[Home] [Databases] [World Law] [Multidatabase Search] [Help] [Feedback]

High Court of Ireland Decisions

You are here: BAILII >> Databases >> High Court of Ireland Decisions >> Dos Santos & ors -v- Minister for Justice & Equality & ors [2014] IEHC 559 (19 November 2014)
URL: *http://www.bailii.org/ie/cases/IEHC/2014/H559.html*
Cite as: [2014] IEHC 559

[New search] [Help]

Judgment

Title:	Dos Santos & ors -v- Minister for Justice & Equality & ors
Neutral Citation:	[2014] IEHC 559
Date of Delivery:	19/11/2014
Court:	High Court
Judgment by:	McDermott J.
Status:	Approved

Neutral Citation: [2014] IEHC 559

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 343 J.R.]

IN THE MATTER OF THE REFUGEE ACT 1996 (AS AMENDED), IN THE MATTER OF THE IMMIGRATION ACT 1999 (AS AMENDED), AND IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000

BETWEEN

ODENIS RODRIGUES DOS SANTOS, ANTONIA ALEXANDRE DE MORAIS, ITALO ALEXANDRE DUARTE, CAMILA ALEXANDRE DUARTE (A MINOR SUING BY HER FATHER AND NEXT FRIEND ODENIS RODRIGUES DOS SANTOS), KARINE ALEXANDRE RODRIGUES (A MINOR SUING BY HER FATHER AND NEXT FRIEND ODENIS RODRIGUES DOS SANTOS), GIOVANNA ALEXANDRE RODRIGUES (A MINOR SUING BY HER FATHER AND NEXT FRIEND ODENIS RODRIGUES DOS SANTOS), JOAO ALEXANDRE RODRIGUES (A MINOR SUING BY HIS FATHER AND NEXT FRIEND ODENIS RODRIGUES DOS SANTOS)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered the 19th day of November, 2014

1. The applicants seek orders of *certiorari* quashing the decision of the respondent ("the Minister") making deportation orders against them on 12th March, 2012. The application raises issues concerning the welfare of the child applicants and whether their best interests were considered or adequately considered when making the decision to deport and furthermore, whether their best interests must be considered as a primary consideration in considering the making of a deportation order. Leave to apply for judicial review was granted (MacEochaidh J.) on 30th May, 2013, on the following grounds:-

> (1) In failing to consider the practical consequences of removing the minor applicants from their schooling and present safe environment and the corresponding practical consequences for the minor applicants of relocating to Brazil, the Minister failed to respect and vindicate the personal rights of the applicants pursuant to Article 40.3 of the Constitution and further failed to make a reasoned assessment of the interference with their rights pursuant to Article 8 of the European Convention on Human Rights and/or their Charter rights and/or their rights pursuant to the United Nations Convention on the Rights of the Child.
>
> (2) The Minister acted in breach of the principle of best interests of the child.
>
> (3) The Minister erred in law in finding that the deportation of the applicants "is necessary and proportionate". In particular, the Minister failed to consider the disruption of the education of the children in mid-term, the fact that the younger children lacked the ability to understand written Portuguese, and failed to consider the affect of the lifelong nature of the deportation orders in the light of the particular and individual circumstances of the applicants. The said failures of the Minister resulted in a flawed consideration of the interference with the constitutional and Convention rights of the applicants and, in particular, the affect of the deportation decisions on the private lives of the applicants.

2. The application for leave was made eleven days outside the time prescribed but was duly extended for the purposes of s. 5 of the Illegal Immigrants (Trafficking) Act 2000, by MacEochaidh J., having been satisfied that good and sufficient reasons for doing so had been established. The learned judge also granted an interlocutory injunction restraining the deportation of the entire family pending the determination of these proceedings.

3. The applicants are Brazilian nationals and constitute a family unit of father, mother and five children who reside in Roscommon. Three of the children are minors, and are suing

through their father in these proceedings. Camila reached the age of majority on 2nd September, 2012, but was a minor when the deportation order was made against her. Italo reached his age of majority in August, 2011.

4. The first and second named applicants are married and the parents of the third, fourth, fifth, sixth and seventh applicants. The children were born in Brazil. Italo was born on 18th August, 1993, Camila on 2nd September, 1994, Karine on 16th August, 1998, Giovanna on 1st December, 1999, and Joao on 23rd November, 2001.

5. The first named applicant (the father) arrived in Ireland on 24th September, 2002. He worked here in accordance with the terms of a work visa which expired on 24th September, 2003. Notwithstanding the expiration of the permit, he continued to work in the state and paid all appropriate taxes. He was later joined in Ireland by his wife. Other members of the extended family also lived and worked in Ireland during the period of the applicants stay here.

The Arrival of the Family

6. The mother's passport issued on 28th September, 2009, with an expiry date of 22nd September, 2014. It states that she arrived alone from Brazil in 2003. In her affidavit she explains how upon arrival she claimed to be here on a holiday to visit her brother who met her at the airport, and was here on a work permit. She was allowed to enter the state temporarily for the purpose of that visit.

7. The passports of Italo (the third applicant), Camila (the fourth applicant), and Giovanna (the sixth applicant) were issued on 9th February, 2007, with expiration dates of 8th February, 2012. All three entered the state on 19th/20th February, 2007, accompanied by their uncle and his wife who resided in Ireland. The passport of the youngest child, Joao (the seventh named applicant), was issued on 19th May, 2006, and valid until 18th May, 2011. Karine (the fifth named applicant) was issued with a passport on the same date with the same expiration date and both entered the state on 4th or 5th June, 2007, accompanied by their uncle who, having lived here for a number of years, has now returned to Brazil. The same man met their mother on her arrival in 2003.

8. The first named applicant remained in the state illegally after the expiration of his working visa on 24th September, 2003. The second applicant travelled to Ireland four days afterwards and did not make known her husband's circumstances to the immigration officials. Instead, she maintained that she was here to visit her brother, and was allowed to stay temporarily for that purpose. She remained unlawfully in the state. The children were conveyed into the country in the company of the members of the extended family who must have known the dubious legal status of the parents. The parents demonstrated scant regard for immigration law and procedures in bringing their children to Ireland. They decided that they wished to live in Ireland for the indeterminate future with their children.

9. The first named applicant at a very late stage sought permission to remain in Ireland by letter dated 14th October, 2009. By that time his employment had ceased. He was in receipt of unemployment benefit. Italo, Camila and Giovanna at that stage had been in the country for two years and eight months, and Joao and Karine for approximately two years and three months. The Minister was informed by their solicitors that the family had formed an intention to remain in Ireland because the father had worked here for eight years, and the children and their mother had formed relationships within the community and were well settled.

10. On 19th October, 2009, the applicants' solicitors supplied correspondence from various schools attended by the children which contained limited information. It indicated that Camila was in fulltime education in secondary school since 1st September, 2007, in the second year of a six year cycle. Joao was attending primary school, having been

placed in second class for the school year 2009/2010. Karine and Giovanna were attending primary school. Italo enrolled in secondary school in 2007 and was in fifth year for the academic year 2009/2010.

11. By letter dated 10th June, 2010, the Irish National Immigration Service (INIS) informed the first applicant's solicitor that a s. 3 letter had been issued dated 6th May, 2008, advising that it was proposed to deport him. His solicitors then wrote to the Department of Justice and Law Reform on 21st September, 2010, claiming that the applicant had not received the s. 3 letter, and inquiring whether his position was under review and if submissions were required. The letter stated that he had been in Ireland for nine years and "continued to be self sufficient". The Minister treated this letter as a request to extend the time for submissions on the matter and did so by ten days.

12. The evidence is that on or about 25th June, 2007, the Minister received details concerning the first applicant from the Garda National Immigration Bureau (GNIB). He had been questioned by an immigration officer in Roscommon Garda Station on 8th June, 2007, and was found not to have permission to remain in the state. He was refused permission to remain in the state on the same occasion. This refusal was never challenged. On the same date he furnished an address at which he might be contacted and for the purpose of correspondence. The letter of 6th May was sent to that address informing him that the Minister was considering his deportation. This letter was returned marked "gone away".

13. Submissions were made on 7th October, 2010, on behalf of the first named applicant. Updated letters from each of the schools attended by the children were furnished which stated that each had progressed to the next academic year, but adding nothing further. It was stated that the first applicant required legal certainty concerning his status before attempting to return to Brazil to see his sick and elderly mother, and:-

> "Given that our client has resided here for a period of nine years, has integrated into local society in Roscommon, is self sufficient and has been for nine years, lives with his family here and his children attend both primary and secondary school in Roscommon town, we ask you to accept that our client requires a degree of certainty in relation to his legal status here before he can consider leaving the country to travel home to see his mother in Brazil."

The Minister was also asked to consider that the family were not "reliant on social welfare payments".

14. In a letter dated 29th October, the Minister confirmed to the solicitors that their client had been served with the letter of 6th May, 2008, because his work permit had expired on 24th September, 2003. It stated:-

> "Your client has been "illegal" in the state since that date. In spite of this, your client would appear to have made arrangements to have his five children and maybe a spouse or partner, join him in the state. In the absence of evidence to the contrary, it would have to be assumed that all your client's children, and possibly his spouse/partner, are illegally in the state, and as such, will have to be issued with individual notifications under s. 3 of the Immigration Act 1999 (as amended)."

Full details were requested of the applicant's family and the circumstances in which they came to enter and remain in the state. It was noted that a contention that he was self sufficient was "somewhat at odds with his status since 2003 in that he had no work visa and was not entitled to work in the state".

15. The first applicant's solicitors replied on 2nd December stating that gardaí at Roscommon were aware of their client's presence in the state. His original passport was in

the possession of the immigration office at Roscommon Garda Station for a period of three to four years. It had been taken by the gardaí following a road traffic check at which he was asked to present his passport to the immigration office in Roscommon. It was further stated that after the taking of the passport "he received the s. 3 notification to which we refer". He did not seek legal advice at the time and did not complete the application for leave to remain in the state. It was also stated that the immigration garda met the first applicant on many occasions since the service of the notification and that the gardaí were aware of the entire family's residence in Roscommon.

16. The letter outlined in a very general and inaccurate way how the children arrived in Dublin with the first named applicant's brother in law and that inquiries having been made by the immigration officer "matters were satisfied so that the children were permitted to enter Ireland". It is difficult to see how this could be correct since the children arrived in two groups, two years apart, when their parents were both illegally in the state, none of which was disclosed at the time to the authorities. The letter confirmed that following a period of employment with Kepac, the first applicant worked on construction sites. Tax documents were supplied confirming that he had been employed and paying taxes up to 2009. The family's presence in the state was contrary to s. 5 of the Illegal Immigrants Act 1999, and their presence had not been registered as required under s. 9 of the Immigration Act 2004.

17. The only other reference to the children in this letter states that the two younger children "do not have skills in written Portuguese", though they were able to speak it.

18. Following further requests for details concerning the applicants presence in the state contained in letters dated 8th December, 2010 and 16th February, 2011, copies of the passports of the second to seventh named applicants were furnished to the respondent. By letter dated 11th August, 2011, the Minister indicated that he was proposing to consider the deportation of each of the applicants because they "had remained in the state without the permission of the Minister…" and were persons whose deportation would, in the opinion of the Minister "be conducive to the common good".

19. By further letter dated 13th September, the applicants' solicitors made very limited and general representations to the Minister as to why the family should not be deported. The submission repeated a number of facts including the length of time spent by the first applicant living and working in the state. He hoped to obtain employment, but the proposed employer was not willing to apply for a work permit on his behalf. He was not in a position to confirm that he would be given a job if he had the appropriate authorisation to remain and work. The facts concerning the children's education were repeated. The family was receiving state benefits, but it was hoped that these would not be required in the future as the first applicant was confident he could obtain employment to support himself and the family.

20. On behalf of the children it was submitted that they were growing up in Ireland, had settled well and made friends. They considered Ireland to be their home. They did not cause any difficulties in their local community. They wished to contribute to society and acquire the skills and education necessary to contribute at a higher level. A specific submission was made in respect of Italo, then aged eighteen years, who wished to complete his secondary education and proceed to third level. This would be interrupted if he were to be deported. Though not expressly stated, this amounted to a submission in support of the proposition that it was not in the best interests of the children that they be returned to Brazil. Two further letters dated 29th September and 19th October relating to the father's case also referred to the children, and enclosed up to date letters from their schools indicating the class in which each child had been placed.

21. Deportation orders were made in respect of each of the applicants on 12th March, 2012. Separate examinations of file were conducted under s. 3 of the Immigration Act

1999, one in respect of the father, another in respect of the mother and the children as a group, within which the case of each child was considered separately.

Examination of File: The Parents
22. The history of the parents as outlined earlier in this judgment and canvassed in the submissions made to the Minister by their solicitors was considered in their respective examinations of file. All relevant statutory considerations under s. 3(6) of the Immigration Act 1999, were taken into account. Both parents had been residing illegally in the state since 2003. There was nothing which suggested that they could not be returned to Brazil. Emphasis was placed on upholding the integrity of the state's immigration procedures. Their respective rights under Article 8 of the European Convention on Human Rights to private and family life were considered. It was accepted that deportation would engage those rights. However, it was considered that the state had a legitimate aim to maintain control of its borders and operate a regulated system for the control, processing and monitoring of non-nationals in the state in the interest of the common good. The effect of granting the first applicant leave to remain on the health and welfare systems of the state and the chances of his obtaining legal employment in the current economic climate, which were regarded as poor, were considered. It was accepted that the first applicant had the opportunity to develop links with his community and a private life in the State as a result of the permission which was granted to him to remain in the State from 24th September, 2002, until 24th September, 2003. It was concluded, nevertheless, that his deportation was necessary and proportionate and in accordance with the common good.

23. In respect of the right to family life, it was noted that the cases of the children had been examined and a recommendation had been made to deport them in tandem with the considerations concerning the parents. No separation of the family unit was envisaged by the proposed deportation. Consequently, the deportation of the parents did not constitute an interference with the right to respect for family life under Article 8(1). In respect of the second applicant it was not accepted that her right to private life would be so interfered with as to have consequences of such gravity as potentially to engage the operation of Article 8 and the court notes that no evidence was submitted in respect of her personal development while in the state.

Examination of File: The Children
24. The examination in file in respect of Italo was completed on 13th February, 2012, when he was no longer a minor. The other children were seventeen, thirteen, twelve and ten at the time of the decisions. At that stage Karine and Joao had been present in the state for four and a half years approximately and the other three children had been here for five years.

25. The right to private life was considered in respect of each child. It was accepted that the deportation had the potential to interfere with the right, but not that it would "have consequences of such gravity as potentially to engage the operation of Article 8". This related to their educational and other social ties formed while in the state. Matters relating to personal development were also considered. The information already discussed concerning school attendance by each child was considered.

26. The conclusion was also reached that a decision to deport the children with their parents would not constitute an interference with their right to respect for family life because, given the decision to deport the parents, no separation of the family unit would occur.

27. It is claimed that there was no specific assessment in the examination of file of the practical consequences of removing each child from their present schooling and safe environment and/or the practical consequences of their relocation to Brazil. It is also claimed that the Minister failed to consider the disruption of the children's education "mid-term" and that the younger two had no ability to write Portuguese. It is clear that the

educational level to which each child had progressed was considered. No further information beyond that previously outlined by the court was supplied to the Minister. No submission was made about any potential consequences for the children if deported mid school term. The Minister was aware of the limited capacity of the two younger children to write Portuguese and that they were aged fourteen and twelve at the time of his consideration. No submission was made that Brazil was an unsafe environment, and in respect of each of the applicants a prohibition of refoulement was considered in accordance with s. 5 of the Refugee Act 1996. It was concluded that repatriating the applicants would not be contrary to the section. There was no suggestion that the repatriation of the family would be contrary to s. 4 of the Criminal Justice (United Nations Convention against Torture) Act 2000.

Parental Responsibility Article 41 and the Welfare of Children

28. It is not contemplated by the Minister or the parents that the family as a unit would be separated as a result of the making of the deportation orders. The history of this case is that the married parents in exercise of their parental rights and duties made all decisions in respect of their children concerning where they lived and attended school. The father sought and obtained work lawfully in Ireland in 2002- 2003. His wife arrived days after the expiration of his work visa. They decided as parents to leave their children in Brazil and clearly contemplated and arranged a period of separation from them for a number of years in the early stages of their development. They then arranged for the children to be brought to Ireland at a time when the parents were illegally resident in the country. The children entered and remained in the state illegally. Whatever educational, social and other family ties which the children had established while living in Brazil, were disrupted for this purpose. The mother and children remained here without making themselves known to, registering with or coming to the attention of immigration officials until the road traffic incident in 2007. It was only after the referral of the father's case to the immigration authorities by gardaí in Roscommon that details of the family's presence were sought and supplied on the limited basis already outlined. The parents decided that the family should come to Ireland, which they chose as the family's future permanent home. They did so illegally and in clear and deliberate contravention of Irish immigration law.

29. Article 41 of the Constitution is not relied upon by the applicants in this case. However, it is important that the grounds relied upon be viewed in their proper constitutional context because of the reliance placed upon the provisions of Article 40.3, to which I will later refer. Though all the applicants are non-citizens, they constitute a family vested with rights under Article 41 which recognises the family as the natural, primary and fundamental unit group of society and a moral institution possessing inalienable and imprescriptible rights antecedent and superior to all positive law, which the state guarantees to protect in its constitution and authority. The rights and responsibilities of parents in respect of the custody and nurturing of their children are protected, including decision-making concerning all aspects of their welfare. Article 42(1) acknowledges that the family is the primary and natural educator of the child and "guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children". Each child has the constitutional right to the company, care and support of its parents. These rights are not absolute and unqualified. Even if the children were Irish citizens and thereby had a right to reside in Ireland "it does not flow from the rights of the child that the family or parents and siblings of Irish children have the right to reside in Ireland" (*AO & DL v. Minister for Justice* [2003] 1 I.R. 1 per Denham J. (p. 62)).

30. A family, whether a family of nationals or non-nationals within the state attracts the full protection of Articles 41 and 42. As Murray J. noted in *A.O.*, (at p. 83):-

> "When a family of non-nationals is within the state it has all the attributes which the Constitution recognises as a "moral institution". I do not think

> that there can be any question but that the non-national children of such a family have a constitutional right to the company, care and parentage of their parents within a family unit whilst in the state and that one or both parents could not be removed from that role on grounds any different from those which the Constitution permits as the basis for removing children from the custody of their parents who are citizens.
>
> In the present context it is only when the deportation of a family arises that a distinction is made between families…and that distinction is the fact of citizenship of one or more of the children of the family. It is a distinction based on citizenship and not on family rights…It has never been suggested, and I do not think it could be seriously contended, that the deportation of a non-national family, on otherwise lawful grounds, could be said to put in peril the status of a family as such or undermine its constitution and authority."

Murray J. explained the distinction as follows:-

> "…unlike a family of non-nationals who can be deported simply because they are non-nationals, having no personal right whatsoever to be within the state (where rights arising under the immigration and asylum systems have been excluded), the Minister must take into account in a case such as the present one, the prima facie constitutional rights deriving from the citizenship of the infants in question and consider whether, notwithstanding those rights, there are, in the circumstances of the case, good and sufficient reasons associated with the common good for the deportation of their parents with the inevitable consequences for their child." (p. 84)

31. The reality of the decision making process in this family of non-nationals must be recognised. The supervening authority of the parents must be respected and acknowledged in decisions concerning the welfare of the children. Furthermore, the legal constraints applicable to the exercise of that authority must also be recognised: parents decide where their children will live but must take that decision responsibly and with due regard to the legal restraints applicable to their capacity to decide in which country they choose to live. As Hardiman J. stated in *A.O.*:-

> "I do not consider that a parent in taking a decision in relation to the welfare, education or residence of a child can realistically be described as exercising the child's choice for it. On the contrary, such parent is making his or her own decision for and on behalf of the child. This, however, is a parental decision, made in the ordinary course of the care and custody of a child and not a delegated exercise of some notional authority of the child. The myriad decisions, ranging from crucial to banal, which parents habitually take in relation to children are not usually so analysed as to their legal character and would not be here unless there was some point to be gained. In the case of an infant of about one year, it is wholly unrealistic to regard a decision as to place of residence as being anything but the parents' decision. As such, it is constrained by the parents' capacities: they are not at large in the decisions they can take but constrained by their material circumstances, their own needs and entitlements and the laws which apply to them. I believe that what the parents have done in this case was aptly described by Barrington J. in *Fajujonu v. Minister for Justice* [1990] 2 I.R. 151: they have posited on the child a wish to remain in Ireland. But this wish is wholly notional. The only persons at present capable of wishing or electing anything in relation to residence are the parents: the decision is theirs subject only to their capacity and the laws applying to them…
>
> The parents undoubtedly have wishes and views as to where the family should reside. But they lack the power and capacity themselves to decree that they or their children (other, perhaps, than the Irish born child) will

> reside in this state…
>
> The parents have themselves decided, in the exercise of their own powers, and not as agent or surrogate for the child, where they wish him to live. His place of residence will be decided by his parents and (like every other decision) this decision will be subject to the constraints of what they are practically and legally entitled and able to do. There simply does not exist a notional, inviolable decision of the child to which every other consideration must yield." (pp. 158 - 161)

32. In *G.O. (a minor) v. Minister for Justice* [2010] 2 I.R. 19, Birmingham J. stated:-

> "I cannot accept that it is open to individuals to arrive in the State on what is essentially a false basis, as indicated by the rejection of their claim to asylum status (in that case), and then proceed to so organise their family affairs as to frustrate the operation of the immigration system."

33. In *A.O*. the Supreme Court concluded that it was open to the Minister to deport the non-national parent of an Irish citizen child. In doing so the Minister was obliged to consider whether in the circumstances there were substantial reasons associated with the common good which required the deportation. In making that determination the Minister was not restricted to taking into account only those matters which were personal to the non-national parent and would render their continued residence inimical to the common good, but could also take into account policy considerations which arose from allowing a particular applicant to remain which would inevitably lead to similar decisions in other cases. The Supreme Court approved the statement by Barrington J. (the High Court judge in *Fajujonu*) that:-

> "In the present case the parents never had a right to live or to work in Ireland. The child clearly has a certain right to be in Ireland. She also has a right to the society of her parents. But it does not follow from this that she has a right to the society of her parents in Ireland. I do not think that the parents can by positing on their child a wish to remain in Ireland in their society confer upon themselves a right to remain in Ireland such as could be invoked to override legislation passed by the Irish parliament to achieve its concept of what the common good of Irish citizens generally requires. I think this distinguishes the present case from *The State (M) v. The Attorney General* [1979] I.R. 73. There the paramount issue was what the welfare of the child required. But the present case does not turn merely upon the rights of the child, it also raises the powers of the Oireachtas to control the immigration of aliens into the country." (at pp. 156-159)

34. In this case the applicants are non-nationals. They do not have a constitutional right to reside in the state. The constitutional rights of the family are in no way compromised by its deportation. Its unity will be maintained. The parents have no right to choose that they and the children should remain in the state. Their decision is clearly circumscribed by immigration law which they have flouted in a planned way since 2003. The family rights guaranteed under Articles 41 and 42 of the Constitution, in these circumstances, do not provide any legal grounds upon which to challenge the deportation orders and, indeed, no such claim is made by the applicants. However, notwithstanding the limitations on the rights of the parents to choose Ireland as their country of residence and the fact that family unity will not be disrupted by its deportation, the applicants claim that the deportation decisions are vitiated because they violate the personal rights of the applicants under Article 40.3 of the Constitution. The court is satisfied that this submission must be considered in the context of the rights of the family under Articles 41 and 42, the children's personal rights under Article 40.3 and the presumption that the welfare and best interests of the children in the present case lies in the preservation and protection of family unity and the state's right to regulate the entry to and residence in the state by non-nationals.

Article 40.3

35. It was submitted on behalf of the applicants that under Article 40.3 of the Constitution

each child had a personal right to private life which was said to consist of a right to be part of and participate in the community. It was also submitted that each had a personal right to be reared and educated with due regard to his/her welfare and a right to have it considered in the sense of what is in each child's best interests. It is claimed that a failure by the respondent to consider the practical consequences of removing the children from their "schooling and present safe environment" and the practical consequences of moving the children to Brazil constituted a failure to respect and vindicate the personal rights asserted.

36. A child possesses constitutional rights as a member of a family unit and an individual. There is a constitutional presumption that the welfare of the child, including his/her religious, moral, intellectual, physical and social welfare, is to be found with the family. It is only in exceptional circumstances under Article 42.5 that the place of the parents may be supplanted in decision making where, for example, there is an immediate threat to the health or life of the child, or a degree of parental neglect or abandonment of the child or of the child's rights by the parents (*North Western Health Board v. HW* [2001] 3 I.R. 622). The child's unenumerated rights under Article 40.3 of the Constitution were considered by O'Higgins C.J. in *G. v. An Bord Uchtála* [1980] I.R. 32 (at pp. 55-56):-

> "The child also has natural rights… Having been born, the child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being. These rights of the child (and others which I have not enumerated) must equally be protected and vindicated by the State. In exceptional cases the State, under the provisions of Article 42.5 of the Constitution, is given the duty, as guardian of the common good, to provide for a child born into a family where the parents fail in their duty towards that child for physical or moral reasons."

Children born outside marriage also have a personal right to the care, company and society of their parents (*W.O'R v. E.H. (Guardianship)* [1996] 2 I.R. 248).

37. In *K.I. v. The Minister for Justice, Equality and Law Reform* [2014] IEHC 83, this Court held that when considering the deportation of the non-national parent of an Irish citizen child, whether the family was one based on marriage under Article 41 or a "*de facto*" family in which the parents are not married, but demonstrate all the other attributes of family life, similar consideration should be given to the best interests of the child and the effect of the disruption of its family life caused by the deportation of a parent. The core element of such a consideration lies in the effect of the disruption of family life and the consequences for the child of deportation where the child or the other parent has a right to reside in the state.

38. The applicants relied upon the decision of the Supreme Court in *Oguekwe v. the Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 795, and in particular the judgment of Denham J. (as she then was) concerning the principles applicable to a consideration of the personal rights of an Irish citizen child in deciding whether to deport the child's non-national parent. Denham J., with whom the other members of the court agreed on this point, stated:-

> "The High Court identified personal rights of an Irish citizen child, within Article 40.3.1 of the Constitution, which the Minister was obliged to have regard to as:-
>
> > 1. The right to live in the State.
> >
> > 2. The right to be reared and educated with due regard to his/her welfare including a right to have his/her welfare considered in the sense of what is in his/her best interests in decisions affecting

> him/her.
>
> 3. Where…the parents are married to each other the rights which as an individual, the child derives from being a member of a family within the meaning of Article 41.
>
> I would affirm this non-exhaustive list of rights. However, the rights are not absolute, they have to be weighed and balanced in all the circumstances of the case." (paras. 56-57)

39. The court is not satisfied on the basis of these authorities, that a non-national child illegally in the state has a right under Article 40.3 to a private life consisting of a right to remain in the state and/or participate in community life whether at national or local level. No authority was cited in support of the existence of such a right. It is clear from *Oguekwe* and earlier authorities that Irish citizen children have a right to reside in the state by virtue of that status. Non-national children do not have a constitutional right to be and/or to remain illegally within the state or a right to be reared and educated in the state. It is well settled that the state is entitled to deport non-nationals who are illegally in the state, whether they be adults or children. Though non-nationals are entitled to the protection of the fundamental rights provisions of the Constitution, the state is entitled as a matter of state sovereignty to regulate the entry and stay of non-nationals (*Re Illegal Immigrants Bill 1999* [2000] 2 I.R. 36 and *Pok Sun Shun v. Ireland* [1986] ILRM 593). The decision in *Oguekwe* dealt with the proposed deportation of the non-national parents of Irish citizen children and did not extend any further protection from deportation or a right to reside to non-national children. Non-national children do not have a constitutional right not to be deported.

40. Furthermore, the consideration of the rights of the Irish citizen child in *Oguekwe* must be understood in the context of the obvious and clear distinction to be drawn between those children who are citizens and those who are not. Thus, the right to reside which vests in an Irish citizen child, which Denham J. included as one of those rights arising under Article 40.3, is clearly referable to the child's status as a citizen.

41. It is clear, however, that non-national children are entitled to avail of other fundamental rights under the Constitution including the rights accruing to them as members of a family under Articles 41 and 42, and the right to fair procedures embracing constitutional and natural justice. The decision of the respondent to deport the applicants is one which must be taken in accordance with those principles. It is in that context that the submission that the respondent failed to consider the consequences of the removal of the children to Brazil for their welfare falls to be considered. It is claimed that the failure by the respondent to consider the best interests of each child and, in particular, the disruption to their social and educational ties that would be occasioned by their deportation to Brazil, vitiated the respective deportation decisions. However, the court is satisfied that the consideration by the Minister of the children's welfare or best interests is not an isolated issue. It is an important element of the decision-making process which must be considered as a matter of fair procedures under s. 3 of the Immigration Act 1999, and in accordance with and appropriate to the relevant personal and family rights of the children under the Constitution and Article 8 of the European Convention on Human Rights. This includes the presumption that the best interests of the child lie in maintaining the unity of the family.

Section 3 of the Immigration Act 1999 and the Best Interests of the Child

42. The Minister is obliged to consider a number of matters insofar as they are known to him under s. 3(6) of the Immigration Act 1999. The age of each applicant must be considered under s. 3(6)(a). The duration of residence of each applicant within the state (s. 3(6)(b)), his/her family's domestic circumstances (s. 3(6)(c)), the nature of the applicant's connection with the state (s. 3(6)(d)), employment record and prospects (s.

3(6)(e) and (f)), the character and conduct of the applicant (s. 3(6)(g)), humanitarian considerations (s. 3(6)(h)), any representations made by or on behalf of the applicant (s. 3(6)(i)), the common good (s. 3(6)(j)), and considerations of national and security policy (s. 3(6)(k)) must also be taken into account. The purpose of the section is to ensure that all relevant details concerning the applicants' lives are considered when making the deportation decision.

43. The applicants submit that s. 3(6)(a) requires something more to be considered than the age of each applicant and that the Minister must consider how the interests of each child are affected by the making of a deportation order. The court is satisfied that the general purpose and intention of s. 3(6) is to ensure that the overall effect of deportation upon a minor is taken into account fairly. The decision to deport requires a consideration of personal and other factors which may make it unduly harsh and inhumane to deport the applicant even though he/she is illegally within the state (see *P.B. & L v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 164 *per* Hardiman J.).

44. The representations made on behalf of the applicants must be considered under s. 3(6)(j). The Minister is dependent upon the applicant to submit all relevant personal facts which the applicant wishes the Minister to consider. In *Oguekwe*, Denham J. stated in this regard that:-

> "Save for exceptional cases, the Minister is not required to inquire into matters other than those which have been sent to him by or on behalf of applicants and which are on the file of the Department. The Minister is not required to inquire outside the documents furnished by and on behalf of the applicant, except in exceptional circumstances." (para. 85)

45. The nature and extent of the Minister's obligation to examine and assess the representations made is commensurate with the nature and gravity of the risks asserted by the applicant, and it is for the Minister to determine the weight to be given to those representations. This matter was considered by Clark J. in *Bot (O.S.B.) v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Clark J., 20th May, 2010) in which she stated:-

> "37. It is undoubtedly true that the Minister must "have regard" to the factors outlined in s. 3(6) including whatever representations are made but the Court rejects the contention that the Minister must enter into any discussions or correspondence or engage with the applicants on their representations. The Minister must read and evaluate the representations, which are at no higher a level than the other matters to which the Minister must "have regard" under s. 3(6), such as their age, the duration of their residence in Ireland, their family and domestic circumstances, the nature of their connection with the Irish State, their employment record and prospects and the common good. His obligation to have regard to representations made must be set against the fact that he has the legal right in accordance with the conduct of an ordered immigration policy to order the deportation of the applicants. It is therefore for the Minister to assess the weight of those representations. It seems axiomatic that unless the representations are of real substance and raise the probability that such deportation would be unnecessarily harsh or disproportionate, no in-depth or extensive analysis of those representations will be necessary and the rationale underpinning his decision that no humanitarian considerations of relevance arise will be self-evident."

46. It is clear from the examinations of file in respect of the applicants and the submissions made on their behalf in the course of the deportation process, that the matters advanced in respect of each applicant were considered by the Minister under section 3(6). The basic facts concerning the age, family circumstances and educational progress of each child were submitted and nothing more. No evidence of their participation in social events, sport, organisations, church, or hobbies was submitted. It was clear that the deportation of the children would result in their moving to Brazil and

thereby moving schools. There is nothing exceptional about requiring a child to change schools or leaving friends behind and making new friends, whether they move within the state or from Ireland to Brazil, a fact apparently accepted by the parents when they moved their children to Ireland in the first place. The court is satisfied that these factors were considered as matters pertaining to the welfare of the children under the various headings of s. 3(6). The weight to be attached to such representations was a matter for the Minister. However, the applicants submit that the consideration afforded to these matters did not involve the consideration of the best interests of each child which is required under Article 40.3 of the Constitution and Article 8 of the European Convention on Human Rights.

47. The court is satisfied that, as a matter of fair procedures, the provisions of s. 3 require that the welfare of each child must be considered by the Minister when making a deportation decision. The factors set out in s. 3(6) clearly involved a consideration of matters relevant to the child's best interests. The constitutional presumption is that the best interests of the children of a marriage are served by continuing to live within the family unit. This lies at the core of the constitutional protection of Articles 41 and 42, the personal rights of the child under Article 40.3 and the right to respect for family life under Article 8 of the European Convention on Human Rights. However, the applicants submit that there is a further legal obligation on the respondent to consider the best interests of each child at a different level as "a primary consideration in considering a deportation order".

United Nations Convention on the Rights of the Child

48. The applicants submit that the best interests of the children must be considered not simply as one of a number of considerations but as "a primary consideration". It is said that since Ireland is a signatory to the United Nations Convention on the Rights of the Child, 1989, s. 3 of the Immigration Act 1999, should be interpreted in accordance with the provisions of the Convention and, in particular, Articles 3(1) and 6(2). Article 3(1) provides:-

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Article 6(2) provides:-

> "States Parties shall ensure to the maximum extent possible the survival and development of the child."

49. The court notes that Article 3.1 of the Convention provides that the best interests of the child should be regarded as "a" primary consideration and not "the" primary consideration in making child related decisions suggesting that it is not the first but one amongst a number of matters that should be to the forefront of the decision maker's mind.

50. The applicants rely upon *A.N. & Ors v. The Minister for Justice, Equality and Law Reform* [2003] JIC 3103 (2002/656JR) in which Finlay Geoghegan J. considered the extent to which the provisions of the Refugee Act 1996, as applied to a child applicant for refugee status should be interpreted in accordance with the United Nations Convention on the Rights of the Child. In granting leave to apply for judicial review, the learned judge stated:-

> "The provisions of the Act of 1996 must be construed, and its operation applied by the authorities in accordance with the Convention on the Rights of the Child which has been ratified by Ireland. Article 12 of that Convention entitles children, capable of forming their own views to "the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the

> child". It also provides that…the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

The court must have regard to the fact that this ruling was given at an early stage of proceedings granting leave to apply for judicial review and that the applicant had to establish only a "substantial" ground in order to obtain leave.

51. The applicants also rely upon the decision in *O'Domhnaill v. Merrick* [1984] I.R. 151, in which the Supreme Court by a majority of two to one dismissed the plaintiff's claim on the grounds of inordinate and inexcusable delay even though it had been initiated within the time limit provided by statute. Article 6 of the European Convention on Human Rights provides that everyone is entitled to a fair hearing within a reasonable time in the determination of his/her civil rights. In the course of his judgment, Henchy J. while not expressing a concluded opinion on the matter stated that:-

> "Apart from implied constitutional principles of basic fairness of procedures which may be invoked to justify determination of a claim which places an inexcusable and unfair burden on the person sued, one must assume that the statute (of limitations) was enacted (there being no indication in it of a contrary intention) subject to the postulate that it would be construed and applied in consonance with the State's obligation under international law, including any relevant treaty obligation."

The learned judge noted that though the Convention was not part of the domestic law of the state:-

> "Still, because the statute of limitations, 1957, was passed after this State ratified the Convention in 1953, it is to be argued that the statute, since it does not show any contrary intention, should be deemed to be in conformity with the Convention and should be construed and applied accordingly."

52. McCarthy J. in a dissenting judgment accepted as a general principle:-

> "That a statute must be construed so far as possible, so as not to be inconsistent with established rules of international law and that one should avoid a construction which will lead to a conflict between domestic and international law. As I have said, the matter was not argued during the course of the hearing of this appeal but since, as Mr. Justice Henchy points out, the Convention is not part of the domestic law of the state (In *Re Ó Laighleis*), I cannot subscribe to the view that the statute of limitations (passed in 1957 four years after the ratification of the Convention, and permitting the commencement of proceedings as I have indicated) is to be limited by the terms of Article 6(1) of the Convention."

The learned judge relied upon the well established authority of In *Re Ó Laighleis* [1960] I.R. 93, and in particular the passage from the judgment of Maguire C.J. at p. 125:-

> "No argument can prevail against the express command of s. 6 of Article 29 of the Constitution before judges whose declared duty it is to uphold the Constitution and the laws. The court accordingly cannot accept the idea that the primacy of domestic legislation is displaced by the State becoming a party to the Convention for the protection of human rights and fundamental freedoms."

McCarthy J. added:-

> "This is not to say that, in appropriate cases, a statute should not be construed, if possible, so as to conform to international law, and the nature of that international law is established." (p.166)

It should, of course, be emphasised that, as noted in both judgments, no argument was addressed to the court in *O'Domhnaill v. Merrick* on the effect, if any, of Article 6(1) of the Convention in domestic law.

53. The United Nations Convention on the Rights of the Child does not form part of domestic law. Article 29.6 of the Constitution provides that:-

> "No international agreement shall be part of the domestic law of the state save as may be determined by the Oireachtas."

54. In *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 I.R. 97, the Supreme Court rejected the submission that the ratification by Ireland of the United Nations Covenant on Civil and Political Rights created a "legitimate expectation" that the state would respect the terms of the Covenant and give effect to the view of the United Nations Human Rights Committee under the Covenant. Fennelly J. stated:-

> "…The Constitution establishes an unmistakeable distinction between domestic and international law. The government has the exclusive prerogative of entering into agreement with other states. It may accept obligations under such agreements which are binding in international law. The Oireachtas on the other hand, has the exclusive function of making laws for the state. These two exclusive competences are not incompatible. Where the government wishes the terms of international agreement to have effect in domestic law, it may ask the Oireachtas to pass the necessary legislation. If this does not happen, Article 29.6 applies. I am prepared to assume that the state may, by entering into an international agreement, create a legitimate expectation that its agency will respect its terms. However, it could not accept such an obligation so as to effect either the provision of a statute or the judgment of a court without coming into conflict with the Constitution."

55. The court is, therefore, satisfied that Article 3(1) does not have direct effect in Irish law. It does not confer any directly enforceable rights on non-national children (see also *N.S. v. Anderson* [2008] 3 I.R. 417).

56. This position may be contrasted with that which applies in the United Kingdom which incorporated Article 3(1) as part of domestic law under s. 11 of the Children Act 2004, and applied it to immigration decisions under s. 55 of the Border, Citizenship and Immigration Act 1999, as interpreted and applied by the United Kingdom Supreme Court. (See *The Minister for Justice and Equality v. Bednarczyk* [2011] IEHC 136 and *Minister for Justice, Equality and Law Reform v. D.L.* [2012] 1 I.L.R.M. 270).

57. Furthermore, the Supreme Court in *Kavanagh* considered the decision of the High Court of Australia in *Minister of State for Immigration and Ethnic Affairs v. Teoh* (1994-1995) 183 C.L.R. 273, which considered the effect of Article 3(1) in Australian domestic law. The Convention had been ratified by Australia but had not been incorporated into domestic law. The court held that the applicants had a legitimate expectation that in making administrative decisions, the authorities must take into account as a primary consideration the best interests of the child. The court was, however, careful to draw a distinction between "enforceable obligations" which were not created because the Convention was not part of domestic law and a "legitimate expectation" created by the state's ratification of the Convention. It held that if it were not intended to take account of the child's best interests as a primary consideration, the persons affected must be given an opportunity to argue against such a course of action. In this case there was no such intention and every opportunity was given to the applicants to advance any matter relevant to the children's welfare and best interests.

58. In *Kavanagh*, Fennelly J., noted that though Australia operated the dualist approach to the domestic effect of international agreements, it was clear that the Australian application of the rule was not replicated "with anything like the constitutional rigour with which it is embodied in Article 29.6 of the Constitution" (pp. 124-125). The learned judge added that the legitimate expectation in that context did not guarantee anything more than procedural fairness and did not compel the decision-maker to act in a particular way.

He did not accept that the state's obligations under the Convention affected the provisions of a statute unless provision was made by the Oireachtas to that effect under Article 29.6.

59. The court is not satisfied that s. 3(6)(a) which obliges the Minister to consider the age of each applicant in making a deportation order must be interpreted in accordance with Article 3(1) of the United Nations Convention on the Rights of the Child. The Oireachtas has not given effect to the Convention in domestic law by passing the necessary legislation and consequently has not conferred any directly enforceable rights on non-national children. The court does not accept that the applicants had any legitimate expectation that the best interests of each child would be given primacy over any other right or interest by reason only of Article 3(1) of the Convention. However, the court is satisfied that within the provisions of s. 3(6), and the matters which the respondent was required to consider, all relevant factors pertaining to the best interests of the children were considered before the orders were made.

60. Edwards J. in *Bednarczyk* summarised the position as follows:-

> "Currently, Irish domestic law does not universally provide that in court actions concerning or affecting children, whether directly or indirectly, the best interests of the child shall be a primary consideration. At most, it can be said that Article 3.1 of the UNCRC equates broadly with the so-called "welfare principle" which appears in a number of domestic statutes relating to children. However, it does not appear in all potentially relevant legislation. It certainly does not appear in the European Arrest Warrant Act, 2003 (or in the underlying Framework Decision). Neither does it appear in express form in the Constitution."

However, in the later case of *The Minister for Justice and Equality v. R.P.G.* [2013] IEHC 54, Edwards J. noted that there was nothing to prevent an Irish court approaching the application of Article 8 on the basis that it was required to regard the best interests of an affected child as "a primary consideration", not because of any requirement mandated by international law but as a sensible basis upon which to approach the issue of the best interests of the child. He held that this would not offend any principle of Irish domestic law or have the effect of granting rights or imposing obligations additional to those existing under domestic law. The consequences of the adoption of such a guiding principle and its meaning and effect will be considered later, but for the moment I am satisfied that the adoption and application of such a principle should not endow it with the force and effect which is impermissible under Article 29.6. The court is satisfied in that context that insofar as the best interests of the children were considered, they were, in fact, "a primary consideration" insofar as they were to the forefront of the decision maker's mind in accordance with the principles of fair procedures under Article 40.3 and section 3(6).

Article 8

61. In *Abdulaziz v. United Kingdom* [1985] 7 EHRR 471, the European Court of Human Rights restated the principle that the contracting States to the Convention were not obliged to respect the choice of country of residence of a married couple or a "*de facto*" family unit to which the provisions of Article 8 applied. The court has repeatedly emphasised in cases concerning the right to respect for private and family life, the right of each State to regulate the entry and residence of non-nationals. The Convention does not recognise the right of a non-national or a non-national's family who have entered and remained unlawfully in the territory of the Contracting State not to be deported. Consequently, it is not a breach of the right to respect for private or family life to deport a non-national when enforcing Immigration law. A factual basis must be established for any alleged interference with Article 8 rights before the provision can be invoked successfully in relation to a deportation decision. The court has, in many cases, relating to this issue, focused on the facts of the particular case and in particular, seeks to determine whether the individuals asserting breaches of Article 8 rights are in fact asserting a choice of residence in a contracting State or an interference with Article 8 rights. (See *Agbonlahor*

v. Minister for Justice [2007] 4 I.R. 309 at p. 316). Many of the decisions of the court in which Article 8 rights have been considered concern minors or young adults who arrived in the country lawfully and/or acquired lawful residence. In other cases, an applicant's spouse or children were entitled to reside lawfully in the State.

62. In this case, it was accepted, in the examinations of file, that the deportation of the applicants would engage their respective rights to private and family life under Article 8. The question set out in *R(Razgar) v. Home Secretary* [2004] A.C. 368, which arise when considering Article 8 rights were posed, namely:

> "(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference 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?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

63. It was concluded that no issue concerning family rights arose as there was no prospect of any interference with the unity of the family by the State which it was proposed to deport as a unit.

64. It was, however, accepted that the deportation of mother and children had the potential to constitute an interference with their right to respect for private life insofar as their educational and other social ties formed in the State, as well as matters relating to their personal development since their arrival in the State might be adversely affected by the decision. No information had been submitted regarding the mother's personal development since arriving in the State. The educational history of each of the five children supplied by their parents and solicitor was reviewed. This included the submission that the children had settled well and made friends in Ireland and considered it to be their home. No evidence of any specific adverse consequences was advanced concerning the potential effect of deportation on any one of the children. There was no evidence of any exceptional, unusual, or individual difficulties that might arise because of their removal from Ireland or because of the circumstances of the life they faced in Brazil. It was not accepted that the potential interference with these rights would have consequences of such gravity as potentially to engage the operation of Article 8, and as a result, it was determined that the decision to deport the mother and children would not constitute a breach of the right to respect for private life. In essence, it was determined that the applicants had failed to establish that the consequences of deportation for the children reached the level of seriousness sufficient to amount to a breach of Article 8 (see *Razgar* above per Lord Bingham at paras. 17 and 18 and *Costello - Rob v. United Kingdom* [1994] 19 EHRR 112).

65. The applicants submit that this conclusion was unreasonable and irrational, having regard to the necessary consequence of removing the children from their school and social environment and returning them to Brazil. It was submitted that this had inevitably implications for the development of the children of such a nature and extent as to amount to an interference with their right to respect for private life under Article 8. As already

noted, the limited evidence submitted by the applicants was considered in the examination of file and the matters relied upon as amounting to the alleged breach are no more than necessary incidents of moving from one country to another, a move to which their parents had already exposed the children when moving them from Brazil to Ireland. The interruption of educational and social ties and the benefits achieved by the children in the time spent illegally in the country did not, of themselves, on the evidence advanced reach the required threshold of seriousness necessary to establish an interference with respect for the right to private life. The parents knew of the precarious legal status of the family when residing in the country. The decision in this case recognises that the parents unlawfully chose Ireland as their preferred place of residence and brought their children into the country in planned phases. Though the concept of private life extends beyond the traditional category of personal privacy and the potential consequences for educational, social and personal development of the children are relevant factors in considering the nature and extent of any potential interference with the right to private life, it is clear that the limited evidence advanced was considered in determining that the consequences for these aspects of their lives were not of such gravity as to constitute a breach of the right.

66. The court does not accept the further submission that the Immigration Authorities acquiesced in the presence of the family in the State following the road traffic incident in Roscommon. It is clear that the first named applicant took every step possible to avoid attracting the attention of the Immigration Authorities to the illegal presence of his wife and children in the State. It was only in 2009, when making a s. 3 application for leave to remain, that the presence of the other applicants was brought to the attention of the relevant officials. Even at that stage, the information forthcoming was neither clear nor accurate. The court does not accept, on the evidence, that the applicants have established any basis upon which the behaviour of the Minister or the Immigration Authorities created a legitimate expectation on the part of the applicants that they could remain in the State unlawfully under the benign indifference of the Immigration Authorities and that this should be taken into account as part of the circumstances relevant to the alleged interference with the right to private life. The details requested by the authorities were not furnished until February, 2011.

67. The court is satisfied that the conclusion reached that the alleged interference with the right to private life under Article 8 did not have consequences of such gravity to potentially engage its operation and that, consequently, the decision to deport the applicants did not constitute a breach of the right to respect for private life under Article 8, was, on the facts and circumstances considered in the examinations of file, reasonable.

68. In a statement similar to that of Birmingham J. in *G.O.* quoted above, the European Court of Human Rights in *Omoregie v. Norway* (Application No. 267/07, 31st July 2008), stated that a family could not simply assert Article 8 rights as a basis on which to claim a right to reside by an illegal applicant whose presence in the country was simply presented as a *fait accompli* to the authorities. The conclusion reached in the examination of file in respect of the *Razgar* question no. 2 is entirely consistent with this principle.

69. It is clear that the proposed deportation is in accordance with domestic law which requires the Minister to consider various matters under s. 3 and permits the deportation of adults or children in the interests of the common good and the legitimate aim of controlling the Borders of the State and regulating the entry and residence of non-nationals who arrive or remain illegally.

70. In *Boultif v. Switzerland* [2001] 33 EHRR 1179, the court was satisfied that the refusal to renew the applicant's residence permit in Switzerland interfered with his right to respect for his family life within the meaning of Article 8(1). It went on to consider the relevant factors to be taken into account in considering the questions which then became relevant in considering whether the deportation was "in accordance with the law", motivated by one or more of the legitimate aims set out in Article 8(2) and "necessary in

a democratic society". The court examined whether the refusal to renew the permit struck a fair balance between the relevant interests namely, the applicant's right to respect for his family life, on the one hand, and the prevention of disorder or crime, on the other (the applicant having been convicted of a number of offences). It stated:

> "48. … In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he is going to be expelled; the time which has elapsed since the commission of the offence and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage and, if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion."

71. In *Uner v. Netherlands* [2007] 45 EHRR 14, the European Court added two further criteria which were held to be implicit in those quoted above, namely:-

> "(i) the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
>
> (ii) the solidity of social, cultural and family ties with the host country and with the country of destination."

72. The European Court has also accepted that the "mutual enjoyment by parents and children of each other's company constitutes a fundamental element of family life" (*B.V. v. United Kingdom* [1998] 10 EHRR 87) the importance of which is central to a number of its decisions in immigration cases and must, in this case, be regarded as a factor most relevant to any issue of proportionality had it arisen.

73. The submission is made that the best interests of the child referred to in the Uner case is one of the matters to be considered in the determination of the proportionality issue under Article 8(2) but was not considered in respect of any aspect of the determination. While the phrase was not used in the examination of file, the court is satisfied that every aspect of each child's welfare which the Minister was asked to consider and had been submitted on their behalf was clearly identified and addressed. It is unrealistic when one considers the entirety of the material submitted, to conclude that the welfare of the children or their best interests were not considered. Though the phrase "best interests" was not adopted in the examination of file, it was clearly implicit that the parents believed the best interests of their children lay in their continued residence in Ireland. As previously noted, the Minister considered the welfare and best interests of the children within the provisions of s. 3(6) of the Act in accordance with the right to fairness of procedure under Article 40.3 of the Constitution.

74. The consideration by the European Court of Human Rights of the best interests of the child in decisions concerning proportionality does not bear the relevance for which the applicants contend because of the finding made in respect of *Razgar*. However, even if the view had been taken in the examination of file that the deportation of the children had such consequences as to constitute an interference with the right to private life, the court is not satisfied that a reasonable consideration of the balancing of the respective rights of the children and the state or the proportionality of the decision to deport could or would have availed the applicants.

75. In *Maslov v. Austria* (Grand Chamber Application No. 1638/03), the applicant lawfully entered Austria in 1990, at age six, with his parents and two siblings. His parents were lawfully employed and became Austrian citizens. He was educated in Austria and spoke German. In 1998, at the age of 14, he was convicted of a number of serious offences, but in 1999, was granted an unlimited settlement permit. He was later convicted of a number of additional offences and received a sentence of imprisonment. In 2000, he committed further offences and received a further custodial sentence. In 2001, the Austrian authorities imposed a ten-year exclusion order on him to Bulgaria, his country of origin. The European Court of Human Rights noted that all parties accepted that the expulsion would have an effect on the applicant's private and family life. It stated at para. 63:

> "Furthermore, the court observes that not all settled migrants, no matter how long they have been residing in the country from which they are to be expelled, necessarily enjoy 'family life' there within the meaning of Article 8. However, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world, and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of 'private life' within the meaning of Article 8. Regardless of the existence or otherwise of a 'family life', the expulsion of a settled migrant, therefore, constitutes an interference with his or her right to respect for private life. It will depend on the circumstances of the particular case whether it is appropriate for the court to focus on the 'family life' rather than the 'private life' aspect (see *Uner*)."

It is important to note that the *Maslov* case concerned a lawfully settled migrant which explains the acceptance by the court that the expulsion of the applicant constituted an interference with his right to private and family life.

76. In reaching its decision that the proposed expulsion was a breach of Article 8 because it was a disproportionate measure under Article 8(2), the court referred to Article 3(1) of the United Nations Convention on the Rights of the Child and that the best interests of the child were a "primary consideration" in such determinations. However, it did not elaborate on the meaning of that phrase and appeared to be content to follow the Uner approach in regarding the child's best interests as one of the factors to be considered when determining the issue of proportionality.

77. In *Nunez v. Norway* (Application No. 55597/09), and *Neulinger and Shuruk v. Switzerland* (Application No. 41615/07), the European Court of Human Rights, in different circumstances, referred to the provisions of Article 3(1) of the Convention on the Rights of the Child. Apart from the requirement that the best interests of a child were to be regarded as a "primary consideration", the court did not state that the existence of Article 3(1) affected the nature and extent to which the best interests of the child were to be applied to a consideration of the issues in either case nor had it done so in *Maslov*. Accordingly, if it were necessary to address the issue of proportionality in the course of the examinations of file, it is not clear how Article 3(1), as applied in immigration cases or the facts of this case, would have made any material difference to the application of the *Uner* test.

78. The relationship between Article 3(1) and Article 8 was considered in detail by Edwards J. in *Minister for Justice and Equality v. T.E.* [2013] IEHC 323, concerning the approach which the court ought to adopt to an objection to surrender based on Article 8 rights in respect of a European Arrest Warrant. He stated:-

> "20. Where the Article 8 rights of a child or children are engaged by a proposed extradition measure, the best interests of the child or children concerned must be a primary consideration. They may be outweighed by

> countervailing factors, but they are of primary importance."

Subsequently, in the *Minister for Justice and Equality v. R.P.T.* [2013] IEHC 54, this principle was qualified by Edwards J. in the following way:-

> "However, this case provides an opportunity which the Court welcomes to provide more clarity, and to emphasise, for the avoidance of doubt, that although point number 20 is couched in mandatory language it is in fact no more than an indication of this Court's belief that, in any case in which the article 8 rights of a child are engaged, the best interests of a child will fall for consideration and that it is important that due regard be had to them in the balancing exercise that must be conducted. It was not intended to indicate that any specific weight should be attributed to them. On the contrary how the best interests of the child should be rated in terms of weight will only be determinable when the required case specific assessment is performed. It was also not intended to proscribe procedurally how the court should approach its task…" (At p. 40)

The learned judge approved the approach adopted by Lord Mance in *R.(H.H.) v. Genoa* [2012] 1 A.C. 338 where he stated at para. 98:-

> "(A primary consideration)…means, in my view, that such interests must always be at the forefront of any decision makers mind, rather than that the need to be mentioned first in any formal chain of reasoning or that they rank higher than other considerations."

79. It is clear from the facts and the European Courts jurisprudence that a distinction is drawn between the consideration given to the expulsion of long settled non-nationals and foreigners who had no right to be or remain in the contracting states. The applicants had a history of deliberate breaches of immigration law. No evidence of any or any insurmountable obstacles to the return of the family to Brazil was adduced or that they could not enjoy educational, social and personal development in their home country. The elements of private life relied upon were created during a period of unlawful residence in Ireland. The parents were aware that the continuance of private and family life within the host country would be precarious from the time they decided to bring the children into the country. In *Nunez* it was recognised that the removal of a non-national family member would be incompatible with Article 8 only in exceptional circumstances. (See also *Antwi v. Norway* [2012] ECHR 259).

80. The court is satisfied, in any event, that the conclusion reached in respect of Question 2 on the *Razgar* test is implicitly based on a finding that the deportations proposed would not give rise to any more serious consequences than those that normally flow from the movement of a family from one jurisdiction to another and, therefore, did not give rise to a breach or potential breach of the right to private life which determines the matter.

81. In the father's examination of file, a different approach was adopted and required in respect of Article 8 because he had the capacity to develop a private life during his period of lawful residence in the State. The other *Razgar* questions were therefore posed and answered. The competing rights of the State to control immigration and uphold the immigration law of the State in the interest of the common good were balanced against the father's right to private life. Deportation was found not to be a disproportionate measure. Consequently, there was no breach of the father's Article 8 right to private life. It is clear that this conclusion was entirely reasonable and reached in accordance with the principles developed in the jurisprudence of the European Court of Human Rights.

Oguekwe

82. In the *Oguekwe* case cited above, the Supreme Court laid down a number of guiding principles in the consideration of the deportation of the parent of an Irish citizen child, in particular, in relation to the facts relevant to the child. Denham J. stated:

> ". . . the consideration of the Minister should be fact specific to the individual child, his or her age, current educational progress, development

and opportunities. This consideration relates not only to educational issues but also involves the consideration of the attachment of the child to the community, and other matters referred to in s. 3 of the Act of 1999.

68 The extent of the consideration will depend on the facts of the case, including the age of the child, the length of time he or she has been in the State, and the part, if any, he or she has taken in the community. Thus, his or her education, and development within the State, within the context of his or her family circumstances, may be relevant. If the child has been in the State for many years, and in the school system for several years, and taken part in the community, then these and related facts may be very pertinent. However, if the child is an infant then such considerations will not arise.

69 However, I respectfully disagree with the High Court Judge, and I believe the High Court erred, in holding that the Minister was required to inquire into and take into account the educational facilities and other conditions available to the Irish born child of a proposed deportee in the country of return, in the event that the child should accompany the deportee. I am satisfied that while the Minister should consider in a general fashion the situation in the country where the child's parent may be deported, it is not necessary to do a specific analysis of the educational and development opportunities that would be available to the child in the country of return. The Minister is not required to inquire in detail into the educational facilities of the country of the deportee. This general approach does not exclude a more detailed analysis in an exceptional case. The decision of the Minister is required to be proportionate and reasonable on the application as a whole, and not on the specific factor of comparative educational systems."

Denham J. also stated (at para. 72):

"In the exercise of his discretion the Minister is required to consider the constitutional and the Convention rights of the parents and children and to refer specifically to factors he has considered relating to the position of any citizen children. The circumstances and factors will vary from case to case. The formal approach with specific questions as required by the High Court is not necessary. Each case will depend on its own relevant facts."

83. The court has already pointed out that *Oguekwe* is relevant to the deportation of the non-national parent of an Irish citizen child, but a number of the matters referred to at para. 85 of the judgment are also relevant to the consideration of the deportation of a non-national child. Amongst the factors which may usefully be regarded as of a more general application and relevant to this case are:-

(i) The Minister should consider the circumstances of each case by due enquiry in a fair and proper manner as to the facts and factors affecting the family.

(ii) Save for exceptional circumstances, the Minister is not required to enquire in to matters other than those which have been sent to him by or on behalf of applicants and which are on the file of the Department. The Minister is not required to enquire outside the documents furnished by or on behalf of the applicant except in exceptional circumstances.

(iii) The personal rights of the non-nationals under the Constitution and the European Convention on Human Rights should be taken into account.

(iv) The facts expressly referred to in s. 3(6) of the 1999 Act should be

considered.

(v) The Minister should consider the potential interference with the rights of the applicants. This will include a consideration of the nature and history of the family unit.

(vi) The Minister should consider the Convention rights of the applicant which may overlap to some extent and therefore may fall to be considered together with any constitutional rights which the non-nationals may have, all of which must be considered in the context of the factual matrix of the case.

(vii) The Minister is not obliged to respect the choice of residence of a non-national married couple or their other children.

(viii) The State's rights must be considered, and in particular, the right to control entry and residence and to expel non-nationals illegally in the State.

84. The court is satisfied that all of the above principles have been applied in this case with due and proper regard for and emphasis upon factors relevant to the welfare and best interests of the children and the fairness of procedures to which they are entitled under Article 40.3 of the Constitution and the provisions of s. 3 of the Immigration Act 1999. The court is also satisfied that the rights to private and family life were properly and adequately considered in the examinations of file and the making of the deportation orders.

85. For the reasons set out above, the applicants have failed to establish that the deportation orders are fundamentally flawed. The application is refused.

BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII
URL: *http://www.bailii.org/ie/cases/IEHC/2014/H559.html*