



THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 246

Record Number: 2018/131

Costello J.
Ní Raifeartaigh J.
Power J.

BETWEEN/

E.O. AND A.O. AND
C.M.O. (AN INFANT SUING BY HER MOTHER
AND NEXT FRIEND E.O.) AND
C.M.O. (AN INFANT SUING BY HER MOTHER
AND NEXT FRIEND E.O.) AND
C.M.O. (AN INFANT SUING BY HER MOTHER
AND NEXT FRIEND E.O.)

APPELLANTS

- AND -

MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE
ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Power delivered on the 13th day of August 2020

1. This is an appeal against the judgment of the High Court ([2017] IEHC 816) delivered on 15 November 2017 and its order of 15 December 2017 wherein the trial judge (Faherty J.) refused to grant an order of *certiorari* quashing a decision made by the first named respondent ('the Minister') to refuse a visa to the second named appellant.
2. The impugned decision of the Minister concerned the refusal of a visa application made by the second named appellant (A.O.) who is the father of the third, fourth and fifth named appellants and the partner of the first named appellant (E.O.).

Part I Background Facts and Proceedings

3. E.O. is originally from Nigeria. She entered the State on 8 October 2004 and two months later gave birth to her first born child, the third named appellant. Her partner, A.O., also entered the State in 2004 and remained only for a number of weeks. He was here for the birth of the child and he left shortly thereafter. The following year, E.O. was granted residence in the State pursuant to the Irish Born Child Scheme 2005 under which the non-national parents of a child born in Ireland before 1 January 2005 could apply for leave to remain in the State on the basis of their parentage of an Irish born child. E.O. and A.O. have two more children – the fourth and fifth named appellants – who were born in 2008 and 2011, respectively. On 13 December 2012, E.O. was granted a Certificate of Naturalisation. E.O. and her three daughters are all Irish citizens.

4. A.O. was granted a short stay visa in respect of his entry into the State in 2004. He has visited Ireland on a number of occasions since then.¹ E.O. and her children have also visited A.O. in Nigeria several times. Photographs on file indicate that the family met on several occasions, including, in March and June 2006 (Nigeria), in 2008 (location not indicated), in 2009 (France) and in 2014/2015 (Nigeria). As their third daughter was born in March 2011, it is reasonable to assume that A.O. and E.O. also met in 2010.

5. On 15 April 2011, the Irish Naturalisation and Immigration Services ('INIS') within the Department of Justice, Equality and Law Reform received a letter from A.O. wherein he sought to apply for permission to join E.O. in the State on foot of the *Zambrano* decision.² On 14 June 2011 INIS replied and advised A.O that if he wished to obtain permission to enter and

¹ There is a statement on file from A.O. dated 20 November 2015, wherein he claims that he has been in Dublin on several occasions, including, in 2004, 2005, 2006 and 2008. The Minister states (at para. 3 of his submissions) that there is a written record of A.O. having entered the State on 25 March 2005 and 17 March 2006 but that there is no record in respect of his departure from the State on either occasion.

² Referring to the decision of the Court of Justice of the European Union ('the CJEU') in *Zambrano v. Office National de l'Emploi* (Case C-34/09) 8 March 2011, [2011] ECR I-1177.

reside in the State, he must first apply to the relevant Irish Embassy or consulate in his country of residence for a visa. Nothing further was heard in respect of that application.

6. The evidence indicates that A.O. has lived in various countries, including, Austria, France and Nigeria. Whilst resident in France, he was charged in respect of *repeated* offences for possessing, transporting and offering/selling unauthorised drugs in Village-Neuf, Alsace, over a period that ran from January 2009 until October 2011. He was convicted in respect of six offences, including, recidivist drug related crimes and other offences. In addition to a term of imprisonment, he was fined and had imposed upon him a 10-year prohibition on re-entering French territory.

7. On 4 July 2015, A.O. applied for a visa to come to Ireland in order to join his family. His application was made through the Irish Embassy in Abuja, Nigeria. The application was refused on 22 July 2015 on a number of grounds. A.O.'s finances were deemed to be insufficient insofar as E.O. had not demonstrated her ability to support him, financially, if he were granted a visa. Insufficient documentation had been submitted in support of the application. The terms of the *Zambrano* judgment could not be applied to a third country national ('TCN') parent of an Irish born citizen child who had been convicted of serious and/or persistent criminal offences, and accordingly, *Zambrano* did not apply. Other grounds of refusal included the cost to public funds and to public resources. Absent the submission of evidence of an ongoing family relationship, it was not accepted that any family rights under Article 8 of the European Convention on Human Rights ('the ECHR') arose.

8. On A.O.'s behalf, his solicitors appealed this refusal by letter dated 16 September 2015. Enclosed with that letter was one written by A.O. some years earlier on 8 September 2009. He submitted that E.O. was unable to work due to difficulties in taking care of her children. The fourth named appellant had medical problems. Letters from the Children's University Hospital indicated difficulties mobilising and co-ordinating her limbs and referred

to a nail injury to her right index finger. If granted a visa, A.O. would take up employment in Ireland as soon as possible and would not rely on public funds. A.O. had complied with the conditions on a short stay visa granted in 2004. Before entering France in 2009, A.O. had lived in Vienna for some time. He was convicted in France for a drug offence in 2011 (*sic*).³ He was sentenced to 4 years in prison, of which he served 34 months. It was his first ever conviction and he was extremely sorry. In prison, he transferred money to E.O. to help support her and his children. He continues to support his family in Ireland by paying for their travel tickets so that they can visit him in Nigeria. Such an arrangement was not practical long term as it creates a financial burden and causes stress. He undertook to discharge all expenses in connection with his stay in Ireland and to find employment. Two letters of support from E.O. dated 8 September 2015 and 14 September 2015 were included in support of his application stating, *inter alia*, that A.O. was very involved in his children's lives and that they talked to each other by phone almost every day.

9. On 10 November 2015 the Visa Office of the Irish Embassy in Abuja sought further information from A.O. in relation to his appeal. Information on A.O.'s family's details and immigration history was sought as was clarification regarding the extent of the fourth appellant's movement disorder and the care and the treatment she required. Additional information was also sought concerning A.O.'s conviction.

10. By e-mail dated 30 November 2015, A.O.'s solicitors furnished additional information including details of his visits to Dublin in 2004, 2005, 2006 and 2008 and documents concerning his convictions. They confirmed their instructions that the fourth appellant was '*now ok*'. The translated Criminal Conviction Record confirmed that by decision of the Correctional Court of Mulhouse on 13 June 2013, A.O. was found guilty of six charges

³ Whereas this statement is made in a letter to the Irish Embassy in Nigeria from the appellants' solicitors dated 16 September 2015, it appears to be inconsistent with other information on the file. See reference (in para. 11) to his criminal conviction by the Correctional Court of Mulhouse on 13 June 2013 in respect of offences committed between January 2009 and 3 October 2011.

committed in Village-Neuf from January 2009 to 3 October 2011. He was sentenced to 4 years imprisonment, was fined and had imposed upon him a 10-year prohibition on re-entering French territory.

The Proposed Decision

11. On 26 January 2016 an Appeals Officer within the Visa Section of the Irish Embassy in Nigeria wrote to A.O. advising him of a proposed decision to refuse his application. It was expressly stated therein that in order to protect A.O.'s right to fair procedures, the Appeals Officer was setting out his reasoning, as it then stood, and inviting A.O. to comment. The letter set out in considerable detail the reasons for the proposed refusal of the visa application. The Appeals Officer confirmed that there was no less restrictive process available which could achieve the legitimate aims of the State. Such aims included the need to safeguard both the economic well-being of the country and the rights and freedoms of others, as well as the maintenance by the State of control over its borders and its operation of a regulated system for control, processing and monitoring of non-national persons in the State. This, it was stated, constituted a substantial reason associated with the common good for the refusal of the visa application. As the decision, at that stage, was only a proposal to refuse the application, A.O. was invited to comment on the proposal. The letter ended with an assurance that the reasons given for the refusal were not fixed and that any comments furnished would be taken into consideration before a final decision was made.

Appeal of Proposed Decision

12. The invitation was accepted, and, in this regard, additional submissions were filed by A.O.'s solicitors on 11 March 2016⁴ and on 1 April 2016. The submissions acknowledged

⁴ This letter contains a typo in the date wherein 2016 is typed as 2015.

'the extensive work and consideration' that had been involved in relation to A.O.'s application which was stated to be *'quite apparent from the draft decision'*. The logic of the decision was said to be *'clear and understandable'*. However, a request for reconsideration was made on a number of grounds, including, the fact that A.O.'s second daughter attended her GP regularly for check-up in relation to movement difficulties. A.O. was also agreeable to having additional conditions (less restrictive than a refusal) attached to any visa permission. Such conditions could include a time limit for the visa or it could be conditional upon A.O.'s obtaining employment within a reasonable period or keeping the authorities apprised of his whereabouts at all times. It was submitted that in A.O.'s absence, it would be more likely that the other appellants would remain *'a burden on the State'*. Strasbourg case law was mentioned in the context of a hypothetical situation of what might have occurred had A.O.'s partner and children been living in France. Whilst acknowledging that it could be said at that juncture that *Zambrano* does not apply, it was nevertheless submitted that the minor appellants' *Zambrano* rights would be triggered by a refusal to grant a visa. A.O. was deeply regretful of *'the difficulties he encountered in France'*. He undertook not to be a burden on the State and confirmed that he had an offer of a job in Ireland. The solicitors for the appellants then stated: -

"Lastly, having taken detailed instructions from Mrs. O_____ in the recent past and enquired of her what her intentions would be if it became apparent that her partner would not be allowed to come to Ireland for a very long time. After much soul searching and reflection Mrs. O_____ so has informed us that she would in those circumstances leave Ireland and go and live in Nigeria with her children. At the end of the day she feels unable to continue indefinitely and singlehandedly to bring up her children and the emotional support from her partner and practical assistance in parenting her young family would outweigh, in her view, the undoubted benefit of raising her family in Ireland."

13. On 11 April 2016 the Appeals Officer issued a final decision ('the impugned decision') refusing A.O.'s application for a visa (see para. 16 below).

14. A.O.'s solicitors replied on 22 April 2016 requesting that the refusal of the visa application be withdrawn within seven days on the basis that there was a failure to consider (i) the application of *Zambrano* principles and (ii) the possibility of 'less restrictive processes'. They confirmed that they had made it clear that in the event of a refusal the mother of the children would return to Nigeria with them. Her decision would come about as a result of the failure to grant the visa. They requested a reconsideration of the matter.

15. On 27 April 2016 the Appeals Officer confirmed that he had taken the opportunity to review the impugned decision.⁵ Having done so, he declined the invitation to withdraw it and he confirmed that the decision stands.

The Impugned Decision

16. As noted, in his decision of 11 April 2016, the Appeals Officer informed A.O. that his appeal had not been successful. He was advised that his application for a visa to travel in order to join his family in Ireland had been examined in accordance with the Policy Document on non-EEA Family Reunification ('the Policy Document') as published by INIS on behalf of the Minister on 31 December 2013. It was further confirmed that the said Policy Document had been prepared in accordance with public policy and in observance of constitutional, ECHR and other rights of the parties and of society in general. It was stated that in assessing the application it was important to note that family unification decisions were not intended to become merely a 'box ticking exercise' and that any decision made was based on a consideration of all the relevant facts of a particular case. A.O. was advised that the decision maker retains the discretion to grant family reunification in cases which, on their face, do not appear to meet the requirements of the Policy.

⁵ I am aware that the Minister refers to the Appeals Officer in the third person feminine. However, in this email, the Appeals Officer is identified as Mr. Oliver Gainford.

17. A.O.'s claim that he had a right to reside and be employed in Ireland pursuant to Article 20 of the Treaty on the Functioning of the European Union ('the TFEU') as interpreted by the Court of Justice of the European Union ('the CJEU') in *Zambrano* was noted and the importance of assessing this claim was underscored. It was confirmed that the Appeals Officer reached a decision in a manner that is compatible with the State's obligations under the ECHR and that similar rights under the Constitution (including under Article 41) are relevant to any decision reached. When considering an application where one of the parties is a minor then, regardless of nationality, '*especial care*' was stated to be owed and the judgment of the European Court of Human Rights ('the ECtHR') in *Neulinger and Shuruk* was referenced.⁶ In *Neulinger*, the Strasbourg Court noted the broad consensus, including, in international law, in support of the idea that in all decisions concerning children, their best interests must be paramount. Finally, it was confirmed that the Appeals Officer was mindful that in all cases where one of the parties concerned is an Irish citizen child then special consideration would be given to that case.

18. The above considerations having been detailed, A.O.'s appeal was then assessed under four headings: -

1. whether the operation of the Policy Document, including the discretion retained by a decision maker, meant that the application ought to be granted; if not
2. whether the operation of Article 20 of the TFEU meant that the application ought to be granted; if not
3. whether the operation of the European Convention of Human Rights Act 2003 (the 'ECHR Act') meant that the application ought to be granted; and if not
4. whether, under the Constitution, the application ought to be granted.

⁶ *Neulinger and Shuruk v. Switzerland* (App. No. 41615/07, 8 July 2009).

Consideration under the Policy Document

19. As noted, INIS published a Policy Document on family reunification which sets out a comprehensive statement of Irish immigration policy in this area in cases where non-EEA members are involved. In December 2016, that document had been revised to reflect the commencement of the International Protection Act 2015. The Appeals Officer stated that, in accordance with the Policy Document, when facilitating family reunification, due regard must be had to the circumstances of the family, **including the decisions which the family itself has made,**⁷ and to the fact that the State cannot be regarded as having an obligation to subsidise the family concerned. It was also pointed out that it is a matter of Government policy that family reunification contributes towards the integration of foreign nationals in the State. A.O. was advised that in the particular circumstances of his application, matters of public policy were required to be addressed. However, because his application involved three minor children, the Appeals Officer indicated that he had first considered the rights of the child, including, the best interests of the child in assessing A.O.'s application.

20. Noting the observations of Lady Hale in *ZH v. Secretary of State* [2011] UKSC 4, the Appeals Officer considered that a distinction was to be drawn between decisions which directly affect a child's upbringing and those which affect a child more indirectly. It was acknowledged that in certain decisions involving children, such as, adoption decisions, 'the best interests of a child' will be the determining factor. It may be a primary, though not the sole factor, in other decisions. Identifying the child's best interests did not mean that, in every case, their best interests '*would lead inexorably to a decision in conformity with those interests*'. Noting the importance of giving due weight to a child's opinion when he or she is old enough to express a view,⁸ the Appeals Officer acknowledged the letter on file written by the third named

⁷ Emphasis in bold is mine both here and throughout the judgment unless otherwise indicated.

⁸ Article 12(1) of the United Nations Convention on the Rights of the Child.

appellant expressing her sadness about her father's absence and her hope of living as a big 'happy family'. However, the long-distance relationship that had always prevailed between A.O. and his children was noted, as were the family's previous travels outside the State to visit A.O. It was accepted that, in principle, it was in the minors' best interests that A.O. be admitted to the State. However, referring to Lady Hale's comments in *ZH*, the Appeals Officer found that this fact, alone, could not be decisive.

21. The Appeals Officer then considered the family's circumstances and noted A.O.'s stated interest in his children and involvement in their lives. His observations on his convictions for drug offences were recorded. His partner's stated view of him—to the effect that he was a good man who had sent money for travel tickets and gifts and who video-called regularly—was then considered. Movement difficulties and an injury to the fourth appellant's finger were noted. Having considered A.O.'s current employment in Nigeria, and having had regard to visits, communication and financial supports, and, in particular, the third appellant's preference for her father to be admitted, the Appeals Officer took the view that a reasonable claim for family reunification had been made out.

22. However, that claim had to be considered in the context of other considerations, including, public security, public policy and public health. It was noted that the Policy Document stated at para. 7.1: -

“A critical element in all immigration decisions is the protection of the State, its citizens and persons present within it. Applications for family reunification will be refused where a party to an application is a threat to public security, public policy or public health.”

In examining public policy considerations, the Appeals Officer observed that A.O. was convicted on 13 June 2013 by the Correctional Court of Mulhouse of six charges, which included, recidivism of non-authorised possession of drugs; recidivism of non-authorised transport of drugs; recidivism of offer on sale of non-authorised drugs; fraudulent possession

of false administrative documents; use of false administrative documents; and receiving stolen property from theft. A.O.'s submissions about having learnt from his mistake and of having no other repeated offences were noted.

23. It was noted that pursuant to para. 7.2 of the Policy Document: -

“A criminal record will not automatically exclude a person from consideration for family reunification, but it clearly is highly influential in any consideration of the merits of the individual case”.

In a Communication for the European Parliament and Council, the European Commission had set out guidance on how grounds of public policy ought to be applied in the context of restrictions on the free movement of EU citizens and their family members who would benefit from the application of Directive 2004/38/EC. The Appeals Officer observed that as an application for a visa to join Irish citizen family members living in Ireland was an application under national law, the provisions of Directive 2004/38/EC were not directly applicable. However, he considered that insofar as the Communication sets out a common European approach to the difficult task of balancing public policy or public security as against family life rights, it was appropriate to consider its contents. That Communication had confirmed the right of Member States to retain the freedom to determine the requirements of public policy and public security in accordance with their needs. Such requirements can vary from one State to another and from one period to the next.

24. The Appeals Officer also took into account a recommendation by the Joint Committee on Justice, Defence and Equality that, having regard to the best use of Garda resources, in certain cases a criminal sanction was not mandatory for possession of small amounts of drugs for personal use. However, he noted that this recommendation was set against *‘the need to continue and to escalate the campaign targeting those who supply and deal in illegal drugs’*. Certain provisions of the National Drugs Strategy (NDS) were also cited. These confirmed that problem drug use impacts on society as a whole and that it is a major issue of public

concern. The most damaging effects for communities were those caused by drug dealing, drug related crime and anti-social behaviour. Such drug related activities can undermine the stability of families and communities. The Steering Group had noted that increasing fear and incidents of intimidation had emerged as a key concern within communities. The nature and the scale of intimidation were reported as having increased in recent years. The families, friends and associates of drug users, as well as the drug users themselves, were increasingly the targets of intimidation and violence. These debts usually arose as a result of drug usage or drug supply. Apart from the huge impact which the use or supply of drugs had on families directly affected, the increased levels of violence had significant negative consequences for the wider communities. The commitment of An Garda Síochána to prioritise the tackling of serious organised crime as set out in the Annual Policing Plan was noted.

25. In reaching the impugned decision, regard was also had to the European Union Action Plan on Drugs which stated that the use of illicit drugs and the misuse of drugs generally was a major problem for individuals' families and communities across Europe. Apart from the health and safety implications of drug misuse, the illicit drugs market constituted a major element of criminal activity across European society and indeed globally. The Appeals Officer noted that Irish and European measures on the control of drugs were based on United Nations' Conventions that provide the international legal framework to address, *inter alia*, the use and supply of illicit drugs.

26. Having reviewed the documents referred to above, the Appeals Officer considered it clear that the supply of illicit drugs impacts negatively on society as a whole and is a major issue of public concern. The supply of illicit drugs is associated with drug related crime, anti-social behaviour and the undermining of the stability of families and communities. He was satisfied that the protection of Irish citizens, and all others legally resident in the State, from

the risks attendant on the supply of illicit drugs was a fundamental interest of society and that it deserved and indeed demanded protection by the State.

27. Noting that the mere fact that A.O. had committed offences in the past and so had a criminal record would not automatically exclude him from consideration for family reunification, the Appeals Officer considered that his application must be seen in the light of the EU Communication concerning Directive 2004/38/EC. That Communication noted that restrictive measures may be taken on a case by case basis where the personal conduct of an individual represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society of the host Member State. Individuals could have their rights restricted only if their personal conduct represents a threat. Past conduct may be taken into account only where there is a likelihood of reoffending. The Appeals Officer noted that State Authorities must base their decision on an assessment of the future conduct of the individual concerned. In this regard the kind and number of previous convictions must form a significant element of this assessment and particular regard must be had to the seriousness and frequency of the crimes committed. A remote possibility of a repeat offence was not in itself sufficient.

28. The Appeals Officer noted that the particular circumstances of A.O.'s application involved not just the possession of illicit drugs but also the transportation and offering for sale or supply of illicit drugs. He had three separate convictions for distinct charges in relation to drugs offences and in each case the three offences were classified as repeated or recidivist offences. The Appeals Officer was satisfied that the four year custodial sentence imposed and the ten year ban on re-entering France demonstrated the seriousness of the offences. He stated (at p. 12 of the decision): -

“On balance, the Appeals Officer must take into account the very serious negative impact which the supply of illicit drugs has, on the State (in terms of criminal and anti-social behaviour), on other persons resident in the State, on communities, and on families. It is clear that the suppression of the supply of illicit drugs is of fundamental interest to the State, and that it is an interest reflected within the European Union and within International Law.”

29. The Appeals Officer then turned to consider the question of financial resources in respect of A.O.'s application for family reunification. Pursuant to para. 47 of the Policy Document, an Irish citizen, who seeks to sponsor an immediate family member, must not have been totally or predominantly reliant on benefits from the Irish State for a continuous period in excess of two years immediately prior to the application and must, over the three year period prior to application, have earned a cumulative gross income over and above any State benefits of not less than €40k. Noting that E.O. was unemployed and in receipt of a lone parent allowance, the Appeals Officer was not satisfied that she was not totally or predominantly reliant on benefits for a period of more than two years prior to the application nor that she had earned a cumulative gross income over and above any State benefits of not less than €40,000. The minimum financial requirements in the Policy Document were not met and E.O. would not be able, genuinely, to fulfil the responsibility of sponsor in respect of A.O. As to the stated offer of employment of A.O., the Appeals Officer did not attribute considerable weight thereto and, accordingly, was not satisfied that A.O. would be self-sufficient should he be admitted to the State. The Appeals Officer concluded that this potential cost to the public exchequer and public resources (in terms, *inter alia*, of social assistance and health care) must be taken into account in the decision making process. Whereas it was accepted that the evidence tended to show an active and continuous involvement by A.O. in the life of his children, providing them with real emotional and financial support, the Appeals Officer was satisfied that A.O.'s personal conduct represents a threat to the requirements of public policy. Consequently, the general policy to grant immigration permission where there exists an active and continuous involvement in a child's life ought not to apply in the particular circumstances of A.O.'s application having regard to issues of his personal conduct.

30. In conclusion, the Appeals Officer reached the following five conclusions with regard to the Policy Document: -

- (i) subject to an assessment of other relevant considerations, it would, in principle, be in the best interests of the children for A.O. to be admitted to the State;
- (ii) subject to an assessment of other relevant considerations, a reasonable claim for family reunification has been made out;
- (iii) the personal conduct of A.O. represents a threat to the requirements of public policy;
- (iv) E.O. does not meet the minimum financial requirements of a visa sponsor; and
- (v) the '*general policy, to grant immigration permission where the parent can demonstrate an active and continuous involvement in the child's life, providing real emotional and/or financial support*' ought not to apply in the particular circumstances of the case having regard to the personal conduct of A.O.

Balancing all five findings, the Appeals Officer recalled all the issues to which consideration had been given. He noted the existence of certain ameliorating factors which tended to lessen the impact of a refusal decision. Taking all relevant factors into account he considered that discretion ought not to be exercised in favour of granting A.O. a visa. His conclusion in this regard was reached without prejudice to a consideration of the application under Article 20 of the TFEU and Article 8 of the ECHR.

Consideration under Article 20 TFEU

31. Considering the visa application of A.O. in the context of Article 20 TFEU, the Appeals Officer concluded that it was evident that the minor appellants were in the care of E.O. in Ireland, notwithstanding that A.O. played a role in their lives. Whilst the family may decide to leave the State, he was not satisfied that this was equivalent to a situation where the children would **have to** leave the territory of the European Union (the 'EU'). He noted that in the *Zambrano* case, Belgium's refusal of a visa to live and work in that state would have resulted in the EU citizen children having to leave the territory of the Union. In the present case, by

contrast, the children are all currently residing in the State with their mother who has been in the State since 2004. She is in receipt of State support which assists her in taking care of the children within the State and she, by virtue of her Irish citizenship, is entitled to work in the State. The Appeals Officer considered that it had not been demonstrated that the children were dependant on A.O. It was also the case that the children and their mother had travelled outside of the State in order to visit and spend time with him. The finding that the children would not have to leave the territory of the Union should the visa application be refused, did not exclude the possibility that the children's parents may, in any case, decide to remove the children from the territory of the European Union.

32. The Appeals Officer was of the view that the decision in *Zambrano* could not be interpreted as requiring all minor citizens to remain within the territory of the Union regardless of their wishes or the wishes of their parent. Accordingly, the Appeals Officer held that a refusal of a visa to A.O. would not force the minor appellants to leave the EU, thereby impairing the genuine enjoyment of their EU citizen rights.

Consideration under the European Convention on Human Rights

33. The Appeals Officer then considered the visa application in the light of Article 8 ECHR, noting the provisions of 3(1) of the ECHR Act 2003 obliging the Minister to exercise his functions in a manner compatible with the State's obligations under the Convention. The Appeals Officer noted that the right to family life as protected by Article 8 ECHR places both positive and negative obligations on the State. However, the Convention does not give an automatic right to a foreign national to enter or to reside in a particular country. The State enjoys a margin of appreciation in the area of immigration control. What is required is that a fair balance be struck between the sometimes-competing interests of the individual and of the community as a whole. The question in the present case is whether there existed a positive

obligation on the Minister to grant a visa to A.O. so that he could reconstitute family life within the State.

34. The Appeals Officer considered that Article 8 of the ECHR qualified the right, noting that it may be restricted in accordance with law to pursue a legitimate aim. Such restrictions must be necessary in a democratic society in the interests of national security, public safety or the economic well-being 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. The Appeals Officer accepted that the refusal of a visa to A.O. constituted an interference with a right under Article 8. However, he noted that such interference was in accordance with law and pursued the legitimate aims of the State, including, the interests of national security, public safety, the economic well-being of the country, the prevention of disorder and crime, the protection of health or morals and the protection of the rights and freedoms of others. Citing *Berrehab v. the Netherlands* (App. No. 10730/84, 21 June 1988) and *R v. Secretary of State for the Home Department ex p. Razgar (FC)* [2004] UKHL 27, he noted that the protection of the interests of economic well-being was a legitimate aim in exercising immigration control. He considered that the potential costs to public funds if A.O. were admitted to the State would be detrimental to the economic well-being of the country and the availability of services, thereby affecting the rights and freedoms of others. Whilst recognising that a past criminal offence should not automatically exclude A.O.'s application for family reunification, he found that the considerations of public safety and the prevention of disorder and crime militated against granting the visa application. Having regard to the nature of the offences involving the supply of illicit drugs, A.O.'s personal conduct constituted a present threat to the requirements of public policy. Accordingly, the Appeals Officer concluded that it was in the interests of the common good to uphold the aims of the State to maintain control of its borders.

35. Assessing the proportionality of the interference, the Appeals Officer acknowledged that it must be in response to a pressing social need and that a balance must be struck between the individual's rights and the broader public interest (*per Gulijev v. Lithuania* (App. No. 10425/03), 16 December 2008). Where it had already been concluded that the admission of A.O. would pose a risk to public safety and to the economic well-being of the country the Appeals Officer was satisfied that the rights of the State were weightier than the private and family rights of the appellants and that there were no exceptional circumstances which would warrant a contrary conclusion. He found, therefore, that the refusal of the visa application would not constitute a violation of Article 8 ECHR.

Constitutional Considerations

36. In respect of the appellants' constitutional rights, the Appeals Officer noted that E.O. and the minor appellants each have an unqualified right to reside in Ireland and have personal rights protected by Articles 40, 41 and 42 of the Constitution. Such rights are not absolute and may be restricted when weighed against the rights of the State to control the entry, presence and exit of foreign nationals in the State. In *Lobe v. Minister for Justice, Equality & Law Reform* [2003] IESC 3, the Supreme Court held that it does not flow from the rights of an Irish citizen that their family members necessarily have the right to reside in the State. Further, while the Minister may consider each case on its merits, he is entitled to consider the consequences for other cases of allowing an applicant permission to remain.

37. The decision of Mac Eochaidh J. in *I.G. & J.G. v. Minister for Justice and Equality* [2014] IEHC 29 was noted. The mere fact that a Constitutional right is engaged does not mean that it cannot be '*trumped by a lawful countervailing purpose which must ensure that the denial of the right of residence is proportionate to the policy objective sought to be achieved*'. The Appeals Officer, having considered the rights of the Irish citizens, was satisfied that any right

to live together with A.O. in Ireland was ‘trumped by a lawful countervailing purpose’, having regard to his personal conduct and to the costs to the public exchequer. The denial of the visa was proportionate to the policy objectives it sought to achieve.

38. In conclusion, the Appeals Officer was satisfied that there was no less restrictive process available which would achieve the legitimate aims of the State to safeguard the economic well-being of the country and the rights and freedoms of others and to maintain control over its borders. Having considered all factors relating to the position and the rights of the family, the Appeals Officer was satisfied that the factors relating to the rights of the State were ‘weightier’ than factors relating to the personal rights of the other appellants. No additional considerations in light of the Constitution would warrant a contrary conclusion. The Appeal Officer, therefore, confirmed the refusal of the visa and disallowed the appeal.

The High Court

39. It was this refusal decision of 11 April 2016 that the appellants sought to quash in the judicial review proceedings. On 12 May 2016, Faherty J. made an *ex parte* order, granting the appellants leave to apply for judicial review seeking: -

- (i) an order of *certiorari* quashing the Minister’s decision of the 11 April 2016 refusing the appeal against the refusal of a visa application in respect of A.O.;
- (ii) a declaration that A.O. was entitled to an effective remedy before an independent court or tribunal in relation to the impugned decision and had been denied same;
- (iii) further or other order; and
- (iv) the costs of these proceedings.

40. Five numbered grounds upon which the above reliefs were sought were set out in the appellants’ amended Statement of Grounds. Grounds 1 – 4 were in relation to the order of

certiorari and the fifth ground was in respect of the declaratory relief sought concerning an effective remedy. The Grounds were as follows: -

1. *in failing to properly address two issues raised by A.O. in the context of his visa application (namely the question of 'less restrictive measures' and the applicability of Zambrano) the refusal of A.O.'s appeal was arrived at in breach of fair procedures and A.O.'s right to be heard;*
2. *no proper regard was had to the Irish citizen appellants' right pursuant to Article 20 TFEU in arriving at the decision to refuse A.O.'s appeal;*
3. *in concluding that the appeal of the refusal of a visa should be refused, inter alia, on the basis that there was 'no less restrictive process available which would achieve the pressing social need and the legitimate aims of the State' without, in fact, considering and weighing in the balance any other less restrictive measures available, the Minister was in breach of fair procedures and the appellants' right to be heard;*
4. *in any event and even in the absence of any error in law, irrationality or breach of fair procedures (which absence is not admitted) it is for the High Court to reassess the balance of reasonableness as between the interests of the State and the rights and interests of the appellants; and*
5. *the failure of the Minister to provide a scheme in the State which includes an appeal and/or an effective remedy in respect of refusals of applications such as that impugned herein in accordance with Article 47 of the Charter and/or the Constitution of Ireland is unlawful.*

41. In her judgment of 15 November 2017, Faherty J. considered the grounds upon which the decision was challenged. She also recalled (at para. 37 of her judgment) that: -

"In the statement of grounds, relief was also sought by way of declaration that the applicants were entitled to an effective remedy before an independent court or tribunal. This relief was grounded, inter alia, on Article 47 of the Charter of Fundamental Rights of the European Union (the EU Charter'). In the course of his oral submissions, counsel for the applicants advised that reliance on the EU Charter was not being pursued."

Faherty J. therefore proceeded to consider the remaining grounds under three headings and her findings may be summarised as follows.

The alleged failure to address the applicability of Zambrano (Grounds 1 and 2)

42. The practical effect of the denial of a visa to A.O. was not that the minor appellants would be obliged to leave the State or the territory of the EU. The Appeals Officer was entitled to reach the conclusion he did, having regard to the factual matrix before him. The averment of E.O. that she would leave Ireland if A.O. was not granted a visa was not sufficient to engage *Zambrano* rights. Applying the finding of Hogan J. in *Bakare*, the prospect of E.O. moving to Nigeria with the minor appellants must also *'be considered to be a remote one,'* and as a result, the challenge to the decision on *Zambrano* grounds was not successful.

The alleged failure of the Appeals Officer to properly address and weigh in the balance the question of 'less restrictive measures' (Grounds 1 and 3)

43. The Appeals Officer's consideration of 'less restrictive measures' might have been more expansive. However, it was not *'of such magnitude as to impugn the decision'*. The Appeals Officer did consider the 'less restrictive measures' suggested but found that they were not sufficient to displace his finding that A.O. represented a threat to public policy requirements. The Appeals Officer was also entitled to have regard to financial considerations and to find that A.O. would be a cost to public funds and that E.O. did not have the financial resources to enable her to sponsor him. In any event, the Appeals Officer was entitled to consider A.O.'s criminal record as being a highly influential factor, given his involvement in the possession, transport and offering for sale of illicit drugs. His personal conduct could lawfully be considered as a threat to the public policy requirements in the State. It was within the jurisdiction of the Appeals Officer to assess these findings against his view that the best interests of the minor appellants would be served by having A.O. admitted into the State and to find that the rights of the State were *'weightier'*.

Whether it was for the court to assess the balance of reasonableness as between the interest of the State and the rights and interests of the applicants (Ground 4)

44. The trial judge found the High Court could only enquire into whether the appellants' rights and all relevant facts and circumstances had been correctly identified, whether all submissions were considered and whether the ultimate decision was arrived at fairly, according with the principles of proportionality, rationality and reasonableness. It was not for the High Court to embark upon an adjudication of the merits of the case. As *per* Fennelly J. in *Meadows*, a proportionality test was to be applied to administrative decisions which affect fundamental rights and judicial review constituted an effective remedy to vindicate such rights. The appellants had not discharged the burden of proof upon them to satisfy the court that the application of a proportionality test to administrative decisions was not an effective remedy. Accordingly, the relief sought was refused.

Grounds of Appeal

45. By Notice of Appeal dated 4 April 2018, the appellants sought to set aside the High Court Order made on 15 December 2017. Extensive grounds of appeal were furnished, many of which overlapped. The appellants claimed that the High Court judge erred in fact and/or in law in: -

1. *finding that the denial of a visa would not result in the minor appellants being obliged to leave the State or EU;*
2. *concluding that the averment of E.O. that the denial of a visa to A.O. would cause her to move to Nigeria with the minor appellants was insufficient to engage Zambrano rights;*
3. *concluding that in the event that E.O. and the minor appellants leave the State, it would not be as a result of any compulsion to do so, but, rather, would be giving effect to E.O.'s choice to do so;*
4. *concluding that the prospect of E.O. leaving for Nigeria with her children must be considered to be a remote one;*

5. *failing to address the position put forward and averred to by E.O. (her stated intention to leave the territory of the EU with her children in the event of a visa not being granted). The appellants were entitled to have E.O.'s uncontroverted averments dealt with on the basis made and to an adjudication as to whether 'Zambrano' applied in those circumstances;*
6. *accepting that the adjudication on the validity of the decision in judicial review is confined to establishing that it was a decision made within jurisdiction which could not be deemed irrational or unreasonable;*
7. *failing to accept that the Appeals Officer erred in finding that there was a reasonable concern that there would be a cost to public funds in terms of social assistance and public healthcare if A.O. was admitted to the State;*
8. *concluding that the absence of a more expansive analysis of particular issues (as described at para. 69 of the judgment) was not of such magnitude as to impugn the decision;*
9. *failing to provide a reason or rationale as to why the absence of a more expansive analysis of particular issues (as described at para. 69 of the judgment) was not of such magnitude as to impugn the decision;*
10. *concluding that as the court was not exercising an appellate jurisdiction it could only enquire as to whether the appellants' rights and all relevant facts and circumstances were correctly identified, whether all submissions were considered, and whether the ultimate decision was arrived at fairly and accorded with the principles of proportionality, rationality and reasonableness;*
11. *concluding that the appellants' rights and all relevant facts and circumstances were correctly identified, that all submissions were considered and that the ultimate decision was arrived at fairly and accorded with the principles of proportionality, rationality and reasonableness;*
12. *concluding that the appellants had not discharged the burden of proof required and /or finding that the challenge on the 'less restrictive measures' ground had not been made out;*
13. *finding that the issue raised by Cooke J. in Lofinmakin (as referred to in para. 74 of the judgment under appeal) has since been conclusively dealt with by the Superior Courts;*
14. *concluding (at para. 84) that it was not for the High Court to embark on an adjudication 'in the merits' in this case;*
15. *concluding (at para. 84) that it was not for the High Court to embark on a balancing of competing rights in this case;*
16. *concluding that it has been comprehensively established that judicial review, adapted as it has been, post Meadows, to apply a proportionality test to administrative decisions which affect fundamental rights, is an effective remedy by which such rights can be vindicated;*
17. *such further and other grounds as may be adduced.*

46. The appellants raised six questions which they submitted are the issues to be decided on appeal: -

- a. whether the High Court erred in not dealing with the issues raised by the appellants on the basis put forward;
- b. whether the *Zambrano* judgment was relevant to the appellants' claim;
- c. whether the court's function in judicial review is confined to ascertaining whether the impugned decision was proportionate, within jurisdiction and not irrational and unreasonable;
- d. whether any potential cost to public funds was a relevant consideration in deciding whether to admit A.O. to the State;
- e. whether the consideration of 'less restrictive measures' was properly dealt with by the decision maker and/or the High Court; and
- f. whether judicial review is an effective remedy by which the appellants' rights can be vindicated.

Part II Law on Immigration and the Rights of Families

Statutory Provisions

47. The Immigration Act 2004 (Visas) Order 2014 (S.I. No. 473/2014)⁹ specifies the classes of non-nationals who are exempt from Irish visa requirements and those who are required to be in possession of a valid Irish transit visa when transiting within a port within the State. Regulation 3(a) of the Order provides: -

“3. It is hereby declared that the following classes of non-nationals are specified as classes the members of which are not required to be in possession of a valid Irish visa when landing in the State:

⁹ Whereas the Immigration Act 2004 (Visas) Order 2011 (S.I. No. 146/2011) referred to by the Appeals Officer was revoked by the Immigration Act 2004 (Visas) (No. 2) Order 2011 (S.I. No. 345/2011), there has been no material change to the legal requirement that Nigerian citizens be in possession of a valid Irish transit visa in order to enter the State.

(a) *nationals of a state or territorial entity specified in Schedule 1*”

Nigerians are not listed among the classes of non-nationals specified in Schedule 1.

48. Article 20(1) of the TFEU provides that every person holding the nationality of a Member State shall be a citizen of the Union. It states: -

“Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.”

49. Article 20(2) of the TFEU sets out the rights pertaining to EU citizens, including, the right of free movement: -

“2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States;

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.”

50. Fundamental rights are guaranteed under the Charter of Fundamental Rights of the European Union (the ‘Charter’), Article 7 of which provides: -

“Everyone has the right to respect for his or her private and family life, home and communications.”

51. The rights of the child are protected under Article 24 of the Charter which provides as follows: -

“1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.”

52. Article 51(1) of the Charter provides that the Charter applies only to Member States when they are ‘implementing’ Union law. It provides: -

“The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.”

Control of Borders

53. In *R.M.R. & Ors v. Minister for Justice, Equality & Law Reform* [2009] IEHC 279, the High Court underscored the role of the Minister in determining the conditions under which foreign nationals may enter, remain within and leave the State, recognising that *‘this has been stated on many occasions by the courts’*.¹⁰ At para. 25, Clark J. stated: -

“It is clear that the Minister is under no legal obligation to grant a visa - the grant or refusal of visas is entirely within his discretion and it is for the visa applicant to convince the Minister that he or she should be granted a visa. Government policy determines which foreign nationals require visas to visit or transit the State and whether they can work in the State.”

54. In *A.M.S. v. Minister for Justice and Equality* [2014] IESC 65 the Minister’s refusal of a grant of discretionary family reunification was considered. In considering the assessment of proportionality to be carried out, Clarke J. (as he then was) referred to the reasonable margin

¹⁰ See for example: *Pok Sun Shum v. The Minister for Justice, Equality and Law Reform* [1986] I.L.R.M. 593; *Osheku v. Ireland* [1986] I.R. 377; *In re the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360, F.P. v. *The Minister for Justice, Equality and Law Reform* [2002] 1 I.R. 164; *A.O. and D.L. v. The Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1; *Bode (a minor) v. The Minister for Justice, Equality & Law Reform & Ors* [2007] I.E.S.C. 62).

of appreciation conferred on the Minister in weighing factors in making a decision. He held that the court should only interfere where the Minister's consideration of that balancing exercise is '*clearly wrong*' and where it is demonstrated that '*the Minister could not reasonably have come to the view that the balance should be proportionately exercised in the way in which it was*'. In the circumstances of that case, the order of the trial judge quashing the Minister's refusal was upheld with Clarke J. holding that the balancing exercise between the rights of the applicants and the rights of the State was '*clearly wrong*'.

55. The executive's power in situations concerning the control of immigration cases, such as, where there is a potential deportation of a TCN parent residing in the State, has also been affirmed by the decision of the Supreme Court in *Oguewke v. Minister for Justice and Equality* [2008] 3 I.R. 795 and by this Court in *C.I. v. Minister for Justice* [2015] IECA 192.

56. In *O.O.A. v. Minister for Justice* [2019] IECA 123, the appellant appealed the Minister's refusal to revoke a deportation order on the basis that the best interests of the child had not been properly taken into account. Peart J. dismissed the appeal, holding that the Minister was entitled to balance the interests of the child with those of the State, to include the well-being of its economy and the integrity of its immigration system. He was, therefore, entitled to conclude that the weightier interests in this case were those of the State.

57. The ECtHR has frequently underscored the right of contracting states, subject to their Treaty obligations, to control their territories and borders in the context of immigration regulations. In *Jeunesse v. the Netherlands* (App. No. 12738/10, 3 October 2014) the court noted the '*margin of appreciation*' enjoyed by the State in controlling immigration and it reiterated a contracting state's entitlement to control its territory, subject to its Treaty obligations. It stated, at para. 100: -

"[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 Convention does not guarantee the right of a foreign national to enter or to reside in a particular

country (see, for instance, Nunez, cited above, § 66). The corollary of a State's right to control immigration is the duty of aliens such as the applicant to submit to immigration controls and procedures and leave the territory of the Contracting State when so ordered if they are lawfully denied entry or residence."

In the context of immigration, where family life is in issue, a balance must be struck between the competing interests of the individual and of the community. In *Jeunesse*, it was recognised by the court that a case may concern both family life and immigration and the court held that *'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'*. Relevant factors which the State is entitled to take into account when making a decision about the immigration status of a TCN, include: -

"the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see Butt v. Norway, cited above, § 78)."

European Union Law

58. The *Zambrano* principles form part of EU citizenship law and arise from the decision of the CJEU in *Ruiz Zambrano v. Office National de l'Emploi* (Case C-34/09) 8 March 2011 (hereinafter referred to as '*Zambrano*'). The case involved two Columbian nationals living in Belgium, whose two children had acquired Belgian citizenship by operation of the nationality law in place at the time. The *Zambrano* parents applied for regularisation of their immigration status which was refused, along with Mr. Zambrano's application for unemployment benefit. The national court referred a number of questions to the CJEU regarding the potential applicability of Article 20 TFEU because of the fact that Belgian citizen children were involved. The CJEU ruled that expelling the non-EU parents would, effectively, result in the

departure of the children from the territory of the EU, thereby risking the genuine enjoyment of the substance of the children's EU citizenship rights. In these circumstances, it upheld the right of the EU minors to enjoy their citizenship rights derived under Article 20 TFEU, stating (at para. 45) that: -

“Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.”

59. The case of *Dereci v. Bundesministerium für Inneres*¹¹ tested the scope of application of the *Zambrano* ruling. *Dereci* concerned challenges to the proposed deportation from Austria of five TCNs who were married to Austrian citizens and whose children were Austrian citizens. None of the applicants' family members had ever exercised their right to free movement. Consequently, the applications for residence permits were rejected. The Austrian Court made a referral to the CJEU to clarify how far the rights of the EU citizens could extend in permitting the TCN family members to remain in the State. The CJEU considered Article 20 TFEU and the effect of the *Zambrano* criterion. Referring to Directive 2004/38/EC on the right of EU citizens and their family to move and reside within the EU, it ruled that the Directive could not entitle TCNs to a residence permit in order to join family members who have never exercised their right to free movement. Referring to its judgment in *Zambrano*, the court stated -

*“66. [. . .] that **the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.***

¹¹ (Case C-256/11) 15 November 2011.

67. *That criterion is specific in character inasmuch as it relates to situations in which, although subordinate legislation on the right of residence of third country nationals is not applicable, a right of residence may not, **exceptionally**, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.*”

The court however went on to clarify that the mere desirability of a Union citizen to live with his or her TCN family member in the Union is insufficient. It found: -

“68. *Consequently, the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted.*”

60. The finding in *Zambrano* and the consequences that flow therefrom were considered by this Court in *Bakare v. Minister for Justice & Equality* [2016] IECA 292. *Bakare* involved an application for residence of a Nigerian national, based on his parentage of an Irish citizen child and in the light of the *Zambrano* ruling. His application was refused by the Minister on the basis that there was no evidence that his child would be forced to leave the State or the territory of the EU, in circumstances where the child’s mother was a naturalised Irish citizen, with the right to remain in the State. Following the High Court’s refusal of the application for leave to seek judicial review of the Minister’s decision, the Court of Appeal dismissed the appeal. It held that the correct application of the test in *Zambrano* was whether the denial of residence to a TCN parent of an EU citizen child will bring about a situation where the child is compelled to leave the territory of the Union. At para. 18 of his judgment, Hogan J. identified what he viewed as the true rationale of *Zambrano*, namely, whether it is *‘likely that the administrative decision taken by the Member State will in practice oblige the parents to take the EU citizen children with them so that the latter are obliged to leave the territory of the Union?’*

61. Upon considering what amounted to a denial of the genuine enjoyment of the substance of the rights of EU citizenship in this context, he held at para. 24: -

“It is accordingly clear from a consideration of post - Zambrano case-law that the critical consideration is whether the denial of residency or similar rights to one or both third country nationals who are parents of EU citizen children is likely to bring about a situation where those children are in practice compelled to leave the territory of the Union.”

Although finding that it might be desirable that the applicant would continue to reside in the State, Hogan J. did not find that the practical effect of the denial of residence would be such as to oblige the Irish citizen child to leave the territory of the EU and he concluded that *Zambrano* did not apply.

62. In coming to his decision, Hogan J. noted that Article 7 of the Charter requires that account be taken of the right to respect for family life. However, the Charter only comes into play **if and when** EU law is being implemented. In deciding whether to grant residence permission, the trial judge held that the State was not implementing EU law, in a case of this kind, but was, rather, exercising its sovereign authority to control and regulate the status of TCNs. The provisions of the Charter, accordingly, were held to have no application in *Bakare*.

63. In *M.Y. v. Minister for Justice, Equality and Law Reform* [2017] IECA 317 Peart J. also found that: -

“the effect of Zambrano is [. . .] clear. The member state in which the EU citizen child resides may not refuse such an application for permission if by doing so it deprived the citizen child of the opportunity to exercise and enjoy the substance of his/her citizenship rights deriving from Article 20 TFEU.”

64. Approval by the Supreme Court of the approach adopted by Hogan J. in *Bakare* is to be found in *O v. Minister for Social Protection* [2019] IESC 82. That case concerned the back dating of child benefit payment to parents and whether they were entitled to such benefits prior to the regularisation of their immigration status. Dunne J. confirmed that the ‘*appropriate*

question' for consideration was the one posed by Hogan J. in *Bakare* in his summation of the rationale of *Zambrano*, namely, whether the administrative decision taken by the Member State would, in practice, oblige the parents leave the territory of the Union, taking the EU citizen children with them. Addressing this question to the facts before her, the learned judge held that that the refusal to pay child benefit to Ms. Y prior to the grant of a right of residence did not breach the *Zambrano* principles. She observed that: -

“the only way in which there could be a breach of Zambrano rights would be if it could be shown that the failure to backdate child benefit payments in respect of Emma¹² would have obliged Ms. Y to leave the territory of the Union.

[...] The core of the right recognised in Zambrano is the right to reside in the State. That is a right afforded to the European Union citizen, in this case, Emma. In order to demonstrate that her right to reside has been interfered with, it has to be established that the failure to make child benefit payments on a backdated basis to the date of Emma's birth was such as to deny her, Emma, the enjoyment of her rights as a citizen of the Union to reside in this Member State. In other words, it would be necessary to show that she was being deprived of her right to reside in the State because the financial circumstances of her mother by the denial of child benefit was such as to require her to leave.”

Post Zambrano Developments

65. The *Zambrano* principle, as qualified in *Dereci*, has been considered by the CJEU in a number of later rulings. *Chavez-Vilchez v. Raad van bestuur van de Sociale verzekeringsbank*¹³ involved eight TCN mothers who resided with their Union citizen children in the Netherlands. The children had derived their nationality from their Dutch / EU citizen fathers. None of the mothers had a valid residence permit. Each of the children had various degrees of contact with their fathers. The court considered that if it were established that a refusal to allow residence to the TCN mothers would have the effect that they would **'have to'**

¹² A pseudonym used by Dunne J. in her judgment.

¹³ (Case C-133/15) 10 May 2017.

leave the territory of the European Union, the consequence might be a restriction on the rights conferred on their Union children since those children might be **compelled** to accompany their mothers and, therefore, leave the territory of the European Union.

66. The court recalled its judgment of *O and Others*¹⁴ which held that where a State is determining whether a refusal of residence to a TCN parent means that the child is deprived of the genuine enjoyment of the substance of his rights conferred on him by virtue of his Union status, then certain factors are relevant in making that decision. In order to assess the risk that a particular citizen child might be compelled to leave the territory of the Union and thereby be deprived of the genuine enjoyment of the substance of his Article 20 rights if her TCN parent were refused a right of residence, it was important to determine in each case *‘which parent is the **primary carer of the child and whether there is in fact a relationship of dependency between the child and the third country national parent**’*. The question of who has custody of the child and whether that child is legally, financially or emotionally dependent on the TCN parent is relevant in this determination (at para. 68 of *Chavez*). The court held that when the authorities are making that assessment they must take into account the right to respect for family life under Article 7 of the Charter and they are also required to have regard to the best interests of the child recognised in Article 24(2) of the Charter.

67. The court concluded that Article 20 TFEU must be interpreted as meaning that, for the purposes of assessing whether a citizen child would be compelled to leave the territory and be deprived of the genuine enjoyment of his rights if his TCN parent were refused a right of residence, the fact that the Union citizen parent is actually capable and willing to assume sole responsibility for the primary care of the child is a relevant factor but is not in itself a sufficient ground for concluding that there is not between the TCN parent and the child **a relationship of dependence such that the child would be compelled** to leave the jurisdiction if such a

¹⁴ (Joined Cases C-365/11 and C-357/11) 6 December 2012.

refusal of residence to that TCN parent were to follow. That finding was made in the context of facts where the Union parent was resident in the State but not in fact taking day-to-day care of the children.

68. The burden of proof remained with the TCN parent to establish that such a relationship of dependence existed that, absent permission to reside, the child would be compelled to leave the territory of the Union. The CJEU set out the approach to be taken when assessing whether there exists a relationship of dependence such as would compel the EU citizen child to leave the territory of the EU, holding (at para. 72) that: -

“Such an assessment must take into account, in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium.”

69. In the case of *K.A. v. Belgische Staat*¹⁵, the CJEU condemned the failure of the State to examine, on the merits, applications for family reunification brought by seven applicants residing in Belgium, each of whom was the subject of an ‘entry ban’. They were also all subject to orders to leave the jurisdiction and almost all of them had committed offences. The practice in Belgium was such that the applicants had to leave the jurisdiction and return to their home country from which they could then apply to have the ban lifted and, thereafter, apply for family reunification. The question was whether EU law¹⁶ prevented such a practice and, if so, what factors were to be considered when assessing whether there exists a relationship of dependence between the Union citizen and the non-EU family member on whom the entry ban has been imposed.

¹⁵ (Case C-82/16) delivered on 8 May 2018.

¹⁶ Articles 5 and 11 of the Directive 2208/115 (the ‘Returns’ Directive) and Article 20 TFEU read in the light of Articles 7 and 24 of the Charter.

70. In addressing the first question, the CJEU highlighted the importance of bearing in mind that the Directive in issue concerned only the return of an illegally staying TCN and that there is no provision in that Directive which lays down rules dealing with applications for residence for the purpose of family reunification after the adoption of a return decision and the imposition of an entry ban.

71. In its judgment, the CJEU held that the Belgian authorities could not refuse to examine an application for family reunification solely on the basis that the TCN is the subject of an entry ban. They were obliged to examine it and to assess whether there was a relationship of dependence with an EU citizen, from which a right of residence may be accorded. Citing *Dereci, O* and *Chavez*, the CJEU held that a refusal to grant residence to a TCN is liable to undermine the effectiveness of Union citizenship **only** if there exists **between the TCN and the Union citizen** a relationship of **dependence of such a nature** that it would lead to the Union citizen **being compelled to accompany the TCN** concerned and to leave the territory of the European Union (para. 52).

72. The court observed that such a relationship of dependence between adults would arise only in ‘*exceptional circumstances*’. However, where the EU citizen is a minor, the court reiterated its finding in *Chavez* that it is important to determine which parent is the primary carer and whether there is, in fact, the type of dependence on the TCN parent such as would lead to the minor having to leave the territory with the TCN parent who was refused residence. In making that assessment, the rights and best interests of the child in Article 7 and Article 24(2) of the Charter must be considered. The court considered that the fact that the TCN parent lives with the child is one of the relevant factors, but it is not a prerequisite (para. 73). On the other hand, mere desirability on the part of the Union citizen to live together in the territory is not in itself sufficient to conclude that the child will be ‘*compelled*’ to leave if a right of residence is not granted (para. 74). Importantly, the court held that the existence of a family

link between the minor and the TCN parent cannot, on its own, be sufficient ground to justify the grant, under Article 20 TFEU, of a derived right of residence to that parent (para. 75).

73. A number of applicants in *K.A.* had criminal convictions and so part of the court's consideration turned to whether Member States may derogate from the grant of right of residence (if one arises) and rely on an exception based on the requirements of public policy and the safeguarding public security (para. 90). It was observed that the court had '*previously held that Article 20 TFEU does not affect the possibility of Member States relying on an exception linked, in particular, to upholding the requirements of public policy and safeguarding public security*'. Where concepts of '*public policy*' and '*public security*' are used to justify a refusal to grant a right of residence, they must be interpreted, strictly. At para. 91, the CJEU held that: -

"[T]he concept of 'public policy' presupposes, in any event, the existence, in addition to the disturbance of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. As regards the concept of 'public security', it is clear from the Court's case-law that that concept covers both the internal security of a Member State and its external security, and, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a threat to military interests, may affect public security. The Court has also held that the fight against crime in connection with drug trafficking as part of an organised group or against terrorism is included within the concept of 'public security'.

92. *In that context, it must be held that, where the refusal of a right of residence is founded on the existence of a genuine present and sufficiently serious threat to the requirements of public policy or policy security, in view of, inter alia, criminal offences committed by a third country national, such a refusal is compatible with EU law even if its effect is that the Union citizen who is a family member of the third country national is compelled to leave the territory of the European Union (see, to that effect, judgments of 13 September 2016, Rendón Marín, C-165/14, E.U.: C:2016:675, paragraph 84, and of 13 September 2016, CS, C-304/14, E.U.: C:2016:674 paragraph 40).*

93. *On the other hand, that conclusion cannot be drawn automatically on the basis solely of the criminal record of the person concerned. It can be reached, where appropriate, only after a specific*

assessment by the national Court of all the current and relevant circumstances of the case in light of the principle of proportionality, of the child's best interests and of the fundamental rights whose observance the Court ensures [...].

*94. That assessment must therefore take account in particular of the **personal conduct** of the individual concerned, the length and legality of his residence on the territory of the Member State concerned, the nature and gravity of the offence committed, the extent to which the person concerned is currently a danger to society, the age of any children at issue and their state of health, as well as their economic and family situation."*

74. *Tjebbes & Ors v. Minister van Buitenlandse*¹⁷ concerned a refusal by the Dutch authorities to issue new passports to the applicants in circumstances where the Minister found that, by operation of law, they had lost their nationality. The three adult applicants, and the fourth minor applicant, who was the child of the second applicant, faced the loss of their Dutch nationality, and consequently their Union citizenship, as a result of the operation of these provisions. The CJEU determined that the matter of the **loss of nationality** fell within the scope of Union law, and due regard must be had to the principle of proportionality. In those circumstances, the CJEU held that an **individual examination** by the national authorities was required, which would have regard to the consequences under EU law, holding that *'the loss of the nationality of a Member State by operation of law would be inconsistent with the principle of proportionality if an 'individual examination of the consequences of that loss for the persons concerned' was not permitted.* The loss of nationality where it occurs must be consistent with fundamental rights set out in the Charter rights, specifically Article 7, guaranteeing, as it does, the right to respect for family life. The appellants rely on the CJEU ruling in *Tjebbes* to argue, *inter alia*, that where a decision falls within the scope of EU law, administrative and judicial authorities are obliged to conduct an individual assessment of the consequences for the EU

¹⁷ (Case C-221/17) 12 March 2019.

citizen and to take into account the child's best interests as enshrined in Article 24 of the Charter when conducting such an assessment where minors are involved.¹⁸

75. *Zambrano* and subsequent CJEU case law were considered by the UK Supreme Court in *Patel v. Secretary of State for the Home Department* [2019] UKSC 59. It involved the cases of two separate applicants, Mr. Patel and Mr. Shah. Mr. Patel was a TCN of Indian nationality with no right to remain in the UK. He cared for his elderly parents, both British citizens, who were dependent upon him. The First Tier Tribunal (the 'FTT') found that Mr. Patel's father would not be compelled to return with his son to India by reason of a refusal of residence. Mr. Patel was unsuccessful in invoking the *Zambrano* principle and the decision of the FTT and of the Upper Tribunal ('the UT') was upheld by the Court of Appeal.

76. Mr. Shah was a Pakistani national married to a British citizen. He had no right to live or work in the UK. His wife worked, and Mr. Shah was the primary carer of their son, who was also a British citizen. The FTT found that his wife and son would be compelled to leave Union territory and accompany him back to Pakistan if he were refused residence. He was, therefore, entitled to a derivative residence card. That decision was overturned by the Court of Appeal.

77. In the Supreme Court, Lady Hale noted that the principle at the heart of the *Zambrano* judgment was that there must be a '*relationship of dependency*' between the TCN and the EU citizen (*Chavez*) with a distinction capable of being drawn between dependence in the case of an adult Union citizen and that of a Union citizen child (*K.A.*). As a general rule, an adult is capable of living an independent existence apart from his or her family members. Consequently, where the Union citizen is an adult, a relationship of dependence capable of justifying the grant of a derivative right of residence to a TCN is conceivable only in '*exceptional circumstances*' where, effectively, any form of separation is not possible. As the

¹⁸ See para. 47 of the judgment in *Tjebbes*.

FTT had found that Mr. Patel's father would not be compelled to leave the Union in the event of a refusal of residence to his son, the appeal of Mr. Patel was dismissed.

78. When deciding whether there is a relationship of dependence such that a child would be compelled to leave the territory of the EU if a right of residence were refused to the TCN, the UK Supreme Court recalled (at para. 23) that the CJEU in *K.A.* stated that: -

72. “[. . .] In reaching such a conclusion, account must be taken, in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child’s physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child’s equilibrium.”

79. Noting that the FTT had found that if Mr. Shah were forced to leave the UK the ‘*inescapable conclusion*’ was that his son would have to leave, too, the Supreme Court held that the Court of Appeal’s findings that the mother’s decision to leave was ‘*her own choice*’ and that she would have been ‘*perfectly capable*’ of looking after the child on her own, were erroneous. The ‘*overarching question*’ was whether the son would be compelled to leave **by reason of his relationship with his father**. With Mr. Shah being the primary carer, ‘*the need for a relationship of dependency with the TCN was fulfilled*’ for him to obtain a derivative right of residence, and his appeal was allowed.

Part III Application of Law to the Appellants’ Case

80. Notwithstanding the 17 Grounds of Appeal filed and the 6 questions formulated in their written submissions, at the commencement of the hearing, counsel for the appellants, helpfully, submitted that there were, essentially, two central limbs to the appellants’ appeal, namely: -

- (i) the alleged failure on the part of the Minister and the trial judge to consider, properly, the application of the *Zambrano* principles and of EU law pursuant to Article 20 TFEU; and
- (ii) the alleged failure to determine whether judicial review is an effective remedy.

Each issue will be considered, in turn, but it is important to recall at this point that the trial judge had expressly recorded the fact that counsel for the applicants had informed her that the ground of relief relating to the issue of an effective remedy under Article 47 of the Charter was ‘*not being pursued*’ in the High Court (see para. 41 above).

Does Zambrano Apply?

81. The appellants submit that this case falls to be considered in accordance with the principle articulated in *Zambrano* which, in their view, was developed and nuanced by the CJEU in its subsequent case law. They make the following submissions. The Minister had found that *Zambrano* does not apply in the absence of compulsion and the trial judge erred in upholding this. The High Court judge erred in holding that insufficient evidence had been put forward by the appellants to establish E.O.’s intention to move to Nigeria with her children in the event that A.O. was refused permission to reside with them in Ireland. Nothing more could be offered short of buying airline tickets or seeking to enrol the children in a school in Nigeria. They sought to distinguish the decision in *Bakare* on the basis that, whereas in *Bakare* there was no evidence of an ‘*appreciable risk*’ of the minors having to leave the State, in this case, E.O.’s averment that she intended to leave the State constituted such a risk.

82. Insofar as ‘special circumstances’ are necessary in order for *Zambrano* rights to arise, the appellants claim that the evidence of E.O.’s expressed intention to move with the minors to Nigeria in the event of a refusal of a visa to A.O. constitutes such special circumstances. Such

a refusal will cause E.O. to leave Ireland and thus will, effectively, force the minor appellants to leave the territory of the EU. Without the presence of A.O. in the State, E.O. will be compelled to return to Nigeria with the children.

83. It was in these circumstances that the minors' rights under Article 20 TFEU to live in the territory of the EU were engaged. Consequently, proper regard must be had to **the rights of the child under** Article 24 of the Charter. The consideration of costs to the public exchequer was unlawful, constituting an impermissible derogation from the terms of the Charter. The Appeals Officer, in placing weight on the issue of costs, derogated, impermissibly, from Article 24 of the Charter. The High Court had erred in finding that the Appeals Officer was entitled to have regard to potential costs in this way. Regard also had to be had to the rights of the family under Article 7 of the Charter.

84. During the hearing, Ms. Phelan, SC, for the appellants placed considerable emphasis on three judgments of the CJEU which, in her view, supported the contention that where an administrative decision has the potential to impact rights which flow from Union citizenship, then a full assessment is required (*Tjebbes*). In such an assessment, the best interests of the children must be a primary or paramount consideration. These cases confirm that the decision in issue in this case *is* one that deals with EU law rights and that, consequently such rights must be considered. Citing *Chavez*, Ms. Phelan argued that the dependence of the minor appellants on A.O. had to be considered. *K.A.*, she submitted, had identified the correct test to be applied in considering A.O.'s past criminal convictions, namely, whether his residence in the State would constitute a '*genuine, present and sufficiently serious threat*' affecting one of the fundamental interests of society. This test had not been met. In *Patel*, the UK Supreme Court recognised the applicability of EU legal principles in a case similar to that of the appellants. The cases all indicated that *Bakare* has been overtaken and that Union law rights are in issue

in this appeal. The trial judge had erred in finding that *Zambrano* did not apply in the absence of compulsion.

85. Instead of a blanket refusal in respect of A.O.'s visa application, 'less restrictive measures', as suggested by his solicitors, should have been considered. The trial judge erred in finding that the absence of a more expansive analysis on this point was not of such magnitude as to impugn the decision.

86. During the hearing, counsel for the appellants submitted that the High Court was wrong to find that *Zambrano* did not apply here, distinguishing *Bakare* from the instant case on the basis of the evidential situation which arises here. The factual distinction arises because E.O.'s uncontroverted averment is that she will leave Ireland with the minor appellants if A.O. is not permitted to reside with them in the State.

87. The Minister disagreed with the appellants' submissions and argued that the appeal should be dismissed on all grounds. His submissions may be summarised as follows. Any decision to leave the State and return to Nigeria would be a choice made by E.O. This should not be used to claim an immigration advantage. No mention had been made of such a move in A.O.'s 2016 submissions wherein he appealed the proposed refusal. There is no evidence of such a move becoming a reality. E.O. and her children are well settled and integrated in the State. It is entirely open to them to remain in the State. The Appeals Officer and the High Court had correctly distinguished between a compulsion to leave and a choice to do so.

88. The trial judge's conclusion on the *Zambrano* issue was correct as a matter of law. The appellants had failed to establish that E.O. and her children would be forced to leave the State or the territory of the European Union because of a visa refusal to A.O. For *Zambrano* rights to be engaged, 'special circumstances' are required and there are none in this case. If E.O. chooses what the appellants describe as the '*nuclear option*'¹⁹ and decides to move to

¹⁹ See their submissions to the High Court at p.5..

Nigeria with her children, that will be her choice. As in *Bakare*, there is **no real risk that** the denial of residence to A.O. would oblige all the appellants to leave the territory of the State. It is difficult to see how the judgments in *Chavez* and *K.A.* can assist the appellants.

89. The Minister was entitled to consider the potential cost to public funds in deciding whether to admit A.O. to the State. The allegedly impermissible derogation from Article 24 of the Charter is misconceived. The appellants fail to demonstrate how the Charter applies in their case. Its provisions are applicable only when Member States are implementing Union law. *Bakare* confirms that when states determine whether to grant or refuse a visa, they are not implementing Union law. On the appellants' submission, once the 'best interests of the child' arise, then every TCN would have an automatic right of residence and the State would be stripped of its power or discretion in a significant number of immigration cases. A decision upholding the best interests of the child will not always prevail in every case. Having regard to A.O.'s potential employment prospects and to E.O.'s failure to meet the minimum financial conditions required of sponsors, the Minister's decision was reasonable and proportionate. No irrationality can be identified therein.

90. The Appeals Officer had considered the 'less restrictive measures' proposed by A.O. and this issue was addressed at p. 24 of his final decision. As A.O. failed to satisfy him that these would be implemented, the Appeals Officer was entitled to arrive at the conclusion reached. The trial judge noted the 'weighing exercise' undertaken by the Appeals Officer and found that the decision he reached was within his jurisdiction. He had found that A.O.'s threat to public policy by his personal conduct was weightier than the rights of the appellants and he was not appeased by the proposed measures. There was nothing in the instant case to bring it beyond the scope of *Bakare* nor was there anything in it that merited a revisiting of that judgment.

The Court's Assessment

91. The first issue to be considered is whether the High Court judge erred in her finding that *Zambrano* did not apply. Faherty J. was not satisfied that the refusal decision had the effect of, effectively, forcing the minor appellants to leave the State. The trial judge found that E.O.'s averment that she would leave Ireland if A.O.'s visa were refused, was insufficient, without more, to engage *Zambrano* rights. If E.O. and the minor appellants were to leave the State, the trial judge held that it would not be as a result of any compulsion so to do but rather, it would be based on her own choice.

92. The critical question that falls to be considered is whether the refusal decision of the Minister gives rise to or creates a situation which would force the minor appellants to leave the territory of the European Union. If it does, then EU law rights may be engaged and an assessment in accordance with the principles articulated by the CJEU in its case law should be conducted. If, on the other hand, such a situation is not created by the Minister's refusal of a visa, then *Zambrano* and the subsequent case law does not apply, and the matter falls to be determined in accordance with national law and this Court's judgment in *Bakare*.

93. In seeking to distinguish this case from *Bakare*, the appellants place emphasis on E.O.'s averment of her intention to leave the State in the event of a refusal of A.O.'s visa application. However, on its face, an intention to do something is not synonymous with a compulsion to do so. In *Bakare*, this Court held that the correct application of the test in *Zambrano* was whether the denial of residence to a TCN parent of an EU citizen child will bring about a situation where the child is **compelled** to leave the territory of the Union. While it might be desirable for the appellants to have A.O. reside with them in the State, one cannot say that the practical effect of denying him such residence would be that his children **are obliged** to leave the territory of the EU. They will continue to have every opportunity to

exercise and enjoy the substance of their citizenship rights derived from Article 20 of the TFEU.

94. The Court observes that E.O. has always lived as a single parent with her children since the birth of her first daughter in 2004. She has, single-handedly, raised her three daughters while her partner, A.O. chose to reside in different countries before returning to Nigeria following his expulsion from France. Shortly after his first daughter was born he left E.O. and his child in Ireland and he has, in fact, never lived as part of a family unit with E.O. and the minor appellants. There is ample evidence that the family meets on regular occasions and that they are in regular contact by telephone and video calling. Photographs on file indicate family gatherings in Zurich, France and Nigeria. Indeed, it can be said that the only form of family life which has ever subsisted in this case was one in which A.O. lived at a distance. E.O. is supported, financially, by the Irish State, has access to its healthcare system and all three children attend school in Ireland. They are well settled and integrated into Irish society. They are all Irish citizens and have the right to remain in the State.

95. In examining all the evidence in this case, it is difficult to escape the conclusion reached by the trial judge. There is little to support the contention that the risk of E.O.'s averment becoming a reality is more than remote. Such an averment – without more—is not sufficient. Whereas her desire for greater emotional support from A.O. is understandable, I cannot conclude, in the light of all of the evidence before the Court, that the probability of her suddenly uprooting the life she has built for herself and her children in Ireland is anything other than highly unlikely.

96. Even if I am wrong in this regard, such a choice to leave Ireland could not be said to constitute evidence of the type of 'compulsion' envisaged by the CJEU in *Zambrano*, where an administrative decision has the effect of compelling a minor citizen to leave the territory because of a relationship of dependence subsisting between the child and the TCN parent.

Dereci clarifies that ‘**the criterion relating to the denial of the genuine enjoyment**’ of EU rights refers to situations in which the Union citizen has, in fact, to leave the territory of the Union as a whole.

97. The minor appellants in this case are not compelled to leave the Union territory by any act or decision on behalf of the Minister. They have the right to stay here with their mother as they have always done. The refusal decision in respect of A.O.’s visa does not change that reality. There is no compulsion on any person to do anything arising therefrom. If E.O. elects to move with her children to Nigeria because she seeks greater emotional support from A.O. and desires that her children have his company on a full-time basis then that is a family choice that is open to her to make.

98. The appellants stress that in reviewing the Minister’s decision in this case, regard must be had to Article 7 of the Charter which requires that account be taken of the right to respect for family life. However, as Hogan J. pointed out in *Bakare*, the State in a case of this kind is not implementing EU law. Rather, the State is exercising its sovereign authority under national law to control and regulate the status of TCNs within the State, in accordance with Article 28.2 of the Constitution. The provisions of the Charter, accordingly, have no application. *Zambrano* does not have the effect of dis-applying national immigration and citizenship laws. The CJEU in *K.A.* stressed that the Directive in issue there (the ‘Returns’ Directive) concerned the return of an illegally over staying immigrant. A.O. is not the subject of a return order, nor is he applying for family reunification having enjoyed family life within the State. His application to enter the State thus falls to be determined under national law.

99. The appellants have failed to demonstrate any appreciable risk that the minor appellants would be forced to leave the State or the territory of the EU on the basis of the Minister’s refusal of residence to A.O. That being so, I am satisfied that *Zambrano* is not engaged.

Has Zambrano Been Extended?

100. Ms. Phelan, on behalf of the appellants, has argued that in a number of cases post *Zambrano* (some of which were handed down subsequent to the High Court judgment herein), the CJEU revisited *Zambrano* in such a way as to confirm that that EU law does, in fact, apply to a decision of the type that is in issue in this case. In her view, E.O.'s stated intention to live in Nigeria if A.O. is refused a visa should trigger an assessment of whether the children's EU law rights would be affected. She submits that the CJEU has confirmed that Articles 7 and 24 of the Charter must be considered. She argues that EU law applies in this case because the fundamental rights of the minors are engaged by the refusal of a visa to A.O. That refusal, she says, will result in their being compelled to leave the territory of the EU.

101. I have already found that the test of 'compulsion' as set out in *Zambrano* and confirmed in *Dereci*, is not met on the facts of this case. Absent the requisite element of **having to** leave the territory by virtue of an administrative decision, there can be no triggering of or engagement with or potential effect on the Union rights of the minor appellants in this case. Out of an abundance of caution, however, I propose to consider the appellants' submissions on the cases that followed *Zambrano* and to examine whether the assessment conducted by the Appeals Officer meets the requirements identified in those cases.

102. The appellants point, firstly, to the CJEU ruling in *Tjebbes* to argue, *inter alia*, that where a decision falls within the scope of EU law (and they say the decision to refuse a visa to A.O. does), then administrative and judicial authorities are obliged to conduct an individual assessment of the consequences for the EU citizen and to take into account the child's best interests as enshrined in Article 24 of the Charter when conducting such an assessment where minors are involved.²⁰ Notwithstanding that the decision to refuse to grant a visa to A.O. does not fall within the scope of EU law, there can be no doubt but that the Appeals Officer

²⁰ See para. 47 of the judgment in *Tjebbes*.

conducted a detailed, comprehensive and thorough assessment of all relevant considerations before reaching his decision to refuse A.O.'s application. Indeed, '*the extensive work and consideration*' that had gone into the proposed refusal decision was acknowledged by the appellants' solicitors, this proposal having set out, substantially, the reasons for the intended refusal. The logic of the decision was accepted as '*clear and understandable*'. I am therefore satisfied that the appellants did receive an individual assessment of the type specified by the CJEU in *Tjebbes*.

103. The appellants argued that the assessment, nevertheless, fell foul of certain requirements which the CJEU had indicated should be included, namely: -

- (i) a consideration of the minors' best interests having regard to their rights under Articles 7 and 24 of the Charter;
- (ii) an engagement with the issue of dependence between the minors and A.O.; and
- (iii) the application of the correct test to be adopted when considering issues of public policy and safety, namely, whether A.O.'s presence in the State would constitute a '*genuine, present and sufficiently serious threat*'?

The 'Best Interests' of the Children

104. There is a broad consensus, including, in international law, in support of the idea that in all decisions concerning children, regard must be had to their 'best interests'.²¹ According to Lady Hale, the term might be said to describe, broadly, the well-being of the child (see *ZH (Tanzania) v. Secretary of State for the Home Department* [2011] UKSC 4). In some cases which involve a consideration of actions that directly affect children, their best interests will be *the* determining factor (such as an adoption decision determining by whom a child shall be raised). In other cases, decisions are made which have an impact, indirectly, upon children.

²¹ *Neulinger and Shuruk v. Switzerland* (App. No. 41615/07, 8 July 2009).

In these cases, their interests will be a primary, though not determinative consideration. The case in issue in this appeal falls within the latter category.

105. The appellants submit that the Minister, in coming to his decision, was obliged to consider the family's rights under Article 7 and the children's rights under Article 24 of the Charter and that, in such consideration, the best interests of the children should be a primary or paramount factor.

106. Even a cursory review of the impugned decision reveals that, before making any determination in respect of A.O.'s application, the Appeals Officer devoted a significant part of his assessment to considering the best interests of the minor appellants. From the outset, he noted that a distinctive or '*especial care*' is owed when considering an application that involves minors and he confirmed that, in this case, he had considered the rights of the child and the best interests of the minors involved. Noting the importance of giving due weight to a child's opinion when he or she is old enough to express a view,²² the Appeals Officer acknowledged, expressly, the views, feelings and hopes of the eldest child (the third named appellant), as expressed in support of her father's application. He also noted that the children have always lived with their mother in Ireland and that they had travelled outside the State to visit and spend time with their father. When considering the family circumstances, he had regard to the second child's medical history. Having carried out a thorough review, he accepted that, in principle, it was in the minors' best interests that A.O. to be admitted to the State. That being so, the appellants' contention concerning his failure to have regard to the children's best interests must be rejected. Noting the observation of Lady Hale in *ZH*, the Appeals Officer found that in this case, their interests alone could not be decisive. Other considerations, including public policy and safeguarding security, he concluded, carried greater weight than the minors' best interests in the assessment of A.O.'s application. The Appeals Officer considered it relevant to note the

²² Article 12(1) of the United Nations Convention on the Rights of the Child.

existence of other '*ameliorating factors*' in this case which would tend to lessen the impact of the refusal decision on the children's well-being.

107. The appellants argue that there was an impermissible derogation from Article 24 of the Charter insofar as the Appeals Officer considered the issue of the costs to the public in reaching his decision on a grant of residence to A.O. This argument, too, is misplaced. Firstly, it presupposes that the Charter applies in this case. This Court in *Bakare* has already held that the type of decision under challenge in this case is not one that involves the implementation of EU law.

108. In any event, as already noted, the Appeals Officer did, in fact, consider the minors' best interests before reaching a final view in this matter. Whereas the best interests of the child will carry varying weight (primary, paramount, determinative) depending on the nature of the decision being made, it cannot be said that, as a matter of legal principle, those interests are determinative in every case. In this case, what was required was that they be given a primary consideration which, on the face of the Appeals Officer's decision, is precisely what occurred. If a child's best interests were always to prevail then all applications for the detention or extradition of a parent whose child has Union citizenship would be doomed to fail. As noted by Edwards J. in *Minister for Justice v. D.L* [2011] IEHC 248, (at para. 135), Article 24(2) contains '*an expression of principle rather than the enumeration of a right that can be relied upon directly*' and he confirmed that whereas the '*best interests of affected children are 'a primary consideration'*' they cannot generally '*override the public interest in effective extradition procedures*'. In circumstances where the minor appellants' best interests cannot be regarded as 'outcome determinative', the Appeals Officer was entitled to weigh in the balance all the rights and interests of the State as well as those of the appellants when dealing with A.O.'s visa application and the question of the economic costs to the public exchequer was one which he was entitled to consider. Those costs have a bearing on resources for others,

including, other children in the State. Such an approach does not breach ECHR requirements as the Strasbourg Court has already acknowledged that that the protection of the interests of economic well-being is a legitimate aim in exercising immigration control (see *Berrehab v. the Netherlands*, App. No. 10730/84, 21 June 1988). The Appeals Officer was entitled to consider that the potential costs to public funds if A.O. were admitted to the State would be detrimental to the economic well-being of the country and the availability of services, thereby affecting the rights and freedoms of others.

The Requirement of 'Dependence'

109. With reference to *Chavez* and *K.A.*, the appellants argued that the minor appellants in this case are 'dependent' upon A.O. and that their dependence on him was an important factor which ought to have been considered in the assessment of A.O.'s application. Dependence, they argued, was not limited to financial support.

110. It will be recalled that in *Chavez* the minor EU citizens all lived with the TCN parent (their mothers) who was their primary carer and who did not have permission to reside in the Netherlands. In each case, the non-primary carer was the child's father—a Union citizen living in the Netherlands. In *Chavez*, the Dutch government had argued that the TCN parent should not, automatically, be regarded as the primary carer if it was possible for the other (EU) parent to take care of the children. The court accepted that the mere fact that the TCN parent undertakes the day-to-day care of the child and is the person on whom the child is legally, financially and emotionally dependent, even in part, does not **automatically** lead to the conclusion that the EU child would be **compelled** to leave the Union if a right of residence were refused to that TCN parent. The presence and capacity of the EU parent (who, in *Chavez*, was not the primary carer) was a significant factor when considering the care of the child.

111. The court in *Chavez* began by reviewing its earlier case law. It recalled that in *O and Others* (C-365/11 and C-357/11) it had held that where a State is determining whether a refusal to grant a right of residence to a TCN parent means that the child is deprived of the genuine enjoyment of the substance of his rights conferred on him by virtue of his Union status, then certain factors are relevant in making that decision. In assessing the risk that such a child might be compelled to leave the territory of the Union (and thus be deprived of the genuine enjoyment of the substance of the rights conferred by Article 20) if his or her TCN parent were refused a right of residence, the court considered it important to determine in each case ‘*which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third country national parent*’. Thus, identifying who has custody of the child and whether the child is ‘*legally, financially or emotionally dependent on the third-country national parent*’ were key issues to be determined (at para. 68).

112. In *Chavez*, the court confirmed that the burden of proof as to the existence of a non-national’s right of residence under Article 20 lies on the applicants (para. 74). That said, the authorities must make the necessary enquiries in order to determine where the EU parent resides and whether that parent is actually able and willing to assume primary care of the child. They must also ascertain whether there is a relationship of dependence between the child and the non-Union parent such that a decision to refuse residence to that parent would deprive the child of the genuine enjoyment of the substance of his or her rights by obliging the child to leave the territory of the Union. How exactly the ‘*primary carer*’ test is to be applied was the focus of the CJEU’s judgment in *Chavez*.

113. Albeit based on facts that were the opposite to those that pertain in this case, the CJEU held that in assessing issues of who has custody of the child and whether a relationship of dependence exists between the child and the TCN parent (in that case, the primary carer), the fact that the EU non-primary carer (the father in *Chavez*) was able and willing to assume sole

responsibility for the child was a relevant factor, but not, in itself a sufficient ground for concluding that there was not, between the TCN parent (the mother) and the child such a relationship of dependence that they would be compelled to leave the territory of the Union if a right of residence were refused to the TCN parent. A national court must take into account certain factors when deciding whether there is a relationship of dependence such that the child would be compelled to leave the territory of the EU if a right of residence was refused to the TCN. Such factors include: -

“the age of the child, the child’s physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child’s equilibrium.”

114. The court also held that Article 20 TFEU does not preclude a Member State from providing that a right of residence to a TCN parent who is the primary carer of a minor child is **subject to the requirement** that the TCN must provide evidence to prove that a refusal of the right of residence would deprive the child of the genuine enjoyment of the substance of EU citizenship rights by obliging the child to leave the territory of the Union, as a whole.

115. These findings were confirmed by the CJEU in *K.A.* with attention being focused on the minor’s status as **a dependent** EU citizen. The fundamental import of the judgment in *K.A.* is that the Belgian practice of refusing to examine an application for residence because of an entry ban was prohibited under EU law. The court in *K.A.* recalled that the Treaty provisions do not confer any autonomous right on TCNs. Any right so conferred is a derived right and is derived from the rights enjoyed by the Union citizen. The purpose and the justification of those derived rights is based on the fact that a refusal to allow them would be such as to interfere in particular with the Union citizen’s freedom of movement. The court held that there are very specific situations in which a right of residence must be granted to a TCN family member of the Union citizen because the effectiveness of Union citizenship would otherwise be undermined. Those specific situations arise where, as a consequence of a refusal, the citizen

is obliged, in practice, to leave the territory of the European Union thus depriving him of the genuine enjoyment of the substance of his rights.

116. A refusal to grant a right of residence would be liable to undermine the effectiveness of Union citizenship **only if there exists** between the TCN and the Union citizen **a relationship of dependence** of such a nature that it would lead to the Union citizen being **compelled to accompany the TCN** and to leave the territory of the Union.

117. There is, therefore, a duty on the authorities to examine that application and to assess whether such a relationship of dependence between the citizen and the TCN exists. That dependence, it should be stressed, must be of such a nature that unless a right of residence is granted to the TCN, the Union citizen would be compelled to accompany the TCN as he or she leaves the territory of the European Union (*K.A.* at para. 52).

118. The court then considered the factors that are relevant to determining whether or not such a relationship of dependence exists. It observed that, as a general rule, adults must be regarded as capable of living an independent existence apart from other family members (*K.A.* at para.65). It followed that, as far as adults are concerned, the relationship of dependence capable of giving rise to a derived right of residence under Article 20 is conceivable only in exceptional circumstances where, having regard to all the relevant circumstances, there could be no form of separation of the individual concerned from the family member on whom he is dependant. When it comes to children, however, the court recalled that, in *Chavez*, it had already identified the relevant factors for determining whether a refusal of residence would mean that the child would be deprived of EU rights by being compelled to leave the territory of the Union. These factors include the question of who has custody of the child (the ‘*primary carer*’ test), and whether that child is legally, financially or emotionally dependant on the TCN parent. The assessment must ‘take account’ of the best interests of the child and have regard to the factors identified in *Chavez*, including, the age, development, the extent of emotional

ties to both parents and the risks which separation from the TCN might entail for the child's equilibrium.

Applying Chavez and K.A.

119. It must be said that it calls for a certain level of imaginative agility to see how the principles articulated against the factual background of *Chavez* could be said to be relevant to the facts of this case. Those principles were pronounced in the specific context of facts which are, on their face, diametrically opposed to the facts before this Court. The facts in *Chavez* anticipated the refusal of residence to the EU children's primary carer who was a TCN and on whom the children were, for the most part, dependent. Because their mothers were not EU citizens, there was a risk that the children would be compelled to accompany their mothers when leaving the territory. Those facts bear no comparison to the facts in this case. The primary carer here is a Union citizen and there is no question of E.O. being refused permission to reside in Ireland or of the children being compelled to accompany her from the State and from the EU because of such a refusal.

120. In any event, applying the 'key issues' identified by the CJEU to the facts in this appeal, the national authorities have fulfilled their obligation to identify the child's primary carer. All 'necessary inquiries' were made, and it was ascertained that E.O., a Union citizen and lawfully resident in the State, is responsible for the primary care of the children. As the EU parent, she is not only capable of taking care of the children but has always assumed primary responsibility for their well-being. There is no question of the children's primary carer being refused residence and being required to leave the State with the minors in this appeal compelled to accompany her. The second key issue requires the national authorities to ascertain whether there exists a relationship of dependence between the children and the TCN parent such that the refusal decision would deprive them of the enjoyment of the substance of

their EU rights by obliging them to leave the territory because they are legally, financially or emotionally dependent on **the TCN parent**. The answer to that question is, clearly, that there does not exist between the minors and A.O., the TCN in this case, the type of relationship of dependence that would give rise to their being **compelled to accompany** him as he leaves the State. For a start, he is not and never has been resident in the State and thus has never allowed the possibility of such a relationship of dependence to begin. Moreover, *Zambrano* only applies if the TCN parent is ‘*the primary carer*’ of the Union citizen child. It is the removal of that TCN parent that could have the effect of compelling the child (because of dependence) to accompany that parent out of the Member State and out of the territory of the Union. Thus, in *Chavez*, it was the children’s dependence on the TCN parent that gave rise to a risk that they would be compelled to leave the territory of the Union with her. In this appeal, it is the Union citizen who is the parent on whom the children are, for the most part, legally, financially and emotionally dependent and have been for all of their lives.

121. The CJEU has stated that it is the relationship of dependence between the Union citizen child and the TCN parent who has been refused a right of residence that is ‘**liable to jeopardise**’ the effectiveness of Union citizenship because it is **that dependence** that would lead the Union child to be obliged in practice to leave not only the territory of the Member State but also the Union as a whole. It is that dependence that gives rise to the compulsion, envisaged by the CJEU, that the minors would ‘have to’ leave the territory of the EU. Nowhere in *Chavez* or *K.A.* is it conceded that a factor to be considered is the exercise of free choice by the parent who has custody of the child to leave the territory of the Union thereby compelling her minor children to accompany her.

122. In arguing that the minors’ EU rights are engaged because they would be **compelled** to leave the territory of the Union if E.O. decides to leave, counsel for the appellants fails to identify, correctly, the source of the requisite compulsion. The ‘compulsion’ envisaged by the

CJEU is a compulsion that is linked to the minors' dependence on the TCN parent who has been refused a right of residence. That is the dependence that is '*liable to jeopardise*' the effectiveness of Union citizenship because it is **that dependence** that would lead the Union child to be obliged in practice to leave not only the territory of the Member State but also the Union as a whole. Thus, for *Chavez* to be applicable to this case, the minors' 'compulsion' to leave the territory would have to be based on their dependence on A.O. as their primary carer. The question, therefore, arises as to whether the refusal of A.O.'s application could be said to be the trigger which would compel the minors to leave the territory of the European Union because of their relationship of dependence on him.

123. On no reading of this case, could it be said that the minors' dependence **on A.O.** gives rise to a compulsion on them to leave or 'accompany' him beyond the territory of EU because of a refusal of residence to him. The reality is that the children have never 'accompanied' A.O. anywhere. He is not their primary carer. He has never lived with them either in Ireland or anywhere else in the world. They have spent their entire lives as members of a single-parent family and have known only a long-distance relationship with A.O. The critical relationship of dependence that exists in this case is the relationship the children have with their mother.

124. Whilst it is true that a certain bond exists between the minor appellants and A.O., no amount of mental agility could lead one to conclude that this bond or link is sufficient to constitute a dependence on him such that the refusal of residence is liable to jeopardise the effectiveness of the Union children's citizenship. The Appeals Officer did assess whether the requisite relationship of dependence existed between A.O. and the minor appellants and he prefaced that assessment by taking into account the best interests of the children and the nature of the family life that existed. He accepted that A.O. '*played a role*' in the life of his children through visits, communications and some financial support. He had regard to the age of the children—taking on board, in particular, the opinion of the third named appellant who was old

enough to express a view. Insofar as an issue had arisen at one stage about the fourth named appellant's physical development, he took account of the updated position regarding her health.

125. The Appeals Officer recognised that the children's primary carer is E.O. who is in receipt of the 'one parent family' payment. Notwithstanding the role A.O. plays in their lives, all of the evidence establishes that E.O. is the person on whom the minors are, principally, dependent—legally, financially and emotionally. She has been caring for them as a single parent since their birth. She has raised the three children while their father elected, until recently, to live elsewhere. The Appeals Officer acknowledged the emotional bond that exists and, rightly, had regard to the desire of the third named appellant when conducting the assessment of A.O.'s application. However, he considered that any emotional bond must be seen in the context of this family having lived as a single parent family in Ireland since 2004. As to whether separation from the TCN would entail a disruption for the children's equilibrium, it has to be acknowledged that the emotional ties in issue in *Chavez* and *K.A.* are readily distinguishable from the ties in this case. In those cases, the children were living with the TCN parent on a daily basis and thus any refusal of a visa to those parents would have caused a significant rupture in the lives of the children. Never having lived with A.O., the refusal of his visa application could not be regarded as leading to such a 'rupture' as referred to by the CJEU.

126. Having regard to all the relevant circumstances, the Appeals Officer did not accept that it had been demonstrated that the minors are 'dependent' upon A.O. *in the manner envisaged by the case law.* This was a perfectly reasonable conclusion for him to reach based, as it was, on the evidence before him. He was entitled to come to that view. His finding was also entirely consistent with the ruling in *K.A.* where the CJEU held that the existence **of a family link between the minor and the TCN parent** cannot be sufficient ground to justify the grant, under Article 20 TFEU, of a derived right of residence to that parent (para. 75).

Whilst living with the TCN is an important factor but not a prerequisite for dependence, the required ‘*relationship of dependency*’, as envisaged in *Chavez* or *K.A.*, does not exist between the minors and the TCN parent in this case. That being so, the risk that could arise from such a relationship—a risk of their being compelled to accompany *him* out of the State and the EU—does not, in fact, arise. The bond or link between the minors and A.O., the TCN in this case, important as it may be, comes nowhere near the test of dependence as set out in *Chavez* or *K.A.* The CJEU confirmed that the mere fact that it might appear desirable to a national of a Member State, whether for economic reasons or in order to keep the family together, for the family members to reside together, is not sufficient, in itself, to support the view that the Union citizen will be compelled to leave the territory if such a right of residence is not granted.

127. The court also emphasised that it is for the TCN to provide evidence on the basis of which it can be assessed whether the conditions governing the application of Article 20 are satisfied and in particular evidence that a decision to refuse a right of residence to him would deprive the children of their genuine enjoyment of their rights. In this case the TCN parent has produced no such evidence.

128. Insofar as the appellants in this case seek to rely on the UK Supreme Court decision of *Patel*, I must conclude, that once again, the focus of the appellants’ argument is misplaced because the dependence which triggered the derivative right of residence in that case was a dependence of the child on the TCN parent. It is true that the Supreme Court considered erroneous the Court of Appeal’s finding that the mother’s decision to leave the UK would be ‘*her own choice*’. On that basis, the appellants sought to argue that a similar error exists in the High Court’s finding that E.O. would leave this jurisdiction as a result of free choice. However, in *Patel*, the mother was not the child’s primary carer and the Supreme Court identified the ‘*overarching question*’ as being whether the child would be compelled to leave **by reason of his relationship with his father**. Mr. Patel was the primary carer of the minor

in that case and it was the child's relationship of dependence on him which led the court to conclude that he, as a TCN, had derivative right of residence. Notwithstanding any decision which E.O. may make, it cannot be said that A.O. is the primary carer of the minor appellants and that refusing him a right of residence has the effect of compelling them, because of their relationship of dependence on *him*, to leave the EU.

129. It is important to recall that the assessment of dependence on the TCN parent is conducted for the purpose of establishing whether a refusal of residence would have the effect of compelling a Union citizen child to leave the territory of the EU with that parent. The burden of proof of the existence of a right of residence under Article 20 rests on A.O. to demonstrate that **because of the minors' dependence on him they will be compelled, as a result of refusing him a right of residence, in practice, to leave the territory of the Union** (*Chavez* at para. 74). That scenario simply does not arise in this case.

130. I am, therefore, satisfied that it has not been demonstrated that A.O., as a TCN, has established a derived right of residence based on his EU children's relationship of dependence on him such that the Minister's refusal of his visa application would bring about a situation whereby the EU minors, because of their dependence on A.O., would be compelled, in practice, to leave or accompany him beyond the territory of the European Union and thereby be deprived of the effective enjoyment of the substance of their EU citizenship rights.

Does there exist a 'genuine, present and sufficiently serious threat' affecting one of the fundamental interests of society?

131. The CJEU in *K.A.* confirmed that even where a derived right of residence has been established based on a minor citizen's dependence on a TCN parent, Member States may, nevertheless, derogate from the obligation to grant such a right if the requirements of public policy or the safeguarding of security so demands. In the event that a derived right of residence

could be established by A.O., the Minister relies upon the State's entitlement to derogate from the grant of a such a right based on a recognised exception grounded upon the requirements of public policy and the safeguarding of public security.

132. The CJEU has set down guidelines in accordance with which any derogation from a right of residence (should one arise) is to be assessed. The test of '*a genuine present and sufficiently serious threat to the requirements of public policy or public security*' is the appropriate test. Where such a test is met, then a refusal of a right of residence is compatible with EU law (*K.A.* para. 92). The case law establishes that past criminal convictions, in themselves, are insufficient to ground a decision to refuse family reunification. A Member State must be satisfied that there exists a **genuine, present and sufficiently serious threat** affecting one of the fundamental interests of society.

133. The concepts of public policy and public security are to be interpreted strictly and a derogation may only be reached after a specific assessment *by the national court* of the current and relevant circumstances of the case, in the light of the principle of proportionality, including, the child's best interests and the fundamental rights of those whose observance the Court ensures (see *K.A.* at para. 93). Such an assessment must take account of the personal conduct of the individual, the length and legality of his residence within the State, the nature and gravity of the offences committed and the extent to which he is currently a danger to society. It must also take account of the age of his children and their state of health as well as the economic family situation (see *K.A.* at para. 94).

134. Making such an assessment²³ of A.O.'s current situation, it appears that he is now working in his own business in Nigeria, having been released from prison. As noted earlier, the precise date from which he served his prison sentence is unclear. He claims that he was

²³ As the judgment in *K.A.* had not been delivered by the CJEU when the trial judge gave judgment in this case and as this Court has heard submissions from the parties in respect of that judgment, it is appropriate that this Court conducts the required assessment as indicated by the CJEU.

convicted in 2011 whereas the official record on file cites June 2013 as the date of conviction. Taking the official record as it stands, and assuming he served just under three years, it would mean that A.O. was released in or about 2016. The Court observes that a relatively short period of time had, therefore, elapsed between the date of his release and his application for a visa. It further observes that A.O. is currently the subject of a ban on re-entering the territory of France, another Member State within the European Union. In imposing not only a custodial sentence but also a 10-year ban on re-entry upon French territory, judicial authorities in France obviously considered that, in view of his recidivist offending, A.O. would continue to pose an ongoing or 'present' threat to French society.

135. As to the relevant circumstances of this case, the Court cannot but have regard to the very serious nature of the offences in respect of which A.O. was convicted. Those offences were multiple, three of which related to the possession, sale and use of illegal drugs, two of which concerned the use of false identity documents and one of which concerned theft. The nature of those offences demonstrates that the personal conduct of A.O. over a protracted period of time was such as to involve the inflicting of harm on others and dishonesty in his dealings with others and with authorities. His capacity for duplicity may be inferred from the fact that he operated under a false identity for some considerable time. As the CJEU has pointed out, the national court is obliged to weigh those relevant and current circumstances in a proportionate manner having regard to the best interests of A.O.'s children and the fundamental rights of others with whose protection the Court is concerned (*K.A.* at paras. 93-94). Whilst it is acknowledged that it is, in principle, in the best interests of a child to be in the company of both his or her parents, such recognition cannot be determinative of the matter because the Court must also have regard to the position of others whose rights and interests are also to be protected. This includes the best interests of other children in the State, many of whose young lives may, potentially, be blighted by the scourge of drugs and drug trafficking. The CJEU

requires the national court to have regard to the length and legality of A.O.'s residence on the territory in question. In this regard, it must be observed that A.O. has never been resident within the State and that insofar as he has visited the territory of Ireland there is, at least, a doubt about his compliance with immigration regulations.²⁴

136. Insofar as the Court must consider the age of any children in issue, the state of their health and the economic and family situation, it has to be acknowledged that the minor appellants are of an age whereby they are entirely used to living without the presence of A.O. in the family home. The eldest child is two years short of her majority and all of the children have known only the family unit with their mother as a single parent. For a month or so there was some concern over the health of the fourth named appellant in that there is a medical report indicating that she experienced some movement difficulties. However, her solicitor confirmed that as of 2016 she was '*doing ok*' and that she attends her GP regularly. There is, however, nothing of concern in relation to her health that would give rise to any reason to depart from the derogation in question. As to the economic situation of the family, it appears that there are no pressing economic worries in that they are in receipt of State benefits and also have the wherewithal, through contributions made from A.O., to take regular holiday visits to Nigeria and other countries. As the family situation has always consisted of E.O. acting as single parent to the children and their relationship with A.O. being a long-distance initiative, the Court sees no reason why that family situation could not continue to exist as it has done since 2004.

137. Having regard to the foregoing and, in particular, to the nature and gravity of the offences in issue and to the recidivist nature of A.O.'s offending, it appears to me that the Appeals Officer was entitled to consider that A.O. continues to constitute an ongoing or '*present*' threat

²⁴ See the reference in para. 3 of the Minister's submissions as noted in footnote 1 above. A.O. also claims to have been in the State in 2008 but adduces no evidence of any visa in this regard.

to society and, to that extent, the Minister is entitled to seek to derogate from any right to residence that might be derived under Article 20 of the TFEU.

138. In this case, as already noted, there is no question of the minor Union citizens being compelled to leave the territory of the European Union by reason of their dependence on A.O. Consequently, there is no question of any derived right of residence having been established. Even if such a right could be asserted, the CJEU has confirmed that where a genuine, present and sufficiently serious threat is found to exist, a refusal to grant a right of residence is compatible with EU law **even if** its effect is that the Union citizen who is a family member of that TCN is compelled to leave the territory of the European Union. The fact that the minor appellants herein are not so compelled is sufficient to allow me to conclude that **no derived right of residence arises in this case**. Even if one does, the level of threat to public security which A.O. represents satisfies the threshold test and thus is sufficient to entitle the Minister to derogate from the grant of any such right of residence and such derogation remains entirely compatible with EU law.

139. Reviewing the impugned decision, the Court recalls that the Appeals Officer was mindful of the fact that a criminal conviction cannot, in itself, be the sole basis for automatically triggering a derogation. He attached important weight to the nature and extent of A.O.'s criminal activities when deciding to refuse the application for a travel visa in order to join his family. The assessment he conducted establishes that the test of a '*genuine, present and sufficiently serious threat*' as set out in *K.A.* was applied and met. Convictions are genuinely serious matters and there was nothing insubstantial about the offences in respect of which A.O. was convicted. They were significant offences involving the possession, sale and supply of illicit drugs. Such crimes constitute a genuine and constant threat to the public good. A.O. was also convicted of using false identity records over a considerable period of time. His duplicity in this regard is acknowledged in correspondence to E.O. To the extent that the

Appeals Officer noted the recidivist nature of the drug related offences, I am satisfied that this was an acknowledgment of the present or enduring nature of the threat to public security and safety which A.O. posed. He had been convicted of having committed these drug related offences, repeatedly, from 2009 to October 2011. The havoc wreaked upon individuals and communities by the use, possession and supply of illicit drugs is self-evident and was confirmed, if confirmation is needed, by the Steering Committee of the National Drugs Strategy. The life, health and welfare of all individuals, including children, are of fundamental importance to society and the Appeals Officer was entitled to place those interests in the balance and attribute to them significant weight in reaching the decision he reached. In circumstances where he also had regard to the ameliorating fact that this family has a steady history of travel for the purposes of meeting on a regular basis and has the opportunity to communicate several times daily through video-conferencing platforms, I cannot find that the conclusion reached by the Appeals Officer was one in which the balance could be said to have been disproportionately exercised in the way that it was or, as the Chief Justice put it in *AMS*, ‘*clearly wrong*’. I am, therefore, satisfied that the Appeals Officer was entitled to conclude that A.O. represents a genuine, present and sufficiently serious threat to the requirements of public policy and public security such as would justify a refusal of residence compatible with EU law.

Were less restrictive measures considered?

140. It is true that the trial judge expressed some sympathy for the contention that the Appeals Officer ‘*was not as expansive*’ on the issue of less restrictive measures as he had been in other areas. However, one cannot say that there is no evidence of those alternatives having been considered in circumstances where their non-availability in the present case was noted. I am satisfied that the Appeals Officer considered the alternative or less restrictive measures that

had been proposed by the appellants' solicitors and found that these were not available in the particular circumstances of this case. For example, one such proposed restrictive was that the visa, if granted, could be conditional upon A.O. finding work. The Appeals Officer expressly considered the likelihood of A.O. finding and/or retaining employment, albeit in the context of assessing the potential cost to the public exchequer if A.O. were to be admitted. However, the context in which that consideration took place does not detract from the fact that the prospect of A.O. finding employment was considered. In the absence of relevant supporting information concerning future employment, the Appeals Officer was not prepared to attribute significant weight to the apparent job offer indicated by A.O. His finding that less restrictive measures were not available is consistent with and based, *inter alia*, upon his findings in respect of the likely future employment prospects of A.O.

141. The Appeals Officer's decision ran to 27 pages and addressed, in detail, all matters that required to be considered in relation to A.O.'s visa application. I am satisfied that he considered, comprehensively, all relevant materials before coming to a view on A.O.'s application. An individual proportionality assessment in respect of the appellants' claims was conducted, and I see no basis for impugning the manner in which his decision was reached.

Part IV Law on Judicial Review as an Effective Remedy

Legal Principles

142. On the question of what constitutes an effective remedy, Article 47 of the Charter provides: -

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those

who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

143. It is well-established that decisions in respect of asylum and immigration form part of the executive function of the Minister. Such decisions are amenable to judicial review. The role of the court in reviewing administrative decision was clarified in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701, where Murray C.J. (at para. 55) observed that: -

“it remains axiomatic that it is not for the court to step into the shoes of the decision maker and decide the issue on the merits but to examine whether the decision falls foul of the principles of law according to which the decision ought to have been taken.”

144. When considering how *Meadows* had extended the scope of judicial review so as to incorporate an assessment of the proportionality of the action, McKechnie J. in *Donegan v. Dublin City Council & Ors* [2012] IESC 18, [2012] 2 I.L.R.M. 233, cited the comments made at para. 422 of *Meadows* wherein Fennelly J. had stated: -

“Two fundamental principles must, therefore, be respected in the rules for the judicial review of administrative decisions. The first is that the decision is that of the administrative body and not of the court. The latter may not substitute its own view for that of the former. The second is that the system of judicial review requires that fundamental rights be respected.”

McKechnie J. considered that it was clear from the decision in *Meadows* that, although judicial review may facilitate ‘*some consideration of fundamental rights*’ to be entered into, this would in no way affect ‘*the traditional position that such remedy cannot be used as a rehearing or otherwise to determine conflicts of fact*’ (at para. 131). He did not find that *Meadows* had in any way altered the position ‘*as to the adequacy of judicial review*’, and he held, conclusively, (at para. 143) that: -

“on a judicial review application, the court cannot substitute, for the facts presented, its own view as to what they should be. Moreover, the court is not fact finding and thus cannot resolve conflicts in this regard.”

145. As to the adequacy and scope of review permitted in judicial review, the Supreme Court (O'Donnell J.) in *V.J. v. Minister for Justice and Equality* [2019] IESC 75, recently affirmed that: -

“The consistent position of the jurisprudence has been that judicial review in Irish law is a sufficiently flexible remedy to constitute an effective remedy, whether viewed through the prism of the CFREU, the ECHR, or indeed the Irish Constitution.”

146. More recently, in this Court's judgment in *F.M. & Ors v. Minister for Justice and Equality* [2020] IECA 184, Faherty J. set out a comprehensive analysis of the jurisprudence on the effectiveness of judicial review as a remedy in the context of the refusal of subsidiary protection. The appellants, in that case, had contended that judicial review, as the only mechanism available to them to challenge a refusal of subsidiary protection, was not an effective remedy because it could only consider the legality of the impugned decision and not the facts and the evidence that formed part thereof. Faherty J. recalled that this Court had already rejected the argument that judicial review was not an effective remedy in *N.M. v. Minister for Justice* [2016] IECA 217, [2018] 2 I.R. 591 and the Supreme Court had done so in *AAA v. Minister for Justice* [2017] IESC 80. The CJEU considered the question of an effective remedy in *Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration* (Case C-69/10) wherein it held that it was necessary that the reasons which led a competent authority to reject an application are amenable to ‘*a thorough review by the national court, within the framework of an action against the decision rejecting the application*’.²⁵

147. In *N.M. v. Minister for Justice*, the High Court (Barr J.) had considered that judicial review could not be an effective remedy in accordance with the meaning of Article 39 of the Procedures Directive, on the basis that it was not capable of reversing the first instance refusal but could merely annul and remit it. On appeal, Hogan J. considered that Barr J. ‘*fell into*

²⁵ Council Directive 2005/85/EC (The ‘Procedures’ Directive) and its Article 39 requirement of an effective remedy was in issue in *Diouf*.

error in concluding that the remedy of judicial review was *in itself* an ineffective remedy for the purposes of article 39'.²⁶ Whilst he accepted the 'inherent limitations' of judicial review as identified by the trial judge, Hogan J. did not regard such limitations as depriving judicial review of its efficacy as a remedy. He held (at para. 59) that: -

“What is critical is that – as Samba Diouf v. Ministre du Travail (Case C-69/10) [2011] E.C.R. I-7151 makes clear – the judicial review court can subject the reasons of the decision-maker to thorough review. For the reasons I have endeavoured to state, I believe that this task can be performed by the High Court using contemporary judicial review standards as explained by the recent authorities.”

Hogan J.'s endorsement of 'contemporary judicial review standards' as being capable of achieving the required standard of a 'thorough review' (*per Diouf*) was approved by Charleton J. in AAA. Addressing Council Directive 2005/85/EC (the Procedures Directive), he held (at para. 26) that: -

“There is, however, no authority for any wider proposition to the effect that only a right of appeal from the Minister's decision would amount to an effective remedy in this context, and Diouf is an authority to the contrary. In the absence of any express provision in the Directive itself requiring Member States to provide for a right of appeal, as distinct from judicial review or something approximating to judicial review, any other conclusion would seem at variance with the fundamental principle of EU law of national procedural autonomy. Thereby, Member States are entitled to determine their own legal procedures, subject to the principles of equivalence and effectiveness.”

148. In *V.J.*, O'Donnell J. considered the appellants' reliance upon the CJEU decision in *Secretary of State for the Home Department v. Banger (Case C-89/17)*.²⁷ In *Banger*, in issue was whether Directive 2004/38 requires a redress procedure for issues of both fact and law to be reviewed by a court, in the context of a refusal decision to issue a residence card

²⁶ Emphasis is Hogan J.'s.

²⁷ In *Banger*, Council Directive 2004/83/EC (The 'Qualifications' Directive) was under consideration by the CJEU.

to a person claiming to be a family member. The CJEU held (at para. 52 therein) that to comply with the Directive such an individual: -

*“must have available to them a redress procedure in order to challenge a decision to refuse a residence authorisation taken against them, following which the national court must be able to ascertain whether the refusal decision is based on a **sufficiently solid factual basis** and whether the procedural safeguards were complied with. Those safeguards include the obligation for the competent national authorities to undertake **an extensive examination of the applicant’s personal circumstances and to justify any denial of entry or residence.**”*

O’Donnell J. was of the view that this judgment did not ‘purport to extend, alter or reverse the existing case law’, but rather, emphasised it. He found that it did not constitute authority to question whether judicial review is an effective remedy, compliant with Article 47 of the Charter, given that this has been already established in Irish law by the cases of AAA and N.M. (see para.147).

149. Taking the national and CJEU jurisprudence into account, Faherty J. in *F.M.* concluded that that the CJEU had not resiled from its pronouncements in *Diouf* that ‘*what is required is a ‘thorough review’ which the Supreme Court in AAA and VJ has found to be **eminently capable** of being met by the remedy of judicial review’*. She was, therefore, satisfied that the jurisprudence is ‘*very clear*’ that ‘*judicial review constitutes an effective remedy*’.

Part V Application of the Law to the Appellants’ Appeal

The Parties’ Submissions

150. The appellants’ submissions may be summarised thus. In the case of *Lofinmakin v. Minister for Justice and Equality* [2011] IEHC 38, leave was granted to appeal to the Supreme Court on the issue of the correct interpretation of the decision in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701. *Lofinmakin* concerned a deportation order which had been revoked prior to the hearing before the Supreme Court. The issue as to judicial review was thus rendered moot. The answer as to what the correct application of *Meadows*

requires, in this case, would be that the High Court reappraise the case and substitute its own view, if necessary.

151. Judicial review, the appellants say, is not an effective remedy for the vindication of their rights. The onus to prove that there is an effective remedy in domestic law lies with the Minister. Absent a statutory appeal to an independent court or tribunal, Article 47 of the Charter is violated. The process that occurred in this case contrasts, unfavourably, with the availability of an appeal to the Refugees Appeal Tribunal from a decision of the Refugees Applications Commissioner.

152. Traditional judicial review principles are not an appropriate basis on which to evaluate the Minister's assessment of the information provided in A.O.'s application. Where there is a deprivation of a fundamental EU law right, the standard must be that of 'correctness'. It is insufficient that a reviewing court holds only that a decision was a reasonable assessment of material if that court is precluded from forming its own conclusions on that assessment.

153. This Court's judgment in *N.M. v. Minister for Justice and Equality* [2016] IECA 217, is distinguishable from the present case for several reasons, including, the fact that the instant case is not concerned with detailed statutory rules and procedures to be adopted under Article 39 of the Procedures Directive. Rather, this case involves the compliance by the State with the Charter rights of EU citizen children.

154. The appellants submitted that judicial review cannot deal with the facts or the merits of a case and, accordingly, they are limited to a remedy which deals only with the legality of the impugned decision. For an effective remedy under EU law, there must be a full and *ex nunc* examination of both facts and points of law. The failure to provide an appeal mechanism to an independent court or tribunal impedes that '*direct and immediate application of Community rules*' required (*per Simmenthal*). They claim that the High Court must be allowed

to assess the circumstances afresh so as to ensure that the final decision guarantees the appellants the rights they are entitled to under EU law.

155. The Minister made the following submissions on the issue of judicial review. First, the need for an effective remedy under Article 47 of the Charter does not arise, because the refusal of a visa application does not involve the implementation of EU law. Second, the appeals process availed of by A.O., which consisted of a full reassessment of his application, does constitute an effective remedy under EU law and domestic law. That judicial review is an effective remedy for administrative decisions of the Minister was confirmed recently by this Court in *F.M.* The complaint in respect of no statutory appeal, was not raised as a ground for ‘leave’ nor was the alleged right to an independent tribunal pursued before the High Court. In any event, there was a *de facto* appeal in this case. The first instance decision maker provided a full analysis in which all submissions raised were considered and assessed. A draft of the proposed decision was furnished, and comments thereon were invited. Further consideration was given to the appellants’ additional submissions before a final decision was made. An appeal from that decision was permitted. It is difficult to envisage an appeal of ‘better quality’.

156. The Minister submitted that the trial judge did not err in her articulation of the applicable legal principles governing judicial review, which include, the application of a proportionality test to administrative decisions affecting fundamental rights. The appellants have not advanced any justification for a departure from those established principles. Judicial review is an effective remedy by which such rights can be vindicated. The submission that the High Court should re-appraise the case and, if necessary, substitute its own view is misplaced.

157. The Minister noted the trial judge’s acknowledgement of the ‘weighing exercise’ undertaken by the Appeals Officer and her finding that the decision he reached was within his jurisdiction. The Appeals Officer had found that A.O.’s threat to public policy by his personal conduct was ‘weightier’ than the rights of the appellants and he was not appeased by the

proposed, less restrictive measures. It is submitted by the Minister that the appeals process, which involved a full reassessment of A.O.'s application in conjunction with judicial review, did constitute an effective remedy.

The Court's Assessment

158. This Court observes that despite extensive submissions made by counsel for the appellants during the hearing of this appeal, the ground of relief relating to the alleged want of an effective remedy in terms of Article 47 of the Charter was abandoned in the High Court and further observes that this was expressly recorded by the trial judge in her judgment (see para. 41 above). That being so, the alleged failure of the Minister to make available an effective remedy in accordance with the requirements of EU and, more particularly, Article 47 of the Charter, is not a matter that is properly before this Court. Furthermore, I have already found that the Minister, in refusing A.O.'s application, was not implementing EU law and thus the requirements of Article 47 do not arise. It is, however, appropriate to consider the appellants' claim insofar as it relates to the alleged error on the part of the trial judge in articulating the applicable legal principles governing judicial review as a remedy in **domestic** law.

159. The trial judge found that it was not for the High Court in judicial review to embark upon an adjudication of the merits of the case, nor to engage in a balancing of competing rights. As set out in *Meadows*, a proportionality test was to be applied to administrative decisions which affect fundamental rights and, as such, Faherty J. found that judicial review constituted an effective remedy to vindicate such rights. She noted the opinion of McDermott J. in *F.E. v. Minister for Justice, Equality and Law Reform* [2014] IEHC 62 to the effect that the issues raised in *Lofinmakin*, in fact, predated the decision of the Supreme Court in *Donegan*, which affirmed the decision in *Meadows*. McDermott in *F.E.* stated (at para. 34) that: -

“In my view the continued assertion that the High Court has a jurisdiction and obligation to examine the substantive merits of a challenged decision and effectively substitute its own deportation decision

when the court considers the Minister's decision to be disproportionate is, in the light of present authorities, incorrect and does not give rise to a point of law of exceptional public importance that requires resolution by the grant of a certificate."

160. Faherty J. also noted McDermott J.'s finding in *F.E.* that '*judicial review is not a form of appeal and the onus of proof lies upon the applicant to demonstrate that the impugned decision is fundamentally flawed*'. Furthermore, the trial judge had regard to the decision of Hogan J. in *N.M.* She concluded that it had been conclusively established that judicial review, post-*Meadows*, is an effective remedy for the vindication of the appellants' rights and she considered that that the appellants' complaint in this regard had not been made out.

161. There is considerable jurisprudence as to what contemporary judicial review in a post-*Meadows* landscape provides. The appellants' submissions that the High Court judge should not have confined her considerations to whether the decision making process was fair but, rather, should have decided the issue on the merits is misplaced. McKechnie J. confirmed in *Donegan* (at para. 218) that it is not appropriate for judicial review to be used '*as a rehearing or otherwise to determine conflicts of fact*'. There is no doubt that, as Murray C.J. found in *Meadows*, the court when judicially reviewing an administrative decision may only '*examine whether the decision falls foul of the principles of law according to which the decision ought to have been taken*'.

162. Notwithstanding that the Article 47 aspect of the appellants' complaint is not properly before this Court, it should be recalled that the Irish courts have considered that the requirements for a redress procedure as laid down by the CJEU in its case law are fulfilled in a post-*Meadows* judicial review. The CJEU stipulated that what is required is '*a thorough review by the national court, within the framework of an action against the decision rejecting the application*' (*per Diouf*). Recent Irish jurisprudence has comprehensively confirmed that the required standard is fulfilled and is '*eminently capable of being met by the remedy of judicial review*' (*per F.M.*). This Court in *N.M.* confirmed that the challenge to the refusal of admission

to the asylum process could be challenged by way of judicial review which was capable of fulfilling the requirement of a ‘*thorough review*’. The recent statement of the Supreme Court (in *V.J.*) on point confirmed that what the CJEU in *Banger* requires of a national court in order to comply with Article 47 is that it must be ‘*capable of ascertaining whether the refusal decision is based on a ‘sufficiently solid factual basis*’. This, the Supreme Court in *V.J.* found, is fulfilled by judicial review. O’Donnell J. confirmed that the decision of the CJEU in *Banger* emphasised the adequacy of judicial review as an effective remedy, whether viewed through the prism of the Charter, the ECHR or the Irish Constitution.

163. The Court takes note of the questions relating to the interpretation of *Meadows* which the appellants claim remain unanswered since *Lofinkmakin*.²⁸ However, insofar as complaint is made about the adequacy of judicial review as an effective remedy in *this* appeal, I am satisfied that nothing is unanswered or unresolved. No authority has been opened to this Court to support the contention that that the established jurisprudence on judicial review as an effective remedy does not apply. The application of *Meadows* is not in doubt. Nothing has been opened to support the view that the High Court should be able to substitute its own findings for those of the decision maker. The appellants have no entitlement to a full *de novo* hearing, in place of judicial review. In circumstances where the Supreme Court in *V.J.* found that judicial review is an adequate remedy for the purposes of challenging a refusal of subsidiary protection, I do not consider that the refusal of a long stay visa application requires any higher standard of review. There is nothing in the appellants’ submissions that persuades me that judicial review

²⁸The two questions raised in *Lofinkmakin* related to judicial review post-*Meadows*: (i) whether it is insufficient to assert merely that a decision is irrational, unreasonable and disproportionate and (ii) whether an applicant is required to identify the particular error, omission or other flaw rendering an impugned decision irrational, unreasonable or disproportionate.

is not an effective remedy or that the trial judge erred in her articulation of the relevant and applicable legal principles.

164. To the extent that what is required of a decision maker by the CJEU is '*an extensive examination of the applicant's personal circumstances*' and a justification of '*any denial of entry or residence*' (*Banger*, see para. 51), I am satisfied that this is, precisely, what the appellants have had in this case. An individual examination of all factors, including, the best interests of the children, was carried out. There is ample evidence to indicate that the appellants received a fair, comprehensive and individual assessment of their claim and that their submissions on appeal were heard and considered.

165. The appellants were afforded an opportunity to submit observations not once but on three occasions. The initial refusal was the subject of an appeal of which, through their solicitors, they took advantage. They had the opportunity to furnish detailed submissions which they did, and which were considered. The proposed decision outlining all the relevant considerations was put to A.O. and his comments thereon were invited before a final decision was made. He submitted his comments on 11 March 2016 and on 1 April 2016. Following the final decision on 11 April 2016 the Appeals Officer re-visited, once again, the decision and he declined the opportunity to withdraw it. In circumstances where the application had been the subject of at least two reviews by the decision maker and where all submissions made by A.O. were considered, fully, and addressed comprehensively, I am satisfied that there was no want of fairness in the process that was adopted in this case. Thereafter, the appellants were entitled to judicial review. The impugned decision and the reasons contained therein were reviewed carefully and comprehensively by the trial judge in accordance with all relevant legal principles. There were no flaws in her analysis which would warrant allowing the appeal.

Conclusion

166. In this judgment I have concluded that the Minister's refusal of A.O.'s visa application represented the exercise, by the executive branch, of the State's sovereign power to regulate the rights of TCNs. The decision in question did not involve the implementation of EU law for the purposes of Article 51 of the Charter. Accordingly, I found that the Charter has no application to this case.

167. In case I am wrong in this regard, I have set out what I consider the *Zambrano* test of 'compulsion' requires and what the *Chavez* requirement of 'dependence' entails, as illustrated in the jurisprudence of the CJEU. On the facts of this case, neither the test of compulsion in *Zambrano* nor the requirements of dependence in *Chavez* have been met. While I appreciate the appellants' desire to live together, the refusal of A.O.'s visa application does not have the effect of depriving the minor appellants of the genuine enjoyment of the substance of their rights as EU citizens in that it does not compel them, because of their dependence on A.O., to leave the State or the territory of the European Union. The appellants have failed to demonstrate any appreciable risk that the minor appellants would be forced to leave the State or the territory of the EU because of the Minister's refusal of residence to A.O. That being so, I am satisfied that *Zambrano* is not engaged. The appellants have failed to establish that a derived right of residence accrues to A.O. based on the minor appellants' status as EU citizens.

168. In case I am wrong in this regard, I have considered whether, if such a right does, in fact, accrue, the Minister was, nevertheless, entitled to derogate from the obligation to grant a right of residence based on the personal conduct of A.O. Having reviewed, carefully, the individual assessment conducted by the Appeals Officer in this case, I am satisfied that he was entitled to find that A.O. constitutes a genuine, present and sufficiently serious threat to the requirements of public policy and public security such as would justify a refusal of residence compatible with EU law.

169. I have also found that as the implementation of EU law is not in issue in this case, the right to an effective remedy in compliance with the terms of Article 47 of the Charter does not arise—all the more so in circumstances where this point was not pursued before the High Court. The trial judge did not err in her articulation and application of the relevant legal principles in respect of judicial review as an effective remedy in domestic law. The appellants had available to them an individualised examination of their personal circumstances which was conducted in accordance with the requirements of natural and constitutional justice. They were also furnished with detailed reasons that justified the refusal of A.O.’s application. They have also had available to them recourse to a full judicial review of that refusal decision by the High Court.

170. Accordingly, for these reasons and for those set out in this judgment, I would dismiss the appeal.

171. As the respondents has been ‘*entirely successful*’ and costs should, thus, follow the event, my provisional view is that the costs of the High Court proceedings and of this appeal should be awarded to the respondents. If the appellants wish to submit that an alternative order should be made, then they will have liberty to deliver written submissions, not exceeding 2,000 words, within 28 days of the date of delivery of this judgment. Thereafter, the respondents will have 28 days to deliver replying submissions on costs, not to exceed 2,000 words. In default of receipt of submissions from the appellants, an order in the proposed terms will be made.

172. As this judgment is being delivered remotely, Costello and Ní Raifeartaigh JJ. have indicated their agreement with the reasoning and conclusions reached in respect of this appeal.