Neutral Citation [2016] IEHC 551

# THE HIGH COURT
## JUDICIAL REVIEW

**[2014 No. 106 M.C.A.]**

**IN THE MATTER OF S.21 OF THE REFUGEE ACT 1996**

**BETWEEN**

**T.F. (Nigeria)**

**APPELLANT**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES**

**NOTICE PARTY**

**JUDGMENT of Ms. Justice Stewart delivered on the 29th day of July, 2016.**

**Introduction/burden of proof**

**1.** This is a statutory appeal pursuant to s.21 (5) of the Refugee Act 1996 (as amended) against the decision of the respondent to revoke the appellant's declaration of refugee status. The appeal is commenced by way of an originating notice of motion issued on 13th of March, 2014 and made returnable before the High Court on 7th of April, 2014. The procedure to be followed in the statutory appeals grounded upon an originating Notice of Motion is clearly set out in Order 84C of the Rules of the Superior Courts (RSC). Although there are extensive affidavits and written submissions filed in these proceedings, and, notwithstanding that the originating Notice of Motion sought, *inter alia*, directions with regard to the hearing of the matter, no such directions were sought or given at any stage prior to the commencement of the hearing. It seems to me that it would be prudent if directions were sought at an early stage in future applications of this nature. The directions

should focus particularly on identifying the issues to be tried at the hearing and the position of the respective parties on each of those issues.

**2.** Section 21 of the 1996 Act sets out the conditions for the revocation of refugee status and the recourse to the High Court in the form of an appeal of the Minister's decision. It is worthwhile reciting s. 21 in full:-

"*Revocation of declaration*

*21.—(1) Subject to subsection (2), if the Minister is satisfied that a person to whom a declaration has been given—*

*(a) has voluntarily re-availed himself or herself of the protection of the country of his or her nationality,*

*(b) having lost his or her nationality, has voluntarily re-acquired it,*

*(c) has acquired a new nationality (other than the nationality of the State) and enjoys the protection of the country of his or her new nationality,*

*(d) has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution,*

*(e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of his or her nationality,*

*(f) being a person who has no nationality is, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, able to return to the country of his or her former habitual residence,*

*(g) is a person whose presence in the State poses a threat to national security or public policy (ordre public), or*

*(h) is a person to whom a declaration has been given on the basis of information furnished to the Commissioner or, as the case may be, the Tribunal*

*which was false or misleading in a material particular, the Minister may, if he or she considers it appropriate to do so, revoke the declaration.*

*(2) The Minister shall not revoke a declaration on the grounds specified in paragraph (e) or (f) where the Minister is satisfied that the person concerned is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of his or her nationality or for refusing to return to the country of his or her former habitual residence, as the case may be.*

*(3)(a) Where the Minister proposes to revoke a declaration under subsection (1), he or she shall send a notice in writing to the person concerned of his or her proposal and of the reasons for it and shall at the same time send a copy thereof to the person's solicitor (if known) and to the High Commissioner.*

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

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

*(ii) send a notice in writing to the person of his or her decision and of the reasons for it.*

*(4)(a) A notice under subsection (3)(a) shall include a statement that the person concerned may make representations in writing to the Minister within 15 working days of the issue by the Minister of the notice.*

*(b) A notice under subsection (3) (b) (ii) shall include a statement that the person concerned may appeal to the High Court under subsection (5) against*

*the decision of the Minister to revoke a declaration under subsection (1) within 15 working days from the date of the notice.*

*(5) A person concerned may appeal to the High Court against a decision of the Minister under this section and that Court may, as it thinks proper, on the hearing of the appeal, confirm the decision of the Minister or direct the Minister to withdraw the revocation of the declaration.*

*(6) A person concerned shall not be required to leave the State before the expiry of 15 working days from the date of notice of a proposal under subsection (3) and, if an appeal is brought against the decision of the Minister, before the final determination or, as the case may be, the withdrawal of the appeal.*

*(7) The Minister may, at his or her discretion, grant permission in writing to a person in respect of whom a declaration has been revoked under subsection (1) to remain in the State for such period and subject to such conditions as the Minister may specify in writing*."

**3.** Article 14 of Counsel Directive 2004/83/EC of 29 April, 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, O.J. L304/12 30.9. 2004 provides:-

> "*3. Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person, if, after he or she has been granted refugee status, it is established by the Member State concerned that: […]*
>
> *(b) his or her misrepresentation or omission of facts, including the use of false documents, were decisive for the granting of refugee status*."

**4.** Regulation 11 of the European Communities (Eligibility for Protection) Regulations 2006 states:-

> "*Refusal to grant or renew or revocation of a declaration*
>
> *11. (2) Where—*
>
> *(a) paragraph … (h) of section 21(1) of the 1996 Act applies, as respects a person to whom a declaration has been given,*
>
> *(b) a person to whom a declaration has been given misrepresented or omitted facts (including through the use of false documents) and this was decisive for the granting of the declaration, […]*
>
> *the Minister shall, without prejudice to section 21(2) of the 1996 Act, revoke or, as the case may be, refuse to renew the declaration*."

**Background**

**5.** The appellant is a Nigerian national born on REDACTED in Lagos State, Nigeria. She has nine years of formal education, having attended primary school from REDACTED to REDACTED and a hairdressing school from REDACTED to REDACTED. She has three children. Her father remains in Nigeria and her mother is deceased.

**6.** The appellant's version of events is as follows. She was married on REDACTED. Upon finding out that she was pregnant, she decided to leave Nigeria. The cultural rites practiced by her husband and his extended family required the first child of every marriage to be scarred with a tribal mark on their face. The appellant could not accept this, having witness the performance of the rite on another child of the family. The appellant feared that the rite would be performed on her child if she was returned to Nigeria and that she would be seriously beaten by her husband for leaving the country without his permission. When visited by her parents-in-law, her

mother-in-law threatened to have the child removed from her care. State protection was unavailable because this was a cultural practice in which the police would not interfere. She left Nigeria on REDACTED, travelling by air from Lagos Airport to London and then by car and ferry to Ireland, arriving in this State on REDACTED. Upon arrival in Ireland, the trafficker that accompanied her brought her to a house. She was informed that she would stay there until the baby was born. She would then be expected to work to pay off the balance of the money owed. The appellant was brought to the Office of the Refugee Applications Commissioner (ORAC) by a man she met in the trafficker's house and she applied for asylum on REDACTED. The appellant still owes €4,000 to the trafficker who facilitated her travel to Ireland. She fears that, if she is returned to Nigeria, she will be killed by the traffickers for reneging on their deal.

**7.** The appellant went through the asylum procedure, being refused at first instance by the ORAC. On REDACTED, the Refugee Appeals Tribunal (RAT) member who decided the appellant's case recommended that she be declared a refugee. There was no oral appeal hearing. In deciding her appeal, the Tribunal took account of her evidence in respect of her then infant son. The Tribunal concluded that she would be at risk in Nigeria by reason of her refusal to permit Yoruba tribal elders, her husband and his family to ritually scar her son. The declaration of refugee status was made by the Minister on REDACTED.

**8.** Before setting out the background to this appeal, it would be worthwhile to detail the circumstances of the appellant's three children and their respective statuses in the State. The appellant has three children: K, who was born on REDACTED; M, who was born on REDACTED; and E, who was born on REDACTED. They were all born in Ireland. K was granted refugee status on REDACTED. His stated father

throughout the asylum process and on his birth certificate was D.F. On K's birth certificate, D.F.'s occupation is listed as "video technician". M is an Irish citizen and his stated father is S.A.F., whose occupation is listed as "marketing manager". E's stated father is S.A.F., whose occupation is listed as "electrical engineer". Although redaction is necessary herein, it is worth noting that, while the father/husband's first and second names changed, his surname remained the same.

**Revocation decision**

**9.** By letter dated REDACTED, an official from the Ministerial Decisions Unit (MDU) of the Department of Justice wrote to the appellant, proposing to revoke her declaration as a refugee under section 21(1) (h) of the 1996 Act. Essentially, the revocation was brought about on grounds that she is a person to whom a declaration has been given on the basis of information furnished to the Commissioner or, as the case may be, the RAT, which was false or misleading in a material particular. The letter further proposed to revoke the appellant's status pursuant to s.11 (2) (a) (b) of S.I. 518 of 2006 (the 2006 Regulations).

**10.** In accordance with s. 21(3) (a) of the 1996 Act, the MDU officer provided the appellant with a document outlining the reasoning for this conclusion. This is exhibited from p. 243 of the booklet, as follows:-

> *a.* "*You stated that your husband's name was D.F. and that he is the father of your unborn child (K, DOB* REDACTED*).*
>
> *b. Information received from the UK authorities indicates that Mr. S.A.F. applied for a UK visa. Mr F. declared his spouse to be T. F. and his child as K.F. (DOB* REDACTED*).*

c. *I understand that the same Mr. S.A.F. is now the subject of an application for residency in Ireland based on the* Zambrano *ruling as the father of M.F. (DOB* REDACTED*).*

d. *Ms. T.F. (the mother of K.F.) is named as the mother of this child.*

e. *The above evidence indicates that S.A.F. is in fact your husband and the father of both your children.*

f. *You stated that you fled Nigeria due to your contention that your child would be subjected to ritual scarring at the hands of your husband and his family.*

g. *You stated that your child would have to undergo ritual scarification as the eldest child.*

h. *Mr. S.A.F. informed the* [ORAC] *that he was the eldest in his family. He bears no facial scarring.*

i. *This would indicate that you provided both the* [ORAC] *and the* [RAT] *with false and misleading information in a material particular*."

**11.** In response to the above letter, the appellant offered the following explanations, which are exhibited at p. 354:-

a. Her husband's name is Mr. D.F. He is the father of her children K. & M.

b. D.F. fraudulently obtained a Nigerian passport in the name of S.A.F., with which he applied for a UK visa. For the avoidance of doubt, Ms. F.'s husband's real name is D.F.

c. Mr. F.made a *Zambrano* application in respect of his son M. at the advice of his legal representatives.

d. Ms. F. is indeed M's mother.

e. For the avoidance of doubt, there is no S.A.F.; that is simply an alias adopted by Mr. D.F., who is the father of Ms. F.'s children, K. and M.

f. It is the case that Ms. F. fled Nigeria for fear that K. would be subjected to ritual scarring. She feared that the scarification would be carried out by her husband's family. Mr. F. was in favour of the ritual for social reasons. If the family were still in Nigeria, Ms. F. has no doubt that he and his family would still insist on K.'s scarification.

g. It has been and remains Ms. F.'s fear that her son, K., would be forced to undergo ritual scarification as the eldest child if he were in Nigeria with her husband's family. The RAT was persuaded by the country of origin information to this effect.

h. Notwithstanding what Mr. F. may have informed the ORAC in the name of S.A.F., Ms. F maintains that, to the best of her knowledge and belief, Mr. F. is the third child of his family, rather than the eldest. In the circumstances, the issue of his own facial scarring does not arise.

i. If the ORAC or the RAT have been misled, it has been by Mr. D.F. ,

j. Ms. F. further submits that she had never provided the ORAC or the RAT with false or misleading information, material or otherwise.

k. Ms. F. further submits that, insofar as the allegations made against her revealed the scope of his dealings with the State, her husband appeared to have misled the authorities and exploited his relationship with her and with his children.

**12.** On REDACTED, D.F.'s solicitors wrote to the respondent attempting to explain his dishonesty. They enclosed a letter entitled 'my confession'. In it, Mr. F. accepted that it was he and not his wife who had misled the authorities. By letter dated

REDACTED, the respondent informed Ms. F. that her refugee status had been revoked for the reasons set out in the letter of REDACTED, as set out above.

**Appellant's evidence on affidavit**

**13.** The appellant provided evidence on affidavit that can be summarised as follows. The appellant married D.F., a national of Nigeria born on REDACTED. She stated that she and D.F. are parents of K. and M. She stated that, in REDACTED, her husband, D., arrived in Ireland and came to live with her and her son. They had another son in REDACTED. She stated that D.F. lied to the Irish authorities in coming to Ireland. According to the appellant, he lied about his own family and having been in the UK. He allegedly did so in order to obtain residency in Ireland under E.U. law. She stated that he did not consult her about this. The appellant stated that the false and misleading information given to the Irish authorities was given by her husband and not her. The appellant further stated that she should not be punished for her husband's dishonesty. The appellant stated that she still believes that, if she and her children were returned to Nigeria, her eldest son would be subjected to facial scarification. The appellant averred that running away whilst pregnant would almost certainly attract severe mistreatment in Nigeria.

**14.** The appellant stated on affidavit that she is not currently in a relationship with her husband. With regard to the purported divorce papers she received in May, 2011 from D.F. informing her that he had obtained a divorce in Nigeria, Mr. F. was adamant following his arrival in Ireland that these documents were not genuine. With respect to the registration of her second child, the appellant stated that Mr. F. convinced her to register him as the father under his false name, as he told her she would be unable to obtain a birth certificate without doing so. The appellant stated that this worried her because Mr. F. had informed her that, without a birth certificate,

she would be unable to obtain a medical card and social welfare support for the child. She stated that she has since found out that a father's name is unnecessary in obtaining a birth certificate.

**15.** With respect to the letter submitted by the appellant on 16th April, 2013, in support of Mr. F.'s *Zambrano* application, the appellant stated that she was assisted in writing this letter by a Citizens' Information officer. When she attended that office, Mr. F. attended with her and directed how the letter was to be written. She stated that she was operating on the understanding that the authorities knew that S. and D. were one and the same person. The appellant's third child was not mentioned on affidavit, nor in the papers, until the issue was raised at hearing.

**Appellant's oral evidence**

**16.** The appellant gave oral evidence on three dates: REDACTED and REDACTED. There was no Yoruba interpreter available on the first day and the examination-in-chief proceeded through English. On the second and third days, the cross-examination proceeded with a Yoruba interpreter. The following is a summary of the evidence provided at hearing.

**17.** The appellant stated that she did not give any false or misleading information to the ORAC or the RAT. She stated that she encouraged her husband to go to the authorities after he arrived in Ireland. She stated that she is not in a relationship with her husband. The appellant maintained that her eldest son would still be at risk if the family were returned to Nigeria. Further, the appellant stated that she would be at risk because she fled the country while pregnant and therefore would be personally at risk if returned to Nigeria.

**18.** Upon cross-examination the appellant stated that she worked as a hairdresser for more than two years. She was unable to remember the exact dates. She

gave details of her own family. The respondent questioned the appellant regarding an inconsistency in her brother's names in the ORAC questionnaire and her evidence to this Court. The appellant stated that, as was written at the end of her questionnaire, someone else filled in the form and the error was not hers, but that other person's. This inconsistency was also recorded in the s.11 interview notes. The appellant stated that the name recorded at interview is not a Yoruba name and it would be impossible for her to have said that. The appellant maintained that she never said that and could not provide an explanation for the name recorded in the questionnaire and s.11 interview notes.

**19.** The appellant was questioned about her statement that her mother was dead throughout the refugee application process, but then using the plural pronoun 'they' when referring to her remaining parent. According to the respondent, this indicated that both her parents were alive. The respondent put it to the appellant that the elderly status of her sole remaining parent had been a predicating factor in the Tribunal's finding that the option of internal relocation was unduly harsh. It was also put to the appellant that said finding was influential in the Tribunal reaching its final decision. The appellant stated that, in the Yoruba language, the plural 'they' is always used to refer to one's elders. During the evidence, the Yoruba interpreter made the error by referring to 'they' instead of 'he'. The appellant corrected the interpreter.

**20.** The respondent questioned the appellant regarding how she paid for her journey to Ireland, given that her salary as a hairdresser would be insufficient to cover such expense. The appellant stated that her brother paid for and organised it. In the s.11 interview, she did not explain that her brother had done so.

**21.** The appellant was questioned regarding p.2 of the child's Tribunal decision, where it states, *inter alia*: "*The Applicant's own sister had scarring preformed*". The

appellant represented her son at his oral hearing but she could not explain how the Tribunal member had come to such a belief. She stated that this must have been a mistake on the part of the Tribunal member.

**22.** The appellant stated that her husband was not living with her, but visiting and staying for short periods. The appellant stated that she told her husband that he should go to the Department of Justice and confess the truth. She stated that he stayed for three days per week but did not live with her. Counsel for the respondent pointed to the appellant's affidavit, sworn on REDACTED, which states at para. 18:-

> "*I say that in* REDACTED *my husband D. arrived in Ireland. I say that I took him back and that he came to live with me and K. in Clonee. We had another son named M. in* REDACTED."

The appellant stated that her legal advisors at the time informed her that three days is like living together. However, she maintained they did not live together, apart from the three days that he spent with her, and, although there was no continued relationship following her husband's arrival in Ireland, there was a physical relationship that discontinued after she became pregnant with the second child. The appellant became pregnant again in REDACTED, with the couple's third child. She stated that there was no relationship at this time and the pregnancy was the result of a once-off physical encounter, rather than of an ongoing relationship, as suggested by counsel for the respondent. The appellant stated that she has no cause to hide a relationship with her husband because he is her husband and it is not an extra-marital affair. Counsel put it to the appellant that her relationship could affect her one-parent family payment from the Department of Social Protection, which would not be paid if she were found to be in a relationship with her husband. She believed other payments under alternative schemes would be paid by the Department and it would have no

effectual difference on her financial circumstances. Counsel further put it to the appellant that, aside from potentially losing this payment, the appellant's refugee claim would have fallen apart if she had been found to have been in a continued relationship with her husband. Counsel stated that officials believed that the couple have been in a relationship since he arrived in the State. The appellant denied this.

**23.** The appellant stated that her husband had told her that he came to Ireland to see his son and be a part of the child's life. The appellant stated that, when she met her husband in Ireland, she did not fear him in the same way that she would have in Nigeria because she felt protected in Ireland.

**24.** The appellant stated under cross-examination that her husband's profession was that of a video technician. There were numerous discrepancies on the children's birth certificates. The second child's birth certificate stated that his father's name was S.A.F. and that his profession was "marketing manager". The third child's birth certificate stated that her father's name was S.A.F. and that his profession was "electrical engineer". The appellant stated that she believed S. to be her husband's baptismal name and she did not believe it to be a lie when she used it on the third child's birth certificate. The third child was not mentioned in any affidavit before the Court. The appellant stated that she did not think the third child was at issue and she believed her legal advisors were best placed to raise the issue, if necessary.

**25.** Regarding the divorce papers that the appellant's husband had sent from Nigeria, the appellant stated that she believes she is married because her husband, upon arrival in this State, informed her that the divorce papers he had sent from Nigeria were false documents. On the third child's online birth registration form, when asked for 'civil status', the mother's details list 'married', with a handwritten note beside it; 'divorcee has papers'. The appellant stated that she had previously

handed divorce papers to that office and an official in that office must have written the note. Further, on the third page of that document, the appellant signed the bottom of the page. The document described the father as 'single' and, under the mother's details, the appellant ticked 'divorced'. The appellant stated that she had submitted the lie previously and therefore felt it necessary to continue with that lie. She further stated that, if she had been more learned, she would have had a greater understanding of the implications of her actions. The appellant stated that the second child became vested in citizenship because the appellant was a declared refugee at the time. However, she did not apply for citizenship for the third child because the letters of revocation issued before the child's birth.

**26.** The appellant was questioned regarding her husband's ability to secure a Nigerian passport and return with the eldest child to Nigeria in order to see the facial scarring performed. The appellant stated that she felt safe in Ireland and had never considered this possibility. She stated that she is supported by a public health nurse and she feels safe in Ireland because police would intervene, unlike in Nigeria.

**Mr. F.'s oral evidence**

**27.** The appellant's husband gave oral evidence on REDACTED. The husband stated that he came to Ireland to see his son and that he is not in an ongoing relationship with the appellant. He is residing in a direct provision centre. He stated that he acquired divorce papers from authorities in Nigeria but he does not believe he is divorced. The witness stated that he used an alias because that was his baptismal name. The witness stated that he tried to come to Ireland in REDACTED and was refused a visa, so he procured another passport with his baptismal name. He left Nigeria in REDACTED and arrived in Ireland in or around REDACTED.

**28.** Mr. F. stated that the photographs showing people with facial scarification are the eldest males in the individual branches of his family. The witness stated that the eldest son will be scarred if returned to Nigeria, as it is tradition and he would not be able to stop it. He stated that he did not agree with the tradition but he would be unable to protect the child in Nigeria. He stated that the oracle, a type of native doctor, would inform his family of the child's return. Regarding the wedding photographs exhibited before the Court, the witness stated that no scarred individuals appeared in those pictures because he did not ask for those photos. The witness stated that he will not contact his family to seek photographs of him alongside his scarred relatives because he is afraid that this may endanger the eldest child.

**29.** The witness stated that he would have needed an identification card if he were to use his name 'D' on the birth certificates of the second and third children. He said that he and his wife brought the divorce papers in order to register the birth of the second child. He then used the name 'S' to register the birth of the third child with his asylum card as proof of identity. The witness stated that they brought the divorce papers for the second child's birth registration so that he could convince the authorities that he was not 'D', but 'S'. This allegedly would avoid drawing the authorities' attention. In relation to the letter sent to the Department of Justice, entitled 'my confession', the witness confirmed that it was written by him and that this is the true account of events. Herein, the witness took responsibility for the persistent gaps in the truth and stated that the appellant was not responsible.

**30.** The witness stated that he and his wife would have remained a happy couple had it not been for the scarring rite. He stated that he called to his wife's home in Ireland for two weeks before they re-commenced their physical relationship. The witness stated that Ms. F. became pregnant three weeks after they reunited in Ireland

but this does not amount to a fully functioning marriage. He stated that he has not had a physical relationship with her since she became pregnant with their third child.

**31.** The witness stated that he would have been a threat to the appellant, had she remained in Nigeria. He stated that he would have beaten her if she had refused to facilitate the scarring ritual. He stated that, in seeking the appellant's whereabouts, he assaulted her father on a number of occasions and seriously injured him.

**32.** A number of original documents, copied and exhibited in the grounding affidavits, were also submitted to the Court and are dealt with later in this judgment

**Appellant's submissions**

**33.** Counsel for the appellant, Mr. Lynn S.C., with Ms. Gillespie B.L., summarised the appellant's case as follows:-

a. No false or misleading information was given to the RAT by the appellant, such that the respondent's decision pursuant to section 21(1)(h) of the 1996 Act is one that this Court must order be withdrawn;

b. In the alternative, the respondent's decision to revoke the appellant's refugee status was expressly stated to take effect from 16th February, 2014. Accordingly, this Court can only confirm this decision, or order it to be withdrawn per s.21 (5) of the 1996 Act. Counsel argued that, were the Court of the view that false and misleading information was given by the appellant to the RAT, and that this was decisive to the Tribunal's decision, the Court can only confirm the decision before it, i.e. that there be revocation which takes effect from 16th February, 2014. The appellant submitted that this Court cannot back-date the revocation, given that the respondent's decision did not do so.

**34.** In relation to the nature and scope of the appeal before this Court, the appellant argued the Court is not at large to have regard to other matters that may have arisen in the course of the hearing as a justification for revocation, even where such matters may suggest new and different grounds for revocation of the appellant's refugee status. The appellant submitted that s.21 (5) empowers the Court only to confirm the respondent's decision, or direct that it be withdrawn. It contains no power to re-write or amend the decision, or add reasons to it.

**35.** The appellant argued that, if new information were to emerge on an appeal that might merit revocation for reasons other than those previously relied on by the respondent, the appropriate and lawful course is for the respondent to consider whether to revoke the appellant's refugee status on that new information in a separate process, observing the procedural requirements of s.21 of the 1996 Act and Article 38 of the Council Directive 2005/85/EC of 1 December, 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status O.J. L326/13 13.12.2005. Section 21(3)(b) confers on the refugee a right to make representations in respect of the reasons given by the Minister, and imposes an obligation on the Minister to consider any such representations. The requirement to provide the reasons for revocation, both at the proposal stage, and when the ultimate decision is made, is also set out by Art. 38 of the Procedures Directive. Where the Minister issues a decision to revoke a refugee's status, which must be based on the reasons set out in the proposal to revoke, s. 21(5) provides a right of appeal to the High Court. The appellant argues that it follows that an appeal must be confined to the reasons provided by the Minister.

**36.** The appellant submitted that the statutory scheme clearly requires all matters relied on by the Minister for revoking refugee status to be put before the

person affected prior to revocation. The appellant submits that this requirement, and the requirement of fair procedures, prevents the Minister and the Court from introducing new reasons for revocation during the course of an appeal before the High Court. The appellant contended that, if and insofar as this is inconsistent with the High Court judgment in *Adegbuyi v. Minister for Justice and Law Reform* [2012] IEHC 484, as cited in the respondent's written submissions, it was submitted that the approach in *Adegbuyi* is incorrect. Further, as referred to above, the power of revocation under s.21 of the 1996 Act is a matter of ministerial discretion. Therefore, even if the statutory criteria were met, it is a matter for the Minister to decide whether revocation is appropriate, according to the appellant. Thus, the appellant submitted, if reasons other than those advanced by the Minister emerge during an appeal hearing that meet the statutory criteria for revocation, the case would still have to be returned to the Minister for a decision on whether those new reasons are such that she should exercise her discretion. The appellant submitted that, were the Court empowered to supplant the Minister's reasons for revocation with its own reasons, it would also fall on the Court to consider whether, in its discretion, revocation should be ordered. The appellant argued that the legislature never intended such discretion to be exercised by the judiciary. Further, s.21(2) of the 1996 Act provides a further qualification to the Minister's exercise of revocation, namely that the Minister must be satisfied that compelling reasons arising out of past persecution do not arise when considering whether refugee status should be revoked on the basis of cessation. The appellant submitted that the Court, in exercising its appellate function, could not ensure that the provisions of s.21 (2) were fully respected, as this duty is imposed on the Minister. Thus, this appeal is confined to the reasons given by the Minister in her decision.

**37.** The appellant submitted that the burden of proving that the statutory criteria in s.21 (1) are met rests with the respondent in this appeal, because it is the respondent who has alleged that the appellant has provided misleading information such that her refugee status ought to be revoked. The appellant relied on the core common law principle that he who alleges must prove and maintained that the burden of proof may only be reversed where a statute expressly provides for it. Moreover, the appellant submits that, because the impugned decision involves the exercise of ministerial discretion, it is not possible for any party other than the Minister to effectively prove to the Court that the decision should be affirmed.

**38.** The UNHCR issued a 'Note on the Cancellation of Refugee Status' in November, 2004. The appellant submitted that this provides guidance as to how a decision to revoke refugee status should be made. In light of the legislative purpose of both the 1996 Act and EU secondary legislation giving effect to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, the appellant submitted that UNHCR guidance documents are of assistance to the Court. The appellant pointed out that the 'UNHCR Handbook on Procedures and Criteria for Determining Refugee Status' was relied on by McGuinness and Finnegan JJ. in their Supreme Court judgments in *V.Z. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 135 and *A.N. v. Minister for Justice, Equality and Law Reform* [2008] 2 I.R. 48.

**39.** Para. 20 of the 'Note on the Cancellation of Refugee Status' provides:-

> "*Where fraud is considered as the ground for cancellation, States' legislation and jurisprudence consistently require the presence of all three of the following elements: (a) objectively incorrect statements by the applicant; (b) causality between these statements and the refugee status determination; and (c) intention to mislead by the applicant*."

**40.** It continues at para. 34:-

> "*As a general principle, the burden of proof lies on the person who makes an assertion. In cancellation proceedings, the onus to show that refugee status should be cancelled normally rests on the authority which reviews the initial decision. The burden of proof is reversed where the evidence is such that it creates a rebuttable presumption, for example, a valid passport which shows that the applicant's nationality is different from that claimed during the determination procedure*."

The appellant argues that such an approach was adopted and followed in the UK and pointed to the decision of the Asylum and Immigration Tribunal in *RD (Cessation – burden of proof – procedure) Algeria* [2007] U.K.A.I.T. 00066.

**41.** Having regard to the above, the appellant submits that it falls on the respondent to prove the accuracy of the findings relied on in the letter dated 20th February, 2014. It is submitted that said findings must also prove the following: (i) that objectively incorrect statements were made to the Tribunal by the appellant, (ii) that refugee status was granted on the basis of these statements, and (iii) that the appellant intended to mislead the Tribunal. The appellant contends that the respondent has no independent evidence that the appellant misrepresented or omitted facts in her case before the Tribunal and that the only evidence the respondent has relates to falsehood perpetrated by her husband. While it is conceded that the appellant became embroiled in some of these untruths, it is highlighted that all of these post-date the appellant's receipt of refugee status. It is submitted that both the appellant and her husband have admitted these untruths and so they do not form any basis on which to contradict the information given to the Tribunal. The appellant argues the respondent

has no reliable evidence that the Tribunal was misled in a manner that would ground revocation under s.21 of the 1996 Act.

**42.** The appellant relies on s.11A of the 1996 Act, which transfers the burden of proof to the applicant in three situations, none of which relate to an appeal against revocation. The appellant submits that, if the Act intended to shift the burden on appeal to the High Court, it would have explicitly stated as much. The appellant effectively relies on the principle "*expressio unius exclusion alterius*".

**43.** The appellant submits that the requirement to revoke, end or refuse to renew refugee status under article 14(3) of the Qualification Directive only arises where the Member State 'establish[es]' that a misrepresentation or omission of facts was decisive for the granting of refugee status. The appellant argues that it is for the respondent to prove that revocation meets the statutory requirements. The appellant argued that the statement by MacEochaidh J. in *Hussein v. Minister for Justice and Law Reform* [2014] IEHC 130 at para. 41 that the burden of proof rests on the appellant, was a qualified statement. In *Adegbuyi (supra)*, Clark J. stated at para. 42:-

> "*Bearing in mind the contents of the UNHCR Note together with the terms of s. 21(1) (h) and its sister provision Regulation 11(2), it seems that the question to be determined is whether the Minister has satisfied the Court that Mr Adegbuyi provided the asylum authorities with information which was false or misleading in a material particular; that there was a link between the falsity of the information and the grant of refugee status; and that he furnished the false information to the asylum authorities with the intention of misleading them.*"

The appellant submitted that there are conflicting positions in previous case-law, such that this Court can form its own view as to the matter without acting inconsistently with the principles in *Re Worldport Ireland Ltd (In Liquidation)* [2005] IEHC 189.

**44.** In respect of the standard of proof, the appellant stated that there does not appear to be any High Court decisions on this issue. The UNHCR note refers to the standard of proof as follows:-

> "*35. The standard of proof for cancellation is closely related to that required to determine refugee status. At the eligibility stage, the adjudicator must decide if, based on the evidence provided by the applicant as well as the latter's statements, it is likely that the claim of that applicant is credible. The applicant must have presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore, on balance, capable of being believed. The applicant must also establish that his or her fear of persecution is well-founded, that is, reasonably possible.*
>
> *36. Cancellation may be justified only if the (new) evidence, had it been before the determining authority at the time, could have supported a negative finding with regard to the applicant's credibility and/or the well-foundedness of his or her fear of persecution for a Convention reason, or if it would have been sufficient to establish the existence of an exclusion ground provided for under the 1951 Convention. In Article 1F cases, there must be clear and credible evidence to support 'serious reasons for considering' that an applicant was involved in acts within its scope.*"

The appellant submitted that an appropriate approach for this Court to take is to require clear and reliable evidence that misleading information was provided to the

tribunal and to be satisfied that the provision of accurate information would have led the tribunal to issue a negative decision.

**45.** The appellant further argued that revocation under s.21 is discretionary and requires two decisions: 1) the statutory criteria must be met, and 2) the Minister must also consider it 'appropriate' to revoke the refugee status. Counsel contended that it falls on the Minister to justify this second decision. The appellant pointed out that the Minister did not regard it as 'appropriate' to revoke the refugee status of K., the appellant's first son who was granted refugee status at the same time as the appellant for the same reason. His refugee status remains in place and, it must be presumed, is not being revoked. Article 41 of the Charter of Fundamental Rights provides that decisions must be taken within a reasonable period of time where European Union law entitlements are in issue. The appellant argued that the reasonable period of time within which K.'s refugee status could be revoked has passed.

**46.** During the hearing, an e-mail that contained communications between Department of Justice officials was exhibited before the Court. It was stated therein that, should the appellant fail in her appeal, the refugee status of K. would also be revoked and M.'s Irish citizenship would be null and void, thus extinguishing the entire family's residence status in the State. During the hearing, the Court raised a number of questions regarding this scenario, the possible applicability of Article 42A of Bunreacht na hEireann and the impact, if any, this should have on the Court's decision. Because the Article is so new, submissions were made tentatively. The appellant submitted that, if the respondent's decision to revoke the appellant's refugee status withstands judicial scrutiny, then the Court should, at a minimum, have regard to the best interests of the children under Article 42A.

**47.** The appellant argued that the respondent is therefore required to inform the Court of the impact that the revocation of the appellant's status would have on her children's circumstances. It is submitted that, because the revocation decision is stated to take effect from REDACTED 2014, onward, M.'s citizenship would remain intact and the application of Article 42A is unlikely to arise in this regard.

**Respondent's submissions**

**48.** Counsel for the respondent, Mr. Conlon Smyth S.C., with Ms. Mooney B.L., submit that the procedure for an appeal of this nature is distinct from judicial review proceedings and the Court is not limited to the restricted principles applicable in a judicial review context. This allegedly enables the Court to carry out an assessment of the accuracy of the decision. The respondent, in addressing the nature of the Court's jurisdiction, relied upon the decision of Cooke J. in *Gashi v. Minister for Justice, Equality and Law Reform* [2010] IEHC 436, where he states at para. 11:-

> "*There is no doubt, however, that this proceeding is not confined by the judicial review rules as it is a statutory appeal in which the Court can 'as it thinks proper' either confirm the respondent's decision to revoke or direct that he withdraw it. The court is not, therefore, limited to judging the legality of the process by which the decision was made by reference only to the information before the respondent at the time. It can decide on the basis of the evidence now available whether the respondent was correct in finding that the original declaration had been given on the basis of information 'which was false or misleading in a material particular' in accordance with paragraph (h) of s. 21(5) of the 1996 Act.*"

Therefore, the respondent contended, the Court may admit new evidence that was not before the respondent when the impugned decision was made.

**49.** As for the reasons that the Court may adopt for its decision, the respondent pointed to the decision of Clark J. in *Adegbuyi (supra)*, where she states at para. 9:-

> "*Essentially, the statute permits the Court to 'confirm the decision of the Minister' and the Court is at large as to the reasons it may give for so doing*."

Clark J. continues at para. 36:-

> "*In the view of this Court, the appellant jurisdiction under s.21 (5) permits the Court to endorse the grounds for revocation relied on by the Minister or it may add or substitute its own grounds*."

MacEochaidh J. endorsed this approach in *Hussein*, where he states at para. 44:-

> "*It is clear from the decisions in* Gashi *and in* Nz. N. *(Clark J.) that this court is entitled to consider whether the Minister's decision to revoke was correct based not only on the material which the Minister reviewed but also based on the evidence adduced by the appellant orally and on affidavit. In my view, I am required on this appeal to seek to identify false and misleading information and if found to enquire as to the effect of that on the application for refugee status.*"

The respondent submitted that this Court is not entitled to ask the respondent to reconsider the decision. Rather, the Court must come to its own conclusion as to whether the appellant's refugee status should be revoked or whether the respondent should be directed to withdraw the revocation order. The respondent argued that, as a result of the foregoing, the Court is not obliged to stay within the confines of the original evidence presented and is entitled to formulate its own reasons.

**50.** The respondent submitted that the nature and effect of the false and misleading information provided by the appellant during the refugee determination

process should not be narrowly construed, as the appellant wishes it to be. It is argued that the appellant's submission that the false and misleading information must constitute a particular and decisive basis on which the grant of refugee status was made is an incorrect interpretation because it would create a gap in the law wherein the false information that may not be said to be decisive but still might have played a part in creating the convention nexus would be ignored. The respondent relied upon the decision of Cooke J. in *Gashi*, wherein he states at para. 23:-

> "*The Court does not accept that the provision should be so narrowly construed. In the view of the Court the expression 'decisive for the granting of refugee status' is used so as to require refugee status to be revoked where it is clear that the decision to grant it would not have been made had the true full facts been known. Thus, the provision covers the misrepresentation or omission of facts which are directly relevant to the assessment of the application for international protection.*
>
> *24. In this regard it is to be noted that Article 4.1 of the Qualifications Directive recognises the duty of every applicant for protection to "submit as soon as possible all elements need to substantiate the application for international protection". Amongst the 'elements' thus required to be submitted are statements and all documentation at the applicant's disposal regarding, inter alia, 'identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes…' etc. (Article 4.2). It is on the basis of these 'elements' that the facts and circumstances upon which the application for protection is based will be assessed. In other words, the decision to grant or refuse refugee status is*

*based upon such information. The information in question forms the basis on which the decision is made and is 'decisive' in that sense."*

Cooke J. continues at para. 25:-

"*Although the connotation of the word 'decisive' in English could be said to make it open to the interpretation of the provision contended for by the applicant, the Court notes that the use of that term in the English text of the Qualifications Directive is not so precisely reflected in other language versions. The misrepresentation or omission of facts is, for example, qualified in the French text in the phrase: 'ont joué un role determinant dans la decision d'octroyer le statut de refugié'. The corresponding phrase in the Italian text has the same sense: 'ha costituito un fattore determinante per l'ottenimento dello status di rifugiato'. Thus the question to ask is whether the application for protection would have been determined differently had the information not been misrepresented or concealed. In the judgment of the Court it is thus immaterial whether the revocation is based upon paragraph (h) as incorporated in Regulation 11(2) (a) or on sub-paragraph (b) and it is therefore unnecessary to consider the argument made to the effect that it was not competent for the Regulations to continue to permit recourse to paragraph (h) of s. 21(1) having regard to the exhaustive effect of Article 14.3 of the Qualifications Directive in stipulating the mandatory grounds for revocation*."

**51.** The respondent further relied upon MacEochaidh J.'s judgment in *Hussein (supra)*, which states at para. 44:-

"*I must be satisfied that the false or misleading information would have produced a negative asylum recommendation had such been known to*

*ORAC. In my view, it is not sufficient that the false or misleading information would have caused a different analysis of the asylum application but the same result. In other words, it seems to me that the effect of the false or misleading information must persuade the court that the declaration as to refugee status would not have been obtained. I fully accept what Cooke J. said at para. 23 in Gashi that the expression 'decisive for the granting of refugee status' is used so as to require refugee status to be revoked where it is clear that the decision to grant it would not have been made had the true full facts been known*". *The function of the court on an appeal from a decision of the Minister taken under regulation 11 of the 2006 Regulations is to ask whether the Minister was correct (that false/misleading information was decisive) and I can only do this by asking the same question which the Minister was obliged to ask. I must seek to identify the false or misleading facts, ask would these have been decisive in the sense that they would have produced a negative asylum decision if known and then decide if the Minister was correct to revoke refugee status, even if the court has additional material unavailable to the Minister*."

**52.** The respondent rejected the appellant's contention that the burden of proof lies with the Minister. The respondent argued that, as a matter of first principles, the burden rests on the appellant, in bringing these proceedings to the High Court, to prove her case. The respondent submitted that the appellant's reliance on the UNHCR Guidance Note is a misinterpretation of same. Therein, the burden of proof is stated as being on the administrative decision-maker in the first instance. The respondent contends that "first instance" refers to the original revocation decision made by the

respondent, and not the appeal taken by the appellant to this Court. In any event, the respondent submits that the Guidance Note is not a legally binding document.

**53.** The respondent submits that the appellant's declaration of refugee status was revoked for two interconnected reasons: (i) the false identity of the appellant's husband and father of her child; and (ii) evidence of a false and misleading basis for her claim of persecution.

**54.** Over the course of the asylum process, the appellant maintained that her husband's name was D.F., who was also the father of her child, K. Following the declaration of refugee status, it emerged that S.A.F., the father of the second child, made an application for residency under the *Zambrano* judgment (Case C-34/09, [2011] E.C.R. I-01177) of the Court of Justice of the European Union, as the father of an Irish citizen child. The respondent submitted evidence that the appellant had provided false and misleading evidence to the Department of Justice on a number of occasions in support of Mr. F.'s applications for residency. One such example provided to the Court is contained in a letter dated 21st January, 2013, where the appellant states as follows:-

> "*The father of my son M.F. is S.A.F. and he is in the hostel here in Ireland… K.'s father does not contribute financially or otherwise to K.'s upbringing because his father is in Nigeria, and I ran away from Nigeria a very long time, so I have no contact with him*."

Further, the respondent pointed to the false and misleading information contained in the second and third children's birth certificates. The respondent asserted that the appellant engaged with the untruths and was not, in fact, an innocent party. The respondent pointed out that the appellant has maintained throughout the hearing that

she was married but, when she submitted a family reunification application to bring the father to Ireland, she referred to herself as divorced.

**55.** The respondent argued that the second interconnected element of the Minister's decision to revoke the appellant's status rests in her claim of persecution. The respondent submitted that the appellant's entire claim was based upon a fear of her husband and his family. She stated throughout the asylum process that she would be seriously beaten and her son would be facially scarred at their hands. During his asylum application, the husband claimed that he was the eldest in his family. The appellant claimed her husband was the third child in his family. The respondent submitted that this materially affects the persecution claim because the husband does not bear a scar. The respondent further argued that, if the appellant really feared her husband, she would not have resumed marital relations with him after his arrival in the State. Further, the appellant's assertion that her husband was in favour of scarring practice is not borne out by his presence and active participation in the family's life.

**56.** The respondent argued that it is premature at this stage to consider the implications of Article 42A of the Constitution in circumstances where revocation is being made solely against the mother. The respondent argued that the Minister is entitled to consider the children's position after a decision in this case has been finalised, at which point submission should be made regarding Article 42A.

**Legal Analysis**

**57.** The Court has to determine in this case questions relating to the nature of the appeal and the manner in which the burden of proof operates in these matters

**58.** The appellant was at all times represented by a solicitor and counsel, both senior and junior. Submissions were filed on behalf of the appellant on the 17th November, 2014. Those submissions were stated to be without prejudice to any

further oral submissions that may be made at hearing. Section E of said submissions is entitled "The form and scope of the appeal", and states at para. 20:-

> "*An appeal against revocation of refugee status is a statutory appeal in which the court can 'as it thinks proper' either confirm the respondents decision to revoke or direct that he withdraw it.* [1]
>
> *21. There is no restriction as to the evidence which may be heard by the court or the matters which may be considered. The court is not confined to the information which is before the Minister.* [2] *In the present case, the Court may decide on the basis of the evidence available whether the respondent was correct in finding that the original declaration had been given on the basis of information 'which was false or misleading in a material particular' in accordance with paragraph (h) of Section 21(5) of the 1996 Act.* [3]"

**59.** The footnotes 1, 2 and 3 referred to in the above-mentioned extract from the appellant's initial legal submissions refer to para 11, 6 and 8 respectively of the decision in *Gashi*.

**60.** With regard to the burden of proof the appellants submitted at para. 22 of the written submissions:-

> "*Ms. F. succeeds if she persuades the Court that the Minister must withdraw the revocation of refugee status because he incorrectly decided to revoke that status.* [4]
>
> *23. The burden is on Ms. F. to demonstrate that the Minister's conclusion is incorrect.* [5]"

The footnotes 4 and 5 refer to the decision in *Hussein* (*supra*), at para. 41 thereof.

**61.** The appellant's submissions then conclude that the evidence is such that the appellant did not give false or misleading information to the RAT and therefore requests that the Minister withdraw the revocation of her declaration of refugee status.

**62.** The respondent has at all times maintained that the legal framework and scope of the manner in which this Court should deal with the appeal and the burden of proof is as is set out in the appellant's original written submissions.

**63.** By Notice of Motion dated 21st November 2014, returnable for the 24th November, 2014, the appellant's then solicitors on record brought an application before this Honourable Court seeking permission to come off record in these proceedings. The application was granted by order of this Honourable Court and, on 9th December 2014, Messrs. Daly Lynch Crowe & Morris Solicitors were appointed as solicitors for the appellant in this action. It appears that the case had been listed for hearing in November, 2014 but an affidavit on behalf of an officer of the respondent was filed approximately one week prior to the allocated hearing date, which comprised a total of 550 pages, inclusive of the exhibits. The matter did not proceed to hearing on that date. It is unclear whether it was the volume and content of the affidavit or the imminent change of solicitors that gave rise to the adjournment. In any event, the matter was adjourned and was listed for hearing on 14th April, 2015. The matter becomes complicated at this juncture. On 13th April, 2015, the appellant filed supplemental submissions (again, without prejudice to any further oral submissions made at the hearing). In these submissions, the appellant reiterated the written submissions made on her behalf on 17th November, 2014, save for the submissions at paras. 22 and 23 thereof, which had stated that the burden of proof on appeal to the High Court rests with the appellant. For the reasons set out thereafter in the supplemental submissions of 13th April, 2015, the appellant submits that that is

incorrect. The appellant also took issue with the principle set out in the appellant's submissions of 17th November (paras. 20 – 21) with regard to the form and scope of the appeal, to the effect that this Court can depart from the Minister's reasons for the revocation and instead make its own determination and formulate its own reasons for revoking the appellant's refugee status. However, in the April, 2015 submissions, the appellant did concede that, if these principles are clearly established on previous High Court case-law (which it seems to this Court was clearly acknowledged in the first set of submissions, dated 17th November, 2014), then this Court, as a body of co-ordinate jurisdiction, should only depart from them if there are substantial reasons for considering them to be wrong. In this respect, the decision in *In Re Worldport (Ireland) Limited (in liquidation)* [2005] IEHC 189 is relied on.

**Burden of Proof**

**64.** This Court is well-familiar with the principles of *stare decisis* and the decision of *in Re Worldport (Ireland) Limited* in relation to courts of similar jurisdiction not departing from decisions of fellow court members, unless substantial reasons for considering them to be wrong have been established (e.g. that the point had not been sufficiently or properly argued or that relevant authority has not been brought to the attention of the Court).

**65.** The stance now adapted by the appellant in relation to the framework and scope of the appeal and the question of where the burden of proof lies in such an appeal, is fraught with difficulty. Other than relating to the Court that the appellant now disagrees with those decisions, no error of any substance or any substantial reasons have been adumbrated in order to justify this Court's departure from the earlier decisions originally relied upon and acknowledged by the appellant.

**66.** Accordingly, I am satisfied that the principle set out by Clarke J. in *Adegbuyi* and MacEochaidh J. in *Hussein* reflects the established law in this jurisdiction in respect of statutory appeals pursuant to s. 21 of the 1996 Act. I am not persuaded that there are any reasons of substance or error in the manner in which those decisions were arrived at which could or should persuade this Court to depart from the decisions of my colleagues. I therefore intend to apply those decisions and apply the same principles and standards in the determination of this appeal.

**67.** Thus, I am satisfied that, this being a statutory appeal and not a judicial review, as was obliquely contended for by the appellants, it is open to this Court to rely on the *dicta* of Clarke J. in *Adegbuyi*, Cooke J. in *Gashi* and MacEochaidh J. in *Hussein* in allowing this appeal to be determined on the evidence that was before the Minister at the time the original decision was taken and any additional evidence presented on appeal. It seems to me that the matter was put beyond doubt by Cooke J. in *Gashi*, where he commented on the Courts' appellate jurisdiction by stating at para. 11:-

> *"There is no doubt, however, that this proceeding is not confined by the judicial review rules as it is a statutory appeal in which the Court can 'as it thinks proper' either confirm the respondent's decision to revoke or direct that he withdraw it. The court is not, therefore, limited to judging the legality of the process by which the decision was made by reference only to the information before the respondent at the time. It can decide on the basis of the evidence now available whether the respondent was correct in finding that the original declaration had been given on the basis of information 'which was false or misleading in a material particular…"*

**68.** In giving judgment in *Hussein*, MacEochaidh J stated at para. 44:-

> *"It is clear from the decisions in* Gashi *and in* Nz.N. *(Clark J.) that this court is entitled to consider whether the Minister's decision to revoke was correct based not only on the material which the Minister reviewed but also based on the evidence adduced by the appellant orally and on affidavit. In my view, I am required on this appeal to seek to identify false and misleading information and if found to enquire as to the effect of that on the application for refugee status. I must be satisfied that the false or misleading information would have produced a negative asylum recommendation had such been known to ORAC. … I must seek to identify the false or misleading facts, ask would these have been decisive in the sense that they would have produced a negative asylum decision if known and then decide if the Minister was correct to revoke refugee status, even if the court has additional material unavailable to the Minister."*

**69.** I am satisfied as a matter of law that the burden of proof in relation to establishing the case for a direction that the Minister withdraw his or her decision rests with the appellant. While the Minister, when dealing with the decision at the administrative level, had to satisfy herself pursuant to s.21 (h) of the 1996 Act that the information furnished to the asylum authorities was false or misleading in a material particular, the burden of proof rests on the appellant who brings the proceedings before the High Court and is in effect the applicant in the proceedings before the High Court. As with all such applicants, she must discharge the burden of proof resting on the person who brings the case before the Court.

**Decision**

**70.** During the course of these proceedings, the Court raised a number of queries relating to Article 42A of Bunreacht na hEireann and the impact, if any, it

should have on the Court's judgment in this case. The respondents contend, and I agree, that it is premature to consider the implications of Article 42A in circumstances where revocation is sought solely in respect of the mother. Any issues that may arise in that regard are best addressed at some other time, in the event of any proposals concerning the children, which would affect their status.

**71.** Earlier in this judgment, I have set out the evidence that was put forward by the appellant, both by way of affidavit and by way of oral evidence before the Court. In addition, her husband D. (otherwise S.A.) F. swore an affidavit for the purpose of these proceedings, gave direct evidence to the Court and was cross-examined both upon his affidavit and his direct evidence. In addition, extensive affidavit evidence has been filed on behalf of the respondent. One of the matters that was not dealt with at the pre-trial direction stage was the question as to whether or not an interpreter was needed for the purposes of taking oral evidence. After the appellant's initial oral evidence, the Court expressed concern as to the appellant's ability to understand the English language and to give her evidence without the aid of an interpreter. It was in those circumstances that the services of an interpreter were procured for the remaining days of the hearing. It is clear that the appellant speaks English. At the commencement of the hearing, she gave the impression to the Court that she had very little English. As the proceedings progressed, on occasions when the interpreter interpreted the appellant's evidence in a manner that the appellant disagreed with, the appellant had no difficulty in interrupting and correcting the evidence that she wished to give to the Court.

**72.** Copies of a number of items of evidence were exhibited in the grounding affidavits and the originals were submitted to the Court at the hearing. These included a number of photographs purporting to depict the wedding ceremony of the appellant

and D.F. The religious marriage certificate was also submitted. T.F. and D.F. appear to have gone through a ceremonial rite relating to marriage. Although, it must be noted that the certificate is unusual, in that it is written in blue ballpoint ink, appears to have a number of corrections/amendments made to it and is not a sealed document in any way. There is a space for the photograph of the bride and groom but none is attached, nor does it appear that any photograph was ever affixed to the space.

**73.** A copy of a birth certificate for D.F. was also submitted in evidence. The date of birth is given as REDACTED. The religious marriage certificate, whilst not specifying the dates of birth of the parties, states that the ceremony of marriage took place on REDACTED, and that the husband, D.F., was 29 years of age at the date of the marriage. If the birth certificate is correct, and the same D.F. went through a ceremony of marriage on REDACTED, he would have been 34 years of age at that time. The copy birth certificate, from Muslim local government, is dated REDACTED. Although it bears a stamped mark, it is not in any way a sealed document. It is difficult for the Court to place any weight on either of these two documents and, in any event, the discrepancy in the age of D.F. at the time of the marriage remains unanswered. Even if I accept that T.F. and D.F. participated in a ceremonial rite, and although D.F. stated that he purported to divorce her in and around REDACTED, I do not propose to make a finding in relation to their current marital status, as this is not the appropriate Court forum in which to do so. However, I am satisfied, based on the evidence before me, that they are involved in an ongoing and subsisting relationship.

**74.** In relation to two photographs showing a man and a boy with facial scarring, I find I am unable to attach any probative value to those photographs. In effect, they could have been obtained from anywhere and I cannot rely on the

evidence with any degree of confidence. Allegedly, they are photographs of D.F.'s brother and nephew.

**75.** It seems to me that D.F. and S.A.F. are one and the same person. Perhaps T.F. was telling the truth when she referred to her husband as D.F. during the asylum process. However, the signature on the marriage certificate looks more like A[…]. Whatever it is, it is not D[…]. It seems likely that S.A.F. is the correct name, and that he was in fact the eldest in his family. He does not bear any facial scarring.

**76.** At the core of this case is the ongoing and subsisting relationship between T.F. and D.F. For reasons best known only to themselves, they have consistently sought to deny its existence. T.F. described herself as having fled her native country, her husband and his family due to an alleged fear of persecution based on her fears with respect to her then-expected first-born child. She stated that she feared he would be subjected to facial scarring as the first-born and that her husband would beat her for having left Nigeria.

**77.** Other than the two photographs of the man and the boy with scarring, whose provenance are unknown, there were no family group photographs presented which showed persons with facial scars in the company of the appellant or D.F., or indeed in any family setting. No such evidence was adduced.

**78.** I cannot be satisfied that the stated fear of persecution based on facial scarring is in any way grounded in reality. The ongoing relationship between T.F. and D.F. belies any alleged fear of him and his actions towards her. If the Tribunal member had had a true account of the appellant's marital relationship and family background, I am satisfied that it would have made a material difference to his conclusions.

**79.** Having heard the appellant's evidence, it is hard not to conclude that she takes and has taken no responsibility for the blatant untruths put before the asylum authorities since she and her husband arrived in this jurisdiction. Having considered the Tribunal decisions both in respect of the appellant and in respect of her son, K., it seems to me that the appellant's margin of success on appeal to the RAT was slim. The Tribunal member found that it would be unduly harsh for the appellant's elderly parents to be forced to internally relocate within Nigeria. It appears that the primary reason for the finding in favour of the appellant is that the Tribunal member was persuaded to give her the benefit of the doubt.

**80.** The appellant stated in her s.11 interview that she lived with her parents and later said that her mother was deceased. The interpreter sought to explain the appellant's discrepancy in evidence by giving her own evidence to the Court that it would be custom and practice in Nigeria to refer to elderly persons in the plural, rather than in the singular. The reference by the Tribunal member to 'parents' in the plural may have been in error and I am prepared to give the appellant the benefit of the doubt on this point. However, at all times during the asylum process, the appellant gave D.F. as the name of her husband. But a Mr. S.A.F. arrived in this jurisdiction in 2011. He made an unsuccessful asylum application in that name. Despite Ms. F's persistent assertions to the contrary, it seems to me that the appellant and her husband resumed their relationship upon his arrival in Ireland. They clearly do not live together on a full-time basis, as he is currently residing in direct provision. It has also been suggested that, if they were to reside together on a full-time basis, it would have implications for the appellant's social welfare benefits. These matters do not concern this Court. The Court is concerned with the fact that, since Mr. F. arrived in this jurisdiction, he and his wife have had two further children, M. and E. D.F. is

registered as the birth father of K., the first-born child and the subject of a refugee application together with the appellant. S. A. F. is registered as the birth father of M. and E. M.'s birth in Ireland to a person with recognised refugee status was sufficient to see Mr. F.'s *Zambrano*-type application approved, thus obtaining a right of residence in this jurisdiction based on M.'s birth in this jurisdiction. Notwithstanding the swearing of three affidavits for these proceedings, the appellant avers at para. 5 of the affidavit dated 10th April, 2015:-

> "*I wish to clarify to the Court that I am not currently in a relationship with D. and that our relations since he arrived in Ireland have been very difficult, mainly because of the lies he has told the authorities and me.*"

No mention is made of her third child, E., of whom her husband D. (otherwise S. A. F.) is also the father.

**81.** It is common case between the parties that D. otherwise S.A.F., are one and the same person. The question that arises is why the appellant and her husband sought to engage in the deceptions outlined in the evidence recorded earlier in this judgment. When confronted with the contradictions and discrepancies in her evidence, the appellant's invariable response was to blame the officials conducting the interview for mis-interpreting or mis-recording her evidence; the staff member in the citizens' advice centre who assisted in writing the letter of support for Mr. F.'s *Zambrano* application also allegedly misquoted the appellant or wrote matters down incorrectly. Finally, the failure to mention her third child, E., in the affidavits submitted on her behalf was credited to her legal advisers. It is also notable that, when counsel for the appellant opened the case to the Court on the first morning, he referred to the appellant as the mother of two children. I am satisfied that the appellant would have

made no reference to E. in the course of these proceedings, had it not been unearthed by the authorities and put to her on cross-examination.

**82.** The appellant's claim of a fear of persecution presented to ORAC and on appeal to the RAT was based on her stated fear for her eldest son that he would be subjected to ritual scarring at the behest of his father and his father's family. She stated that she was afraid of her husband and would be beaten by him if she were returned to Nigeria.

**83.** Her stated fear of her husband is not borne out by the history of their ongoing relationship, as was unearthed during the course of the proceedings. I am satisfied that, if the true nature of that relationship was known to the Tribunal member, it would have made a material difference to the decision reached.

**84.** I found the appellant to be evasive and unreliable, both in the manner in which she gave her evidence and in the evidence that she gave to the Court. Having been originally persuaded that her knowledge of English was deficient and that she required an interpreter, the appellant then appeared quite capable of intervening through the medium of the English language on occasions where she felt that the interpreter had not given the evidence she wanted put before the Court. At all times, she has been ready to apportion blame to some other person for propagating inconsistencies in her story. It seems to me that she has twisted her story in order to suit the exigencies of the situation as they arose. In short, I found her to be an unreliable witness.

**85.** The appellant's husband also gave evidence and he too seemed to stick to the narrative that had been set out by the appellant. It should be pointed out that Mr. F. was not in Court when the appellant gave evidence. His claim is that he is the person who lied at all stages and that his wife is an innocent party. He professed his

love for her and apologised profusely to the Court. However, the fact remains that he engaged in a myriad of untruths and lies since his arrival in Ireland in 2011. He also failed to mention his third child in the affidavit he swore for the purposes of these proceedings.

**86.** I find the position adopted by the appellant quite mystifying, both with regard to the appellant's story, her evidence, the manner in which it was presented to the Court and the manner in which the legal submissions were addressed.

**87.** For the reasons set out, I am not satisfied that the appellant has discharged the burden of proof placed upon her in this appeal. For those reasons, I would dismiss the appeal and refuse the relief sought.