundamental Freedoms (hereinafter the ECHRFF), and contrary to s. 3 of the European Convention on Human Rights Act 2003. In particular, failing to exercise his discretion in a manner consistent with the applicants' right to respect for their family life, as protected by Article 8 of the ECHRFF.

• Discriminating unfairly against the applicants as a family, and in particular, against the first named applicant as a national of an EU member state who is closely related to a non-national of an EU member state by treating her

differently and adversely compared to other nationals of EU member states and other Irish citizens who apply for residency for a close relative who is a non-national of an EU member state.

• Discriminating unfairly against the applicants as a family, and in particular, against the first named applicant by not treating her the same as other nationals of EU member states who apply for residency for a close relative who is a non-national of an EU member state, in reliance upon the EU treaties and Directive 2004/38/EC.

• Failing to secure the rights and freedoms guaranteed to the applicants under the ECHRFF, and in particular, their rights under Art 8, without discrimination on the grounds of national or social origin, birth or other status, contrary to Art 14 of the ECHRFF.

• Erring in law and/or taking into account irrelevant considerations and/or failing to take into account relevant considerations in making the decision which the applicants seek to impugn.

• Acting in a manner that was ultra vires and/or irrational and unreasonable and/or procedurally improper in making the decision which the applicants seek to impugn.

Relevant Constitutional, Statutory and Treaty Provisions

The Constitution

15. Article 41 of the Constitution (insofar as it is relevant to these proceedings) provides:

"1. 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."

Statute Law

16. S.4 of the Immigration Act, 2004 (insofar as it is relevant to these proceedings) provides:

(1) Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her Passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as "a permission").

...

(6) An immigration officer may, on behalf of the Minister, by a notice in writing to a non-national or an inscription placed on his or her Passport or other equivalent document, attach to a permission under this section such conditions as to duration of stay and engagement in employment, business or a profession in the State as he or she may think fit, and may, by such a notice or inscription at any time amend such conditions as aforesaid in such manner as he or she may think fit, and the non-national shall comply with any such conditions.

(7) A permission under this section may be renewed or varied by the Minister, or by an immigration officer on his or her behalf, on application therefor by the non-national concerned.

...

(10) In performing his or her functions under subsection (6), an immigration officer shall have regard to all of the circumstances of the non-national concerned known to the officer or represented to the officer by him or her and, in particular, but without prejudice to the generality of the foregoing, to the following matters:

(a) the stated purpose of the proposed visit to the State;

(b) the intended duration of the stay in the State;

(c) any family relationships (whether of blood or through marriage) of him or her with persons in the State;

(d) his or her income, earning capacity and other financial resources;

(e) the financial needs, obligations and responsibilities which he or she has or is likely to have in the foreseeable future;

(f) whether he or she is likely to comply with any proposed conditions as to duration of stay and engagement in employment, business or profession in the State;

(g) any entitlements of him or her to enter the State under the Act of 1996 or the treaties governing the European Communities within the meaning of the European Communities Acts 1972 to 2003."

17. Section 3 of the European Convention on Human Rights Act 2003, (insofar as it is relevant to these proceedings) provides:

"(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

The E.C.H.R.F.F.

18. Article 8 of the E.C.H.R.F.F. provides:

"Right to respect for private and family life

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

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

19. Article 14 of the E.C.H.R.F.F. provides:

"Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Directive 2004/38/EC

20. Directive 2004/38/EC of the European Parliament and of the Council of 29th April, 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States of the European Union (insofar as it is relevant to these proceedings) provides:

"CHAPTER III

Right of residence

Article 6

Right of residence for up to three months:

1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.

Article 7

Right of residence for more than three months:

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State, or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence, or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain

the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a jobseeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a jobseeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner."

The applicants' written submissions

Failure to exercise executive discretion and/or unlawful fettering of such discretion

21. The applicants submit that by refusing the fifth named applicant's application for a residence permit on the basis that, "*currently, under Irish immigration legislation,n there is no provision for an Irish national to bring in a non-EU national as their dependent to reside permanently in the State*", the respondent failed to have proper regard to his executive discretion to grant and extend residency to a foreign national, and/or applied a fixed policy such that he fettered his discretion to grant residency.

22. Further, they say that in exercising an administrative discretion, the respondent cannot refuse to exercise the discretion or bind himself to a fixed policy. To do so would be to unlawfully fetter his discretion. The law relating to the unlawful fettering of discretion is summarised in '*Judicial Review of Administrative Action'* (de Smith Woolf and Jowell, 6th Edition at Para. 9-002) as follows:

> "A decision making body exercising public functions which is entrusted with discretion must not, by the adoption of a fixed rule of policy, disable itself from exercising its discretion in individual cases. It may not 'fetter' its discretion. A body that does fetter its discretion in that way may offend against either or both of two grounds of judicial review: the ground of legality and the ground of procedural propriety. It offends against legality by failing to use its powers in the way they were intended, namely, to employ and to utilise a discretion conferred upon it. It offends against procedural propriety by failing to permit affected persons to influence the use of that discretion. By failing to keep its 'mind ajar', by 'shutting its ears' to an application, the body in question effectively forecloses participation in the decision making process."

De Smith, Woolf and Jowell continue (at para. 9-005):

> "The underlying rationale of the rule against fettering discretion is to ensure that two perfectly legitimate administrative values, those of legal certainty and consistency, may be counteracted by another equally legitimate administrative value, namely, that of responsiveness. While allowing rules and policies to promote the former values, it insists that the full rigour of certainty and consistency be tempered by the willingness to make exceptions, to respond flexibly to unusual situations, and to apply justice in the individual case . . ."

23. Further, as de Smith Woolf and Jowell also assert (at para. 9-016), the relevant principles have been stated by Bankes L.J. in *R. v. Port of London Authority: ex parte Kynoch Limited* (1919) 1. K.B. 176, at 184:

> "There are, on the one hand, cases where a Tribunal, in the honest exercise of its discretion, has adopted a policy and without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him, it will, in accordance with its policy, decide against him, unless there is something exceptional in his case . . . if the policy has been adopted for reasons which the Tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand, there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes."

This statement has been described by O'Sullivan J. in the Irish High Court as 'the *locus classicus* of the law'*: McDonagh v. Clare County Council* [2002] 2 I.R. 634 (at 648).

24. The applicants submit that it is clear from the evidence that the respondent has failed to consider exercising his executive discretion to grant a residence permit to the fifth named applicant. Alternatively, he has applied a fixed policy which has so fettered his discretion as to prevent any genuine exercise of that discretion and a proper consideration of the circumstances of the case.

Failure to exercise the discretion under section 4 of the Immigration Act 2004

25. The applicants submit that s. 4(6) and s. 4(7) of the Immigration Act 2004, grant sufficient discretion to the respondent and/or his officials (i.e. immigration officers for the purposes of the Act) to enable the fifth named applicant's

permission to be in the State for a short-term visit to be extended to one of long-term residence. The applicants contend that by stating that, "currently, under Irish immigration legislation, there is no provision for an Irish National to bring in a non-EU national as their dependent to reside permanently in the State", the respondent's servants or agents have failed to properly apply section 4. They contend that the respondent's servants or agents are incorrect in their statement as to the law, and that s. 4 allows for such a situation.

26. The applicants further say that by effectively imposing a requirement that the fifth named applicant must leave the State in order to apply for permission to re-enter the State, the respondent's servants or agents have fettered their discretion under s. 4 of the Immigration Act 2004. The applicants say that the imposition of a fixed policy rule to the circumstances of the fifth applicant's case so as to require her to leave the State in order to apply for residence is unlawful on several grounds. They argue that it has no basis in law, that it is disproportionate and that it breaches the right to respect for family life that is protected by Article 41 of the Constitution and in Article 8 of the E.C.H.R.F.F.

27. In further support of their argument under this heading, the applicants cite the House of Lords' decision in *Chikwamba v. Secretary of State for the Home Department* [2008] 1 W.L.R. 1420 , wherein Lord Scott stated:

> "The appellant, in her appeal, relies on Article 8 of the Convention and, for my part, I regard the decisions of the lower courts as clearly unreasonable and disproportionate. It is, or ought to be, accepted that the appellant's husband [a person with refugee status in the U.K.] cannot be expected to return to Zimbabwe, that the appellant cannot be expected to leave her child behind if she is returned to Zimbabwe, and that if the appellant were to be returned to Zimbabwe, she would have every prospect of succeeding in an application made there for permission to re-enter and remain in this country with her husband. So what on earth is the point of sending her back? Why cannot her application simply be made here? The only answer given on behalf of the Secretary of State is that government policy requires that she return and make her application from Zimbabwe. This is elevating policy to dogma. Kafka would have enjoyed it. I would allow this appeal".

Unlawful discrimination

28. The applicants submit that the respondent unlawfully discriminated against them by treating them differently to non-Irish EU nationals who reside in the State and who have an entitlement to have their dependent parents reside with them in the State under Directive 2004/38/EC.

29. Further, they contend that the respondent has unlawfully discriminated against the first named applicant by treating her differently to other Irish nationals who apply for foreign national relatives to reside with them in the State. For example, the respondent regularly exercises his discretion to grant residence to the foreign national spouses of Irish citizens, whether or not the foreign national is inside the State, lawfully or unlawfully. The applicants cite the background circumstances to my decision in *M. v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Edwards. J., 17th July, 2009) as representing an example of this. Further, they say that the respondent has often granted residence to the foreign national parents of Irish citizen children (for example, in the so-called IBC05 Scheme, he granted residence to more than 17,000 such parents). They argue that in these circumstances, the first named applicant, as an Irish citizen, is being treated differently and adversely to fellow EU citizens and to other Irish citizens who apply for residency for a close relative who is a foreign national. They submit that no, or no adequate reason exists for such different treatment, and that it constitutes a breach of Article 14 of the E.C.R.F.F. (read in conjunction with Article 8 of the said Convention) and s. 3 of the European Convention on Human Rights Act 2003.

30. Relying specifically on Article 14 of the Convention, they say that the first named applicant is being discriminated against, as compared to other EU nationals, on the ground of her Irish nationality, and she is being discriminated against, as compared to other Irish citizens, on the ground of her national origin, in that, she is not allowed to have her Chinese mother join her in the State as a dependent.

31. The applicants submit that it is not necessary, in order for a claim under Article 14 to succeed, for an applicant to show that the State is actually in breach of another Convention right. It is sufficient for the applicant to show that the subject matter of the disadvantage "constitutes one of the modalities" of the exercise of the right, or that the treatment complained of is "linked" to the exercise of a Convention right. They cite *Abdulaziz, Cabales & Balkandali v. United Kingdom* (1985) 7 E.H.R.R. 471, and *Petrovic v. Austria* (1998) 33 E.H.R.R. 307, at [22] and [28] in support of these propositions.

32. The applicants further rely upon a decision of the English Court of Appeal. In *Regina (Morris) v. Westminster City Council,* Sedley J stated:

> "The word 'ambit', which attempts to encapsulate the jurisprudence of the European Court of Human Rights on the operation of Article 14, is an inevitably imprecise term. It recognises that a measure does not have to violate a substantive right in order to affect the enjoyment of it: Convention rights have a penumbra within which unjustifiable discrimination is forbidden even in the absence of a violation of the right."

33. It is further argued that where there is an interference with Article 8, but it is justified under Article 8(2), the interference may still be in violation of the Convention because it is discriminatory. In *Marckx v Belgium* 2 EHRR at 343, the European Court of Human Rights stated:

> "The Court's case law shows that, although Article 14 has no independent existence, it may play an important autonomous role by complementing the other normative provisions of the Convention and the Protocols: Article 14 safeguards individuals placed in similar situations from any discrimination in the enjoyment of the rights and freedoms set forth in those other provisions. A measure which, although in itself in conformity with the requirements of the Article of the Convention or the Protocols enshrining a given right or freedom, is of a discriminatory nature incompatible with Article 14, therefore violates those two articles taken in conjunction. It is as though Article 14 formed an integral part of each of the provisions laying down rights and freedoms."

34. The applicants further submit that the "rights and freedoms" to be secured without discrimination on any ground in accordance with Article 14, extend beyond the mandatory rights which the Convention requires each State to guarantee. In its admissibility decision in *Stec v. United Kingdom*, 6th July, 2005, the European Court of Human Rights held that Article 14 applies also to "those additional rights, falling within the scope of any Convention Article, for which the State has voluntarily decided to provide (paragraph 40)". It stated:

> "Although Article 1 of the First Protocol does not include the right to receive a Social Security payment of any kind, if a State does decide to create a benefits scheme, it must do so in a manner which is compatible with Article 14 (para 55)."

35. The court's attention has also been drawn to *Abdulaziz, Cabales & Balkandali v. United Kingdom* (1985) 7 E.H.R.R. 471, wherein the European Court of Human Rights stated:

> "82. There remains a more general argument advanced by the Government, namely, that the United Kingdom was not in violation of Article 14 by reason of the fact that it acted more generously in some respects - that is, as regards the admission of non-national wives and fiancées of men settled in the country - than the Convention required.
>
> The Court cannot accept this argument. It would point out that Article 14 is concerned with the avoidance of discrimination in the enjoyment of the Convention rights insofar as the requirements of the Convention as to those rights can be complied with in different ways. The notion of discrimination within the meaning of Article 14 includes in general cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention."

36. The applicants say that discrimination in violation of Article 14 occurs when States treat differently persons in analogous situations without providing an objective and reasonable justification. They cite *Thlimmennos v Greece* (2001) 31 EHRR 411, at para. 44 in support of this proposition. Applying it to the facts of this case, they contend that the respondent has been guilty of discrimination in violation of Article 14. In particular, they say that in his decision on the applicants' application, the respondent has provided no objective and reasonable justification for the difference in the way in which the first named applicant is being treated when compared with non-Irish EU nationals in the State, or for the difference in her treatment when compared with other Irish nationals who secure residence for their non-national relatives.

The family's rights under Article 41 of the Constitution and Article 8 of the ECHRFF

37. The applicants also contend that the refusal to grant a residence permit to the fifth named applicant is in breach of Article 41 of the Constitution. They argue that Article 41 is a strongly worded provision that requires the State to respect and protect the rights of the family, and which should, at minimum, provide like protections to family members who are lawfully resident in the State, as those provided for by Directive 2004/38/EC. They contend that the first, second, third and fourth named applicants are all Irish citizens for whom Article 41 of the Constitution should provide the right to have their dependent family members reside with them, save where grave and proportionate reasons exist to override that right.

38. Further, it is submitted, by analogy with the reasoning in *Oguekwe v. Minister for Justice*, *Equality and Law Reform* [2008] 3 I.R.795, that whilst a family unit may not have an absolute right to reside together in the State , nevertheless, any interference with the family unit must be for a substantial reason and must be proportionate. In the applicants' case, it is not reasonable or proportionate to expect the first, second, third and fourth named applicants to move to China in order to care for the fifth named applicant: *Sen v. Netherlands* (2003) 36 EHRR 7. Further, they submit that it is not reasonable to prevent the first named applicant from fulfilling her duty as a daughter to care for her dependent mother in the State, particularly where the fifth named applicant will not be a burden on the State and has private health insurance.

39. Counsel for the applicants further submits that the refusal to grant a residence permit to the fifth named applicant was in breach of the applicants' rights under Article 8 of the E.C.H.R.F.F. and the respondent's duties under section 3 of the European Convention on Human Rights Act 2003.

40. It is argued that Article 8 can give rise to "positive obligations" on the part of a State to ensure that an individual's rights are protected. In *Kutzner v Germany,* 26th February, 2002, the European Court of Human Rights stated:

> "61. Although the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may, in addition, be positive obligations inherent in an effective "respect" for family life. Thus, where the existence of a family tie has been established, the State must, in principle, act in a manner calculated to enable that tie to be developed and take measures that will enable parent and child to be reunited (see, among other authorities: *Eriksson,* cited above, pp. 26-27, § 71; *Margareta and Roger Andersson*, cited above, p. 30, § 91; *Olsson v. Sweden* (No. 2), judgment of 27 November 1992, Series A no. 250, pp. 35-36, § 90; *Ignaccolo-Zenide*, cited above, § 94; and *Gnahoré,* cited above, § 51)."

41. It is further submitted that the operation of a blanket policy that fails to take into account individual circumstances can also violate Article 8. In illustration of this the applicants cite *Slivenko v Latvia*, 9th October, 2003, wherein the European Court of Human Rights stated:

> "The Court considers that schemes such as the present one for the withdrawal of foreign troops and their families, based on a general finding that their removal is necessary for national security, cannot, as such, be deemed to be contrary to Article 8 of the Convention. However, application of such a scheme without any possibility of taking into account the individual circumstances of persons not exempted by the domestic law from removal is, in the Court's view, not compatible with the requirements of that Article. In order to strike a fair balance between the competing interests of the individual and the community, the removal of a person should not be enforced where such measure is disproportionate to the legitimate aim pursued. In the present case, the question is whether the applicants' specific situation was such as to outweigh any danger to national security based on their family ties with former

foreign military officers."

42. An interference with a person's rights under Article 8(1) can be lawful, provided it is "in accordance with law" and is "necessary in a democratic society" (or, proportionate), and the reason for the interference falls within one of the grounds set out in Article 8(2) (*i.e.* it is for a 'legitimate aim'). Whilst the European Court of Human Rights does take into account the margin of appreciation reposing with contracting States, nevertheless, it has held in respect of whether an interference is "necessary in a democratic society" that "necessity" implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to a legitimate aim being pursued: *Beerehab v Netherlands* 11 EHRR 322, paragraphs 28-29.

43. The applicants contend that the respondent has failed to provide any, or any reasonable, justification for his refusal to grant a residence permit to the fifth named applicant. Moreover, the respondent has failed to assess, or alternatively, to have any or any sufficient regard to, the applicants' circumstances as a family unit.

The applicants' oral submissions

44. In the course of the hearing before me, counsel for the applicant made further oral submissions, in addition to and/or in amplification of his written submissions, as follows.

45. Counsel submitted that the applicant's rights under Article 41 of the Constitution are clearly engaged in the circumstances of this case, and stated that he was relying on the plain wording of the Article. He contended that the characterisation of the family in Article 41 as "the natural primary and fundamental unit group of society" and as a "moral institution" reflects a core understanding as to the nature of family life. He argues that there are three primary relationships in the family as understood in Article 41. These are (i) the relationship between parent and minor child; (ii) the spousal relationship and (iii) the relationship between a dependant parent and adult child. The core idea or essence of a family is that a young dependant person is looked after by his or her parents, and an old dependant person is looked after by his or her children. This imports both one's right as a citizen to care for one's dependents and to have them with one as part of one's family, as well as one's duty in that regard deriving from the moral nature of the institution.

46. Relying, in particular, on the wording of Article 41.1.20, counsel referred again to what he characterised as "the duty within a family to look after its dependent members" and urged that this is, "surely one of the aspects of family that is the necessary basis of social order and which is indispensable to the welfare of the Nation and the State." Accordingly, he argued, the State should be encouraging and assisting the M.s in what they want to do in terms of providing care for the fifth named applicant in her twilight years.

47. Counsel further contended that there is an obvious overlap between Article 41 of the Constitution and Article 8 of the E.C.H.R.F.F. Moreover, because Article 8 is a less strongly worded provision than Article 41 it could be said that Article 41 at a minimum embraces the rights guaranteed under Article 8. In other words, whatever relationships attract the protection of Article 8 must also fall within Article 41. In that sense, Article 8 may be used as a guide to the interpretation and application of Article 41.

48. Counsel further submitted that Directive 38/2004/EC "is an instrument of minimum family legal rights" which would "also inform the interpretation and application of Article 41". Putting it another way, his submission in that regard was to the effect that the Directive contains a set of minimum standards that family members should enjoy, and that being the case, Article 41 should be interpreted as embracing those standards, on account of the strong wording of the Article itself, and also having regard to the importance of the family in our Constitution.

49. The Court was referred to the decision of the Supreme Court in *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] 3 I.R.795, for two principal purposes. First, counsel for the applicant, being aware from the respondent's written submissions that the respondent relies heavily on the decision of the Supreme Court in *A.O. & D.L. v. Minister for Justice, Equality and Law Reform*, [2003] 1 I.R.1, wanted to draw the court's attention to the following remarks of Denham J. about the precedent value of *A.O. & D.L.,* and the manner in which it should be considered and applied, in the course of her judgment in *Oguekwe*. The learned judge said (at paras. 58 – 62 inclusive.):

> "58. The High Court referred to the judgment of this court in *A.O. & D.L. v. Minister for Justice* [2003] 1 I.R. 1, and stated that the Minister is bound to make his decision in accordance with these judgments. It was noted that the obligations were set out in differing ways in the judgments of the court. While *A.O. & D.L. v. Minister for Justice* is an important precedent and is relevant, it must be considered in light of the facts of that case. The decision in this case is made on its own factual matrix.
>
> 59. Having considered judgments in *A.O. & D.L. v. Minister for Justice* [2003] 1 I.R. 1, in the context of Article 40.3.1, and the personal rights of the citizen, the High Court held that if the Minster was to take a decision to deport the parent of an Irish born citizen child which is consistent with the State guarantee in Article 40.3.1 "to respect" and "as far as practicable … to defend and vindicate" the personal rights of the citizen child, that the decision making process must include the following elements:-
>
> "(i) it must consider the facts relevant to the personal rights of the citizen child protected by Article 40.3 of the Constitution, if necessary, by an appropriate inquiry in a fair and proper manner; and
>
> (ii) it must identify the grave and substantial reason at the relevant time, which requires the deportation of the non-national parent of the Irish citizen; and
>
> (iii) it must demonstrate that the respondent considers deportation, having regard to each of the above, to be a reasonable and proportionate decision."
>
> 60. I would agree and affirm para. (i) above, though perhaps state it now in slightly different words:-
>
> "(i) it must consider the facts relevant to the personal rights of the citizen child protected by Article 40.3 of the Constitution, if necessary, by due inquiry in a fair and proper manner."

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

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

While acknowledging that the facts in *Oguekwe* were very different to those in the present case, counsel for the applicant submitted that the approach and principles outlined by Denham J. should nonetheless be applied in any review by the court of the respondent's decision in the M. family's case (i.e. on the application made by the first named applicant on behalf of the fifth named applicant) which involves a dependent parent of an Irish citizen.

Secondly, counsel wanted to draw the court's attention to a further passage from the same judgment concerning the questions to be addressed by the Minister in making a decision in that case (on whether or not to deport the applicants), in circumstances where it was accepted that Article 8 rights were engaged. Denham J. said (at paras 70 – 72 inclusive):

"70. The High Court stated that unlike the position in *A.O. & D.L. v. Minister for Justice* [2003] 1 I.R. 1, s. 3 of the European Convention on Human Rights Act 2003, applied to the decision of the Minister in this case. The High Court considered that this imposed similar but not identical obligations on the Minister when determining whether or not to deport the citizen child. The High Court held that the Minister is required to make his decision on deportation in a manner compatible to the Convention, and that rights of the applicants under Article 8 of the Convention were relevant. I would affirm this approach.

71. The High Court referred to cases from this jurisdiction, the European Court of Human Rights, and to those of the United Kingdom. Relevant cases have been set out previously in this judgment. On the application of the European Convention on Human Rights Act 2003, the High Court held:-

"The actual obligations imposed on the Minister by s. 3 of the Act of 2003, so as to act in a manner consistent with the State's obligations under Article 8 of the Convention, will depend upon the factual circumstances of the individuals and family concerned and the potential interference in the rights of the individual members of that family to respect for their private and family life.

Where, as on the facts of this application, there is an acceptance that the applicants enjoy a family and/or private life in the State so as to engage the rights to respect for private and family life under Article 8(1) of the Convention, then the following appear to be the questions which must be addressed by a person, determining whether or not to recommend or make a deportation order under s. 3 of the Act of 1999.

1. Whether or not the proposed decision will constitute an interference with the exercise of the applicants' or other family members' rights to respect for his or her private and family life.

2. Unless a conclusion is reached that the proposed decision will not constitute an interference, as that term has been construed by the European Court of Human Rights, then:-

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

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

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

72. I affirm the general approach proposed by the High Court. However, the issues and questions are interrelated and need not be addressed in such a micro specific format, as long as the general principles are applied to the circumstances of the case. In the exercise of his discretion, the Minister is required to consider the constitutional and the Convention rights of the parents and children and to refer specifically to factors he has considered relating to the position of any citizen children. The circumstances and factors will vary from case to case. The formal approach with specific questions as required by the High Court is not necessary. Each case will depend on its own relevant facts."

Counsel submitted that the same general approach should have been applied by the Minister in this case. Moreover, Denham J. had stated that the issues did not require to be considered in quite the micro specific format suggested by the High Court, it was urged upon the court that "the High Court's micro specific format is still a very good starting point" but that, in any event, there is nothing in the Minister's decision in the present case approaching the kind of analysis of rights that is required.

50. Counsel for the respondent also drew the court's attention to a number of passages from the judgment of McGuiness J. in which she comprehensively reviews the jurisprudence on Article 41 of the Constitution, and to emphasise to this court that the inalienable and imprescriptible rights of the family referred to in Article 41 are both natural law rights and human rights (the existence of which the Constitution confirms) over which the State has no authority. Further, and as stated by Walsh J. in *McGee v Attorney General* [1974] I.R. 284, to which McGuiness J refers:

"….the family, as the natural primary and fundamental unit group of society, has rights as such which the State cannot control. However, at the same time it is true, as the Constitution acknowledges and claims, that the State is the guardian of the common good and that the individual, as a member of society, and the family, as a unit of society, have duties and obligations to consider and respect the common good of that society."

As there is no dispute on the correctness of these propositions, the court does not consider it necessary to quote the specific passages relied upon. Their relevance, according to counsel for the applicant, is that they support his case that one must look to the natural law and the natural order of things in determining the scope of the rights of families and family members within our society. He says that it is a natural thing that a dependent parent should be cared for by her adult child, if possible, and that, equally, the adult child has a duty to care for her dependent parent if she has the means of doing so. Counsel contends that in the circumstances, the right of a dependent parent to be cared for by their adult child, and the corresponding duty, must be recognised as being fundamental or core aspects of the concept of family.

51. In further support of this argument, counsel has also referred the court to a passage from a judgment of Hardiman J. in a case entitled *N v. Health Service Executive and Others* [2006] 4 I.R. 374. This case concerned an inquiry under Article 40. 4. 20 of the Constitution in relation to an adopted child and was therefore far removed from context of the present case. Nevertheless, counsel has urged upon the court that the passage he relies upon has application in the present case in terms of the scope of the natural rights of families and family members. The learned judge said (at p.502):

> "In the case of a child of very tender years, as here, the decisions to be taken and the work to be done, daily and hourly, for the securing of her welfare through nurturing and education, must, of necessity, be taken and performed by a person or persons other than the child herself.
>
> Both according to the natural order and according to the constitutional order, the rights and duties necessary for those purposes are vested in the child's parents. Though selflessness and devotion towards children may easily be found in other persons, it is the experience of mankind over millennia that they are very generally found in natural parents, in a form so disinterested that in the event of conflict, the interest of the child will usually be preferred. A graphic and ancient example of this may be found in I Kings 3:16-28. This bond is greatly valued by parents and children alike, and by natural siblings in respect of their shared parentage. It is illustrated by the frequently found phenomenon of the mature adult who, separated at birth or in infancy from his or her parents and siblings, feels a strong desire to locate them many years later. It is equally illustrated by the widespread legal recognition given to the family, even in instruments whose social and cultural context is different from, and perhaps more varied than, those of the Constitution of Ireland 1937."

Counsel for the applicant submitted that when the present case is considered in terms of the "natural order" referred to by Hardiman J., it is as much a part of that natural order that an elderly parent who has become dependent should be looked after, if possible, by their child (or children, obviously) if she (they) has (have) the means to do so.

52. In relation to the claim based upon Article 8 of the ECHRFF, the court was referred to various cases concerning when Article 8 rights are engaged. In particular, counsel for the applicant accepted the correctness of the statement of principle contained in the following passage from a judgment of the House of Lords in England in a case of *Beoku-Betts v. Secretary of State for the Home Department* [2009] 1 A.C. 115. Lord Brown of Eaton-under-Haywood observed (at para 39 of the report):

> "…the present case is not concerned with young children. But the dependency between the appellant and his mother here clearly engages Article 8. As the court stated in *Mokrani v. France* (2003) 40 EHRR 123, para 33:
>
> 'Relationships between adults do not necessarily benefit from protection under Article 8 of the Convention unless the existence of additional elements of dependence, other than normal emotional ties, can be proven.'
>
> On the adjudicator's findings of fact, such additional elements of dependence can properly be said to exist in the present case."

It should be recorded that in *Beoku-Betts*, the court was concerned with the relationship between a dependent adult child and his mother.

53. The court was also informed that *Beoku-Betts* has previously been considered by our High Court in a case of *Aremu v. Minister for Justice, Equality & Law Reform & Others* (Unreported, High Court, Clark J, 26th May 2009). That case, which concerned a challenge to a decision by the Minister to deport the applicant, not on the grounds that the Minister had failed to consider the applicant's Article 8 rights, but rather, on the grounds of his failure to consider the Article 8 rights of the applicant's two half-brothers in respect of whom the applicant had taken over the parent role. In presenting the case, counsel for the applicant relied heavily on *Beoku-Betts* among other cases. In her judgment upholding the claim, Clark J. stated that she did not believe that *Beoku-Betts* has any real relevance to Irish law, as the statutory provision that was being interpreted by the House of Lords in that case has no equivalent in Ireland. However, later in her judgment, she stated that the interpretation of Article 8 rights in this jurisdiction has, she believed, already been given the interpretation finally arrived at in *Beoku-Betts* in a number of decided cases and she instanced the case of *Sanni v. Minister for Justice, Equality & Law Reform* [2007] IEHC 398, by way of example.

54. *Sanni* concerned a nineteen-year-old Nigerian man to a decision of the Minister to deport him back to Nigeria. He had entered Ireland as an asylum seeker and had then sought to join his parents and two siblings who were born here after the arrival in Ireland of the parents, all of whom were already resident here. His parents had leave to remain here on the basis of their parentage of two Irish citizen children. The challenge to the proposed deportation was based upon an alleged breach of Article 8 on the basis that the protection afforded by Article 8(1) extends to familial relations between siblings, both as minors and as adults, as well as to the relationship between adult children and their parents, the making of the deportation order constituted an unjustified interference with their private and family life. In her judgment in *Sanni*, Dunne J. considered a number of cases relied upon by the applicant in that case in support of his claim, including *Berrehab v. Netherlands* [1988] 11 E.H.R.R. 328, *Olsson v. Sweden* [1989] 11 E.H.R.R. 259, *Moustaquim v. Belgium* [1991] 13 E.H.R.R. 802, *Boughanemi v. France* [1996] 22 E.H.R.R. 228, and *Radovanovic v. Austria* (App. No. 42703/98, judgment of 22nd April, 2004). Having done so, she distilled the following list of principles from them:

"1. Family can include the relationship between an adult child and his parents (see, for example, Boughanemi).

2. Family life may also include siblings; adult or minor (see *Boughanemi* and *Olssen*).

3. The relationship between a parent and an adult child does not necessarily constitute family life without evidence of further elements of dependency involving more than the normal, emotional ties. (See *Advic v. United Kingdom* [1995] 20 E.H.R.R. CD 125]).

4. The existence or not of family life falling within the scope of Article 8 depends on a number of factors and the circumstances of each case."

Dunne J. found in the circumstances of the case before her that family life had not been established.

55. The court was referred in the oral submissions to the cases of *Marckxs v. Belgium*, 2 EHRR 330, and *Sen v, Netherlands* [2003] 36 EHRR 7. In *Marckxs,* the grandparent/grandchild relationship was held to fall within the scope of Article 8, while *Sen* was relied upon in relation to the proportionality exercise that the decision maker is required to engage in.

56. In the course of his oral submissions in support of the discrimination argument, counsel for the applicant referred to a decision of the Austrian Constitutional Court cited in an article by Herwig Verschueren , a Professor of International and European Labour Law at the University of Antwerp and the Free University of Brussels, entitled *'Reverse Discrimination: An Unsolvable Problem?'* and published in a work entitled *'Rethinking the Free Movement of Workers: The European Challenges Ahead'*, Paul Minderhoud and Nicos Trimikliniotis, Editors, (World Legal Publishers: 2009). In this article, the author states:

" …we would like to mention that the Austrian Constitutional Court has already judged that if the rules governing family reunification of EU citizens in a cross-border situation, are not applied to Austrian nationals who cannot invoke Community law because of the purely internal situation, this is a breach of Articles 8 and 14 ECHR. For the Austrian Constitutional Court, there is no objective justification for this difference in treatment."

The case in question is footnoted in the article as being the case of *Verfassungsgerichtshof,* 17th June 1997, No B592/96, which is to be found at www.bka.gv.at/Vfgh/ . Somewhat unsatisfactorily, the judgment was not produced, and while the Court has attempted to obtain the judgment itself via the web link, provided it has found that this link leads to a site published in German, with no translation facility. In the circumstances, as I have been unable to ascertain the reasoning behind the Austrian Constitutional Court's decision I can attach no weight to *Verfassungsgerichtshof.*

The respondent's written submissions

57. Counsel for the respondent submits that what the applicants are seeking to do is, in effect, to prosecute an appeal against the Minister's decision on the merits of the case, rather than genuinely seeking a review by the Court of the decision making process in the exercise of its ordinary supervisory function as a Court of judicial review. It should be noted, he says, that the applicants did not assert in their application to the Minister that they were entitled to a positive outcome on the basis of any specific provision in Irish legislation or on any other legal basis. Accordingly, there was implicit acknowledgement that their application was made to the Minister on an ad *misericordiam* basis, seeking the exercise of the Minister's discretion to grant the decision sought. The discretion was lawfully exercised but, unfortunately for the applicants, yielded a negative outcome. The applicants are simply unhappy with that outcome. However, the truth of the matter is that there was nothing legally wrong with the process by means of which the decision was rendered.

58. The respondent submits that it is clear from the decision in *Lobe, Osayande & Ors v. Minister for Justice, Equality & Law Reform* [2003] I.R. 17, that the Supreme Court is firmly of the view that the State has an inherent right and duty to control the access of aliens to the State. In particular, it has an inherent right to expel or deport aliens not lawfully resident in Ireland. These rights constitute an aspect of the State's sovereignty and are exercised on its behalf by the executive. Furthermore, a majority of the Supreme Court was of the view that an Irish citizen child enjoys a constitutional right to reside in the State, but that this right is not absolute and can be curtailed where the common good so requires. In particular, the Supreme Court was of the view that the constitutional right of a child to reside in the State does not entail an automatic constitutional right to be provided with parental care within the State. Similarly, the family of an Irish born child has no automatic right to reside in the State simply by virtue of such family relationship. Counsel for the respondent in the present case has also drawn the Court's attention to the judgments of the Supreme Court in the case of In *re Article 26 of the Constitution and Section 5 and Section 10 of the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 360, and in *Laurentiu v. Minister for Justice* [1999] 4 I.R. 42, as well as to the High Court's decisions in *Osheku v. Ireland* [1986] I.R. 733, and *Pok Sun Shum & Ors v. Ireland* [1986] I.L.R.M. 593. He submits that it is clear from these legal authorities that the State has a general right to exercise, through the Minister, control of entry to, and residence in, the State by non-nationals, subject, of course, to the State's obligations under European Union law and International law.

The Minister's duty

59. Counsel for the respondent submitted that the duty resting on the Minister in the circumstances of the instant case, was akin to that which was identified in *Baby O. v. Minister for Justice, Equality & Law Reform* [2002] 2 I.R. 169, in which Keane C.J. stated in reviewing the Minister's role when considering an applicant's case pursuant to Section 5 of the Refugee Act, 1996:

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

and, accordingly, this ground was not made out."

(See also *Kouaype v MJELR*, Unreported, High Court, Clarke J., 9th November, 2005)

Counsel for the respondent submitted that the test in Baby O. applies equally to the present type of case. However, unlike in the case of applications for leave to remain pursuant to s. 3 of the Immigration Act 1999, there are no specific considerations in applications such as in the instant case to which the Minister is obliged to have regard. Therefore, he was merely under a general duty to consider the facts/circumstances as submitted to him.

60. Counsel submits that it is self-evident from the decision of the Minister communicated on 29th May 2009, that all of the relevant factual circumstances relating to the application were considered by the Department prior to the decision being made and communicated. This is clear on the face of the document entitled 'Application for Renewal of Permission (pursuant to Section 4(7) of the Immigration Act, 2004)' made by Eileen O'Reilly, General Immigration Division, on 27th May 2009, and more specifically, the letter from Barbara McKelvey, General Immigration Division dated the 29th May, 2009, which latter document states:

> "Following consideration of the individual circumstances of this case including all of the matters known to us and which were adverted in your application Ms L.W.'s position does not warrant an extension of her permission to remain.
>
> In light of the above, the application for an extension of permission to remain in the State in respect of Ms L.W. is refused".

Therefore, counsel submitted, the obligation of the Minister to consider the individual circumstances of the case was clearly discharged.

Alleged failure to exercise executive discretion / fettering of discretion

61. It was submitted that, in refusing the application for an extension of the fifth named applicant's right to reside in the State, the official concerned merely stated that there is no express provision in Irish legislation currently for an Irish national to apply on behalf of a foreign (non-EU) national who is their dependent to join them in the State. That is clearly the position in law and the applicants are not in a position to indicate otherwise. Therefore, the statement concerned cannot and does not operate, and clearly was not intended to operate, as a fixed policy in law, or indeed, an unlawful fettering of discretion. It was merely a statement of fact.

62. It was further argued that even if a policy could be discerned not to grant such applications, it is clear from the relevant jurisprudence that the respondent's discretion has not been exercised in bad faith (especially given the subsequent grant of a further C-visit visa), or so unreasonably exercised to show that there has been no real or genuine exercise of the discretion (see the decisions of Kelly J. in the High Court in *Mishra v. Minister for Justice, Equality & Law Reform,* [1996] 1 I.R. 189, and the House of Lords in *British Oxygen Co. v. Board of Trade* [1971] A.C. 610). Counsel for the respondent submits that to put it in simple terms, the respondent did not shut his ears to the application and clearly considered it on its facts.

63. Finally, it was submitted there was no fettering of the official's discretion under s.4 of the Immigration Act 2004, as contended by the applicants. The decision was clearly considered and addressed on its merits. There was no implicit imposition of a requirement that the fifth named applicant must leave the State to apply for permission to re-enter the State. The fifth named applicant's position was simply that her permission to reside here was not extended and, accordingly, she was obliged by law to leave the State on the expiry of her existing permission. Whether or not she might then apply for a new permission to enter and reside in the State was a matter for her. She was entitled to do so, but could have no expectation of any particular outcome.

Alleged unlawful discrimination

64. Counsel for the respondent submitted that there was no discrimination in the circumstances of this case. Directive 38/2004/EC only confers rights on EU nationals who seek to establish themselves in another Member State. Therefore, there must be an act of cross border movement before any right can be asserted. The right in Article 3 of the Directive for EU workers and the self-employed to be accompanied by qualifying family members is a statutory entitlement where the Minister has absolutely no discretion to refuse access to the State (save for the stated exceptions in the Directive). However, in the absence of cross border movement for the EU worker, there is no connecting factor engaging the fundamental freedoms under the Treaty or pursuant to secondary legislation such as the Directive (and formerly, Regulation 1612/68/EEC. (cf. *Morson and Jhanjan* Joined Cases C-35/82 and C-36/82 [1982] ECR 3723).

65. By contrast, the situation in the instant case is wholly internal, as the EU nationals involved (the first and second named applicants) have not sought to exercise any right to work in an employed or self-employed capacity, or to provide or receive a service in any other Member State of the European Union (see *R v. Saunders* Case C-175/78 and *Uecker* and *Jacquet* Cases C-64 and 65/97). European Community law has always recognised the principle of reverse discrimination i.e. less favourable treatment being afforded to citizens of the host Member State than to nationals of other Member States.

In *Metock v. Minister for Justice, Equality and Law Reform* (judgment of European Court of Justice, Grand Chamber, 25th July 2008, Case C-127/08) confirmed its long-standing line of jurisprudence in this regard, holding at paragraph 77:

> "In that regard, it is settled case law that the Treaty rules governing freedom of movement for persons, and the measures adopted to implement them, cannot be applied to activities which have no factor linking them with any of the situations governed by Community law and which are confined in all relevant respects within a single Member State (Case C 212/06 Government of the French Community and Walloon Government [2008] ECR I 0000, paragraph 33)."

66. Counsel for the respondent further points out that there is no equivalent statutory provision in Irish law to Article 3 of the Directive in respect of Irish nationals having an entitlement to have a dependent relative enter and remain in the State with them. The consideration on the file dated 27th May, 2009, correctly reflects this fact.

67. With respect to the applicants' assertion that they have been treated unequally to Irish citizens who, in many cases, have successfully applied to the respondent to be joined by non-national relatives such as spouses in the State, or in relation to the IBC05 Scheme involving the grant of residence to many foreign national parents of Irish citizen children, the respondent has submitted that the Constitution bans capricious or invidious discrimination rather than inequality per se. Absolute equality of treatment is not required by the Constitution (or, indeed, the European Convention) In *The State* (*Nicolaou) v. An Bord Uchtala* [1966] I.R. 567, Walsh J. stated (at p 639):

> "Article 40, 1, of the Constitution … provides as follows:—'All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.'
>
> In the opinion of the Court, section 1 of Article 40 is not to be read as a guarantee or undertaking that all citizens shall be treated by the law as equal for all purposes, but rather, as an acknowledgment of the human equality of all citizens, and that such equality will be recognised in the laws of the State. The section itself in its provision, 'this shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function' is a recognition that inequality may, or must, result from some special abilities or from some deficiency or from some special need, and it is clear that the Article does not either envisage or guarantee equal measure in all things to all citizens. To do so, regardless of the factors mentioned, would be inequality."

Similarly, in *O'Brien v. Keogh & O'Brie*n, [1972] I.R. 144, O'Dalaigh C.J., at pages 155-156 found:

> "Article 40 does not require identical treatment of all persons without recognition of differences in relevant circumstances. It only forbids invidious discrimination".

Counsel also referred the Court to statements to similar effect in *De Burca and Anderson v. AG* [1976] I.R. 38 at page 68; *Bode v. Minister for Justice, Equality and Law Reform* [2007] IESC 62, and *Gavrylyuk and Anor. v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Birmingham J., 14th October, 2008).

68. The respondent submits that no evidence of capricious or invidious discrimination has been advanced in this case. Moreover, the respondent was not dealing in this application with the circumstances the applicants appear to advance as being parallel to the instant case being those of the parents of Irish citizen children or the spouse of an Irish citizen. The respondent contends that no analogy can be drawn between these cases and a grandmother who has not been living in the State on a permanent basis and only visits periodically as in the instant case.

69. The court is asked to note that in the decision of *Caldaras & Anor v. Minister for Justice Equality & Law Reform* [2003] IEHC 89, which concerned the proposed deportation of the grandparents of Irish born children, O'Sullivan J. concluded:

> "I cannot see in them any warrant for extending the concept of 'family' as considered in those judgments (The L. and O. decision) to include grandparents within the concept of 'family' as guaranteed by Article 41 of the Constitution or indeed otherwise . . . I do not think that as a result of the *O.* and *L.* decision (*sic*) in the Supreme Court, the meaning of the word 'family' in section 3(6)(c) of the Act of 1999, has been widened to include grandparents".

70. The respondent acknowledges that the *Caldaras* judgment only applies to cases engaging Article 41 of the Constitution and not Article 8 of the Convention, as indeed was noted by Hedigan J in *G.O. & Ors v. Minister for Justice, Equality and Law Reform* [2008] IEHC 190. In that case, Hedigan J. accepted that family life within the meaning of Article 8 of the Convention did exist between the first named applicant and her grandchildren, having regard to the circumstances of that case. He stated at paragraph 26 of the judgment:

> "It is my view, having considered these authorities, that family life does exist between G.O and her grandchildren. I would place particular emphasis on the fact that G.O. lives with her grandchildren and is heavily involved in their upbringing. While cohabitation may not always be essential in order for 'family life' to exist, the fact that G.O. lives with her grandchildren strengthens the family ties between them. The cohabitation under one roof of the family members involved and extent of their daily contact add an extra dimension to the normal relationship between grandmother and grandchildren. This sets the present applicant apart from the normal level of contact that exists between grandparent and grandchild which was present, for example, in *Caldaras*.
>
> That said, this view by no means disposes of a consideration in this case of Article 8. The existence of 'family life' between G.O and her grandchildren does not, of itself, mean that the State cannot deport her. The right to family life under Article 8(1) is not absolute and the State is not compelled to abstain from interference with Article 8 rights. Rather, it falls to be considered whether such interference is justified in accordance with Article 8(2)…."

The respondent points out that the circumstances in *G.O.* were that the grandmother concerned lived with her grandchildren for three to four years. That is not the position in the instant case where Ms. L.W. has been regularly travelling over and back from China to Ireland on short term visits to see her daughter, son-in-law and grandchildren. While she would, perhaps, wish to do so, to date, Ms. W. has not been allowed to settle here, and de facto she has not been living with her Irish based family on any permanent, semi-permanent, or even long term temporary basis. Accordingly, the applicant family is not in a similar or analogous situation to that which obtained in the G.O. case. The

respondent therefore submits that the applicants do not have the rights contended for under Article 41 of the Constitution or under Article 8 of the E.C.H.R.F.F.

71. Further, the respondent submits that G.O. concerned a deportation issue of deportation rather than a decision on an application for an extension to a visa or the grant of permission to remain. The issue of deportation does not arise in this case, either generally, or in relation to the circumstances of the fifth named applicant.

72. The respondent further submits that the jurisprudence of the European Court of Human Rights in relation to Article 8 ECHRFF was conveniently summarised in the decision of the English Court of Appeal in *R. (Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840, in which Lord Phillips M.R. (at para. 55 of the judgment) concluded, with regard to married couples and the right to respect for family life, pursuant to Article 8 of the Convention, that:

> "…I have drawn the following conclusions as to the approach of the Commission and the European Court of Human Rights to the potential conflict between the respect for family life and the enforcement of immigration controls. (1) A State has the right under international law to control the entry of non-nationals into its territory subject always to its Treaty obligations. (2) Article 8 does not impose on a State any general obligation to respect the choice of residence of a married couple. (3) Removal or exclusion of one family member from a State where other members of the family are lawfully resident will not necessarily infringe article 8, provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family. (4) Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a State if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled. (5) Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates 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 immigration will depend on (i) the facts of the particular case, and (ii) the circumstances prevailing in the State whose action is impugned."

Counsel for the respondent submitted that this summary may be useful in the instant case and of potential assistance to the court in determining whether the applicants' rights under Article 8 ECHRFF, if any, have been breached. Although *Mahmood c*oncerned the members of a nuclear family and the choice of residence of a married couple, certain of the general principles enunciated mirror principles that have been accepted by the Supreme Court in this jurisdiction and must apply with much greater force to a situation where the family member concerned is a grandmother (and not a parent or a child). In the present case, Ms. L.W. has never had permission to remain within the State for more than six months. All of the adult applicants are fully aware, and have known at all times, that on each occasion that she has entered the State, it has been on foot a short-term visa. No family life could be said to have been established within the State, given the circumstances.

Moreover, the respondent contends further that Article 8 ECHRFF and Article 41 of the Constitution are not engaged in the circumstances of the present case and the applicants' rights, if any, in that regard, would only arise in the context if there was a proposal to deport/expel the fifth named applicant. There is no such proposal. No deportation order has been made or even considered in respect of the fifth named applicant. Counsel for the respondent submitted that as a consequence, neither Article 41 of the Constitution nor Article 8 of the Convention can be relied on by the applicants.

73. Counsel for the respondent also referred the court to a recent decision of the European Court of Human Rights (First Section), given on 31st July, 2008, in which the court reaffirmed that a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there. The court, in *Omoregie*, referred to its earlier judgments in *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28th May 1985, Series A, no. 94, p. 34, § 67 and Boujlifa v. France, judgment of 21st October, 1997, Reports of Judgments and Decisions 1997 V.I, p. 2264, § 42. (See also *Uner v. Netherlands*, judgment of the Court (Grand Chamber) of 18th October, 2006). In *Omoregie,* the court reiterated its earlier position that the Convention does not guarantee the right of an alien to enter or to reside in a particular country, and at para. 57 stated:

> "The State must strike a fair balance between the competing interests of the individual and of the community as a whole; and in both contexts, the State enjoys a certain margin of appreciation. Moreover, Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory, relatives of persons residing there, will vary according to the particular circumstances of the persons involved and the general interest . . ."

At paragraph 65 of the judgment, the court went on to state that the mere fact that the first named applicant's child was a national of the host country, could not, of itself, give rise to any entitlement on the part of the first applicant to remain in the State. The court concluded that in the absence of exceptional circumstances, there was no requirement to grant the first named applicant a right of residence so as to enable the applicants to develop and maintain a family life. Counsel for the respondent in the present case, submitted that, by analogy, the State, in respecting the right to family life of an Irish family, is not under any obligation to permit a foreign national who is the parent of an adult child and the grandparent of two minor children, all of whom are Irish citizens, to reside in the State.

74. With regard to the claim under Article 14 of the Convention, the respondent submitted that the European Court of Human Rights construes discrimination to mean "*treating differently, without an objective and reasonable justification, persons in relevantly similar situations"* (cf Zarb Adami v. Malta [2006] 44 EHRR 49, paragraph 71). In *Rasmussen v. Denmark* [1984] 7 EHRR 371, the court referred, *inter alia,* to a requirement for there to be "analogous situations". Cases under this heading that have come before the European Court of Human Rights have examined (i) differences in treatment under German law as between divorced fathers and unmarried fathers in respect of access to children (Sahin v. Germany), and (ii) differences in U.K. tax law regarding the tax treatment of maintenance payments by unmarried and married fathers respectively (*PM v. UK*).

It was submitted that the situation in the instant case is entirely different to the situation in relation to applications for residence in respect of non-national spouses, and non-national parents of Irish citizen children, many of which are

unsuccessful anyway, and therefore Article 14 ECHRFF cannot apply.

The respondent's oral submissions

75. In the course of the hearing before me, counsel for the respondent made further oral submissions, in addition to and/or in amplification of his written submissions. For the most part, these consisted in opening in greater detail the cases referred to in his written submissions. However, he made the following important additional points.

76. He submitted that the E.C.H.R.F.F. cannot be used to interpret Article 41 of the Constitution, and to the extent that counsel for the applicant has sought to suggest that it can, he is incorrect. Similarly, European Community Law cannot be used to interpret the Constitution.

77. The applicant has accepted that for Article 41 and Article 8 rights to be engaged, the fifth named applicant must be dependent on the other applicants as a family unit, and in particular, on her daughter and son-in-law, the first and second named applicants. Counsel for the respondent submitted that dependency means dependency. It means "some level of handicap, incapacitation, some disqualifying factor which makes you a dependent not simply financially, but also socially, something that prevents the person from completely independent living. Counsel for the respondent submitted that the court cannot be satisfied on the evidence before it that the fifth named applicant is dependent. Therefore, neither Article 41 nor Article 8 is engaged.

78. There can be no question of a breach of Article 14 of the ECHRFF unless Article 8 is engaged.

79. According to counsel for the respondent, the applicant cannot draw any support for his discrimination argument from E.U law. He contends that counsel for the applicant seeks to enmesh E.U. law and Convention law to create for the benefit of Irish nationals a general right of residence in respect of their foreign national parents. He cannot do this as a matter of law. Moreover, the attempt to do so completely ignores the fact that E.U. law has always recognised the principle of reverse discrimination. While E.U. law provides for positive discrimination for E.U. nationals and qualifying family members, it has always been accepted that it is within the power of Member States to treat their own nationals differently, even if that means that the treatment afforded to them is less generous than the treatment afforded to community nationals.

Decision

80. This is a matter to which s. 5 of the Illegal Immigrants (Trafficking) Act 2000, applies. Accordingly, the applicants must go further than simply establish that they have an arguable case. They must satisfy the court that they have "substantial grounds" in order to obtain leave. This is not a particularly onerous requirement. In *Z v. The Minister for Justice, Equality & Law Reform* [2002] 2 I.L.R.M. 215, McGuinness J. said (at p. 222):

> "As regards the requirement that an applicant for leave to issue judicial review proceedings establish 'substantial grounds' that an administrative decision is invalid or ought to be quashed, this is not an unduly onerous requirement since the High Court must decline leave only where it is satisfied that the application could not succeed or where the grounds relied on are not reasonable or are 'trivial or tenuous'."

81. I wish to deal firstly with the "discrimination" or more correctly, "the reverse discrimination" point. The Court does not believe that the applicant has demonstrated substantial grounds under this heading. It is fundamental to the notion of discrimination that you have two persons who are in an equivalent situation and that one is treated differently from the other, notwithstanding this equivalence. In this case, however, the court is satisfied that the first named applicant's situation is not equivalent to that of a non-Irish E.U. worker who travels to Ireland to take up a job and brings her non-E.U. national mother with her to reside in Ireland. In the case of the non-Irish E.U., worker that person has specifically invoked her freedom of movement rights under the E.U. Treaties and the provisions of Directive 38/2004/EC. By comparison, the first named applicant, as a naturalised Irish person, is entitled as of right to work here and does not need to invoke or rely upon any Treaty right, or the provisions of any Directive. Accordingly her situation is not equivalent to the situation of a non-Irish E.U. national exercising her free movement rights. Moreover, if the first named applicant were herself to exercise her free movement rights, she would be treated in exactly the same way as any other E.U. national exercising those rights. Accordingly, if she decided tomorrow morning to move to Spain or to France or to Sweden or to any other E.U. country, she too would be entitled to have her non- E.U. national mother accompany her and reside with her in that country. Her entitlement to do so in that instance would derive from the equivalence of her position *vis-à-vis* the position of any other E.U. national availing of their freedom of movement rights under the E.U. Treaties, and the provisions of Directive 38/2004/EC.

82. Further, the court considers that the respondent is correct in his submission that E.U. law has always recognised the principle of reverse discrimination, and that Ireland is entitled to treat the applicants less favourably than a national of another Member State who is in a position to rely upon a specific Treaty right that the applicants are not in a position to avail of.

83. Turning now to the arguments based upon Article 41 of the Constitution, and also Articles 8 and 14, respectively, of the ECHRFF. Counsel for the applicants has made a strong argument to the court that family rights, and in particular, the right to respect for family life, are both natural law rights and human rights (the existence of which Article 41 of the Constitution and Article 8 of the ECHRFF, respectively, confirm) and over which the State has no authority. In particular, he has stressed that the core idea or essence of a family is that a young dependant person is looked after by his or her parents, and an old dependant person is looked after by his or her children. This imports both one's right as a citizen to care for one's dependents and to have them with one as part of one's family, as well as one's duty in that regard, deriving from the moral nature of the institution.

It is not necessary for the purposes of this judgment to consider the exact parameters or scope of family rights under Article 41 of the Constitution, on the one hand, and under Article 8 of the ECHRFF, on the other hand, respectively. However, it seems clear from a superficial comparison of both provisions that Article 41 is more extensive in its scope than Article 8. It was urged by counsel for the applicants that at a minimum, Article 41 embraces the rights guaranteed under Article 8 and the court is satisfied, without delving further into to it, that this is a correct proposition.

However, be that as it may, it is clear from the way in which the applicants' argument was framed, and indeed, counsel for the applicant has expressly accepted that for the applicants' rights under Article 41 and/or Article 8 to be engaged in the circumstances of the present case, the fifth named applicant must necessarily be "dependent" on the Irish based family (and for all practical purposes the first and second named applicants). This position, at least insofar as Article 8 is concerned, is consistent with the observations of Dunne J. in *Sanni v. Minister for Justice, Equality & Law Reform* [2007] IEHC 398, cited with approval by Clark J. in *Aremu v. Minister for Justice, Equality & Law Reform & Ors* (Unreported, High Court, Clark J., 26th May 2009); and with the English and European cases of *Beoku-Betts v. Secretary of State for the Home Department* [2009] 1 A.C. 115; *Mokrani v. France* [2003] 40 E.H.R.R 123 and *Advic v. United Kingdom* [1995] 20 E.H.R.R. C.D. 125.

84. I accept the submissions of the respondent to the effect that dependency means some level of handicap, incapacitation, some disqualifying factor which makes one a dependent not simply financially, but also socially, something that precludes one from completely independent living. Moreover, as per the judgment in *Mokrani*, there must be additional elements of dependence, other than normal emotional ties.

Counsel for the applicant submitted that receipt of financial support in itself would constitute dependency. The court does not entirely agree with this proposition. I accept that receipt of financial support could in itself constitute dependency, but subject to the following qualification. I believe that such support must be necessary as opposed to being merely welcome.

85. Counsel for the respondent has argued that the court cannot be satisfied on the evidence before it that the fifth named applicant is dependent. The applicant protests that the respondent never queried the fifth named applicant's status as an alleged dependent during any of his dealings and correspondence with the applicants up to the commencement of these proceedings. While this is true, it is also true that the respondent has at all times contested the applicants' assertion that rights inuring to them under Article 41 and/or Article 8, respectively, have been engaged in the circumstances of this case. I am of the view that the applicants' starting point, in terms of possibly persuading the Court that they have substantial grounds for arguing that the respondent's decision ought to be quashed for breach of their rights under Article 41 and/or Article 8, must be to demonstrate that those provisions have been engaged. To do this, they must produce before this court prima facie evidence of the fifth named applicant's dependency. With great regret, I find that they have failed to do so.

86. What evidence does this court have of the fifth named applicant's dependency? The first thing to be said is that no affidavit has been filed by the fifth named applicant herself, deposing as to her circumstances. Indeed, the only evidence as to her circumstances is that contained in paragraph 5 of the affidavit of the first named applicant sworn on 17th June, 2009, which states:

> "My mother is my only remaining family member in China. My father passed away eight years ago. My mother is 53 years of age (she was born on 7th October, 1955). We have been supporting her for a number of years by sending money to her in China. Without this support, she would live a poor and difficult life in China. She is dependent on me and my husband".

Counsel for the respondent submits that this is no more than a bald assertion of dependency without any supporting or corroborating information. While not seeking to suggest that the first named applicant has deliberately deposed to an untruth, it is by no means clear that she is speaking of dependency in the narrow and strict sense of the term as opposed to dependency in the loose and broad sense of the term. Counsel for the respondent points out that the fifth named applicant is only 54 years of age and there is no reason to believe that she is not in good health. There is no information concerning why she cannot support herself financially in China. The court has not been told whether she has ever worked in China, or as to whether work is available to her in China. There is also no information concerning whether she has any training or skills that might assist her in getting work. The court has been told nothing about her assets or liabilities (if any) or as to what are her living arrangements in China. We do not know if she owns her own dwelling or rents one. We have not been told whether she has non-employment income (or potential income) from any source other than from her daughter and son-in-law. We have not been told if she is entitled to any aid or assistance from the Chinese Government, for example, a widow's pension. All we are told is that, "she would live a poor and difficult life in China" were it not for the support that she receives from her daughter and son-in-law. The court will readily accept that this may be the case, and is certain that the financial assistance that she receives from Ireland is extremely welcome, but the critical question is whether it is essential for her support as opposed to being merely most welcome. In this court's view, the evidence of financial dependency that has been offered is insufficient, even for the purposes of a leave application. The applicants bear the burden of proof and I am not satisfied that prima facie evidence of dependency, beyond a bald and unsupported assertion in that regard, has been adduced. The applicants have therefore failed to establish substantial grounds for contending that rights inuring to them under Article 41 of the Constitution and/or under Article 8 of the E.C.H.R.F.F., respectively, have been engaged in the circumstances of this case.

87. Counsel for the respondent is correct in contending that there can be no question of a breach of Article 14 of the E.C.H.R.F.F. unless Article 8 is engaged. As I am not satisfied on the evidence before me that Article 8 is engaged, it follows that substantial grounds have not been established for arguing that there has been a breach of Article 14.

88. Finally, I am not satisfied, in all the circumstances of the case, that substantial grounds have been established for arguing that the Minister failed to have proper regard to his executive discretion and/or the discretion vested in him by s. 4 of the Immigration Act 2004. Further, in circumstances where there is no prima facie evidence that Article 41 and/or Article 8 rights were engaged, substantial grounds do not exist for arguing that he failed to exercise his discretion lawfully and judicially; that he allowed his discretion to be fettered by the application of a fixed and inflexible policy; that he failed to exercise his discretion in a manner consistent with the applicants' rights under the Constitution; that he failed to exercise his discretion in a manner consistent with the applicants' rights under the E.C.H.R.F.F.; that he acted contrary to section 3 of the European Convention on Human Rights Act, 2003; that he discriminated unfairly against the applicants as a family; that he erred in law; that he took into account irrelevant considerations and/or failed to take into account relevant considerations; that he acted ultra vires his statutory powers; that his decision was irrational and unreasonable or that it was procedurally improper.

89. Accordingly, and as I believe that on the state of the evidence before me the applicants could not succeed, I must refuse their application for leave to apply for judicial review.