Irish Court of Appeal

Judgment

Title:	I. Gorry & Anor -v- Minister for Justice and Equality
Neutral Citation:	[2017] IECA 282
Court of Appeal Record Number:	2014 1161
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Court:	Court of Appeal
Composition of Court:	Finlay Geoghegan J., Irvine J., Hogan J.
Judgment by:	Finlay Geoghegan J.
Status:	Approved
Result:	Dismiss

Judgments by	Link to Judgment	Concurring
Finlay Geoghegan J.	Link	Irvine J., Hogan J.
Hogan J.	Link	Finlay Geoghegan J., Irvine J.

THE COURT OF APPEAL
Neutral Citation Number: [2017] IECA 282

Appeal Number 2014 1161

Finlay Geoghegan J.
Irvine J.
Hogan J.

BETWEEN

I. GORRY AND JOSEPH GORRY

APPLICANTS/

RESPONDENTS

- AND -

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT/

APPELLANT

JUDGMENT delivered on the 27th day of October 2017 by Ms. Justice Finlay Geoghegan

1. This appeal is brought by the Minister against the order made by the High Court (Mac Eochaidh J.) on 6th February 2014 for the reasons set out in a written judgment delivered on 30th January 2014: see *Gorry & Anor. v. Minister for Justice and Equality* [2014] IEHC 29. The appeal was heard at the same time as two further appeals where similar issues arose.

2. The second appeal heard on the same day was an appeal against an order made by the High Court (Eagar J.) on 17th December 2015 for the reasons set out in the written judgment delivered on 19th November 2015: see *Ford & Anor. v. Minister for Justice and Equality* [2015] IEHC 720.

3. The third appeal was an appeal by the applicants *A.B.M.* and B.A. against the decision of the High Court (Humphreys J.) made on 16th December, 2016 for the reasons set out in a written judgment delivered on 29th July, 2016: see *A.B.M. & Anor. v. Minister for Justice and Equality* [2016] IEHC 489.

4. In each of these three proceedings, one of the applicants is an Irish citizen and is married to the other applicant who is a foreign national. The marriages in question either took place in Ireland or Nigeria, and all three were recognised by the Minister as lawful marriages. Each application for judicial review sought an order of *certiorari* of an immigration decision by the Minister which in substance precluded or refused permission for the non-national spouse of the Irish citizen to remain in the State or to enter the State. In each of the proceedings, the second applicant is a national of Nigeria and not a citizen or national of any EU or EEA state. In this judgment they will be referred to as non-nationals, meaning a person who is not a citizen of Ireland or any other EU Member State or any EEA State.

5. The High Court decisions in *Gorry* and *Ford* granted orders of *certiorari* of the Minister's decision. The application was refused in *A.B.M.* All three High Court judgments consider the appropriate approach required of a decision maker in relation to an immigration decision concerning a non-national spouse of an Irish citizen where the Irish citizen is relying upon rights conferred or protected by the Constitution (and in particular Article 41) and both spouses are relying on rights under Article 8 of the European Convention on Human Rights ("ECHR") or, more precisely, upon obligations imposed on the State by s. 3 of the European Convention on Human Rights Act 2003 ("the 2003 Act") and Article 8 ECHR. The High Court judgments differ in the conclusions reached on certain of these issues. In particular the judgments in *Gorry* and *A.B.M.* reach different conclusions both as to the approach required by Article 41 of the Constitution and the test to be applied in considering the State's obligations under Article 8 of the ECHR. In broad approach the judgment in *Ford* follows that in *Gorry*.

Mootness

6. At the hearing of the appeals the Court was informed that the appeal against the order of *certiorari* granted by the High Court in *Ford* was moot as a subsequent application for a visa had been made on behalf of Mr. Nwoke, the second named applicant, which had in turn been refused, but that a third application was in progress.

7. The Court was also informed that Mr. and Mrs. Gorry had now separated and that Mr. Gorry was no longer seeking to have Mrs. Gorry live with him in Ireland. The solicitor for the applicants had informed the solicitor for the Minister of these facts. Having regard to the importance of the questions decided in relation to the Constitutional and Article 8 issues, and the different approach in the *A.B.M.* judgment which is not moot and requires a decision by this Court, the Minister nonetheless submitted that in accordance with the principles set out by the Supreme Court *inter alia* in *O'Brien v. Personal Injuries Assessment Board (No. 2)* [2007] 1 IR 328 that this Court should hear and decide the appeal in *Gorry*. This approach was not disputed on behalf of Mr. and Mrs. Gorry.

8. The Court concluded that it should hear and determine the *Gorry* appeal, in relation at least to the issues of principle in dispute, and that it should only consider any other issue insofar as that is necessary having regard to the subsequent separation of the applicants and consequent absence of any requirement for the Minister to reconsider the application even if the High Court order of *certiorari* were to be upheld.

9. The Court was informed that the important issues of principle in dispute in these appeals have not been the subject of a judgment by an appellate court.

10. As appears from the short separate judgment delivered in *Ford*, the Court has reached a different conclusion on the mootness issue in relation to the need to determine that appeal. It is therefore not proposed to refer further to those proceedings or the judgment delivered which on the issues of principle in dispute essentially follows *Gorry*.

Background facts

11. Mr. Gorry is an Irish citizen and was living in Ireland at all relevant times. Mrs. Gorry is a Nigerian citizen who arrived in the State in March, 2005 and who then made an application for asylum under her then name. This was refused and a deportation order made in relation to her in June, 2005. She was informed of this in September, 2005 and required to present herself to the Garda National Immigration Bureau to make arrangements for her deportation. She did not do so and was classed as having evaded deportation.

12. The applicants met in Ireland in 2006 and decided to marry in 2009. They travelled to Nigeria for that purpose and they were married there in September, 2009. Mrs. Gorry then applied in December, 2009 for a visa to enter the State and for revocation of the deportation order based on the change in her personal circumstances following her marriage to Mr. Gorry, an Irish citizen. That application was refused on 3rd February, 2010.

13. In March, 2010, Mr. Gorry went to Nigeria to visit his wife. He has deposed that he found the visit very difficult because of the heat and humidity in Lagos. He returned to Ireland on 20th March, 2010 and on 23rd March suffered a heart attack. He was treated by angioplasty and a coronary stent.

14. On 2nd November, 2010 Mrs. Gorry reapplied for revocation of the deportation order on the grounds of her husband's health. Ultimately, following reminders, she was informed by a letter dated 20th July, 2012 that her application was refused and she was sent the consideration of application for revocation by the executive officer dated 6th

July, 2012, which was affirmed by the principal officer on 17th July, 2012.

15. The primary basis of the renewed application was that Mr. Gorry could not relocate to Nigeria because of his health conditions, which included his heart condition and a kidney condition.

Minister's decision

16. The approach in the decision for which the Minister is responsible (and to which I will simply refer as the "Minster's decision") was, first, correctly to determine whether there should be a further consideration under s. 3(11) of the Immigration Act 1999 as amended. That issue was determined in favour of Mrs. Gorry. Next, there was a consideration under Article 8 ECHR. This is a detailed 8 page consideration of the facts; relevant extracts from decisions of the European Court of Human Rights, the UK courts and the courts in this jurisdiction, and country of origin information in relation to the health services in Nigeria. The first conclusion reached on a consideration of all of the information cited was that:

> "… it is not accepted that it has been shown that there are any insurmountable obstacles for Mr. Gorry to settle in Nigeria, or that treatment for his medical conditions would not be available there. In this regard, however, it is entirely Mr. Gorry's decision whether he wishes to remain in the State and it is beyond question that this is a decision he is entitled to make."

17. The second relevant conclusion follows a consideration of the principles extracted by Lord Phillips in *R. (Mahmood) v. Home Secretary* [2000] EWCA Civ 315, [2001] 1 WLR 840 at p. 861 relevant to the deportation or exclusion of a family member:

> "(1) A state has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.
>
> (2) Article 8 does not impose on a State any general obligation to respect the choice of residence of a married couple.
>
> (3) Removal or exclusion of one family member from a State where other members of the family are lawfully resident will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family members excluded, even where this involves a degree of hardship for some or all members of the family.
>
> (4) Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a State if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled.
>
> (5) Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8.
>
> (6) Whether interference with family rights is justified in the interests of controlling immigration will depend on (i) the facts of the particular case and (ii) the circumstances prevailing in the state whose action is impugned."

18. In applying the above principles the assessor reaches the following conclusions:

> "Firstly, it is submitted that although [Mrs. Gorry] may wish to return to live in Ireland, there is no obligation on the State to accede to this wish,

as per principle two above.

Secondly, it is reasonable to assume that [Mrs. Gorry and Mr. Gorry] were fully aware of [Mrs. Gorry's] lack of lawful immigration status at the time of entering into a relationship. The principle as articulated in point five above is relevant… it is clear that where a person establishes family ties in a State while fully aware that he/she has no lawful residency**, or entitlement to such in the State**, it will only be in exceptional circumstances, or for compelling reasons, that the enforcement of an existing deportation order will be contrary to or in breach of Article 8. The question to be determined in the instant case therefore is whether such exceptional circumstances arise.

Having considered all the facts in this case, it is submitted that no exceptional circumstances arise in the case such that a decision to re-affirm the deportation order in respect of [Mrs. Gorry] would constitute a violation of Article 8.

It is therefore submitted that in re-affirming a deportation order in respect of [Mrs. Gorry] there is no lack of respect for family life, and therefore no breach of Article 8."

19. The decision then turns to consider rights under the Constitution. The marriage of Mrs. Gorry to Mr. Gorry, an Irish citizen, in 2009 in Nigeria is recorded. The consideration of the rights of both parties under the Constitution is in the following two paragraphs:

"With regards to the rights of a non-national married to an Irish citizen or a person entitled to reside in the State, it is accepted that family rights under Article 41 of the Constitution arise. However, these rights are not absolute and may be restricted. As found by the Courts, there appears to be no authority which supports the proposition that an Irish citizen or a person entitled to reside in the State may have a right under Article 41 of the Constitution to reside with his or her spouse in this jurisdiction. Reference is made to the consideration of the position of the couple, as well as the rights of the State under Article 8 consideration above and the conclusions reached therein.

All factors relating to the position and rights of the family have been considered, and these have been considered against the rights of the State. In weighing these rights, it is submitted that the factors relating to the rights of the State are weightier than those factors relating to the rights of the family. It is submitted that a decision to re-affirm the deportation order in respect of [Mrs. Gorry] is not disproportionate as the State has a right to uphold the integrity of the immigration system and to operate a regulated system for the control, processing and monitoring of non-national persons in the State."

20. Having referred to a number of the prior considerations in respect of Mrs. Gorry under the Immigration Act 1999 as amended, the Refugee Act 1996 and the Criminal Justice (UN Convention against Torture) Act 2000, the ultimate submission in this section of the consideration was "that there are no new exceptional circumstances presented beyond those previously considered by the Minister which would warrant the revocation of the Deportation Order signed in respect of [Mrs. Gorry]".

Judicial review

21. By order of the High Court (Clark J.) of 15th October, 2012, leave was granted to apply by way of judicial review for an order of *certiorari* of the decision of the Minister.

The grounds upon which leave was granted included (i) no sufficient proportionality assessment was undertaken, (ii) in breach of Article 41 of the Constitution, the Minister failed to properly consider the family life of the respondents, and (iii) the Minister erred in law in applying the "insurmountable obstacles" deportation test to Mr. Gorry as it is unreasonable to expect him to settle in Nigeria to enjoy family life with his wife in light of his health problems, his age, and his children and family in Ireland. There were additional grounds relating to specific alleged failures by reference to the particular medical condition of Mr. Gorry and the country of origin information in relation to health services in Nigeria. These are not relevant to the issues of principle decided by the High Court and for decision in this appeal.

Judgment of the High Court

22. In relation to the alleged error of approach in the Minister's decision to the Article 41 rights, the High Court judge reviewed relevant judgments and then concluded at para. 42 of his judgment:

> "42. Having reviewed all of these decisions, my view is that an Irish national married to a non-Irish national has a constitutional right to reside in Ireland with that other person, subject to lawful regulation. The right is not absolute. The State is not obliged in every case to accept the country of residence chosen by such a couple. Though I believe such a *prima facie* right exists, not every set of circumstances will engage the right. The couple who marry on a whim in a drive-in church in Las Vegas having met earlier in the evening, may well find that their circumstances do not trigger the respect for marriage reflected in the provisions of Article 41 of the Constitution and a consequential right to reside in the State."

23. Having referred to the first paragraph in the assessment of file on the rights under the Constitution, set out at para.19 above, the trial judge continued at para. 44:

> "44. This is a mistaken understanding of the law. The starting point in any consideration where a mixed Irish and non-Irish nationality couple seeks to live in Ireland is that they have a *prima facie* right to do so by virtue of Article 41 of the Constitution. It is recalled that Article 41.3 pledges the State to guard with special care the institution of marriage. The circumstances of the marriage will indicate whether that right is engaged. If engaged, the State is entitled to supervise the right by requiring an entry visa for the non-national, for example. The mere fact that it is engaged does not mean that it cannot be trumped by a lawful countervailing purpose which must ensure that the denial of the right of residence is proportionate to the policy objective sought to be achieved. As Denham J. said in *Meadows v. Minister for Justice* [2009] IESC 3 'When a decision-maker makes a decision which affects rights then, on reviewing the reasonableness of the decision: (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on irrational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective.' In my view, the Minister and his officials erred in failing to acknowledge the rights which the applicants enjoyed. It was wrong to start the analysis of the constitutional position by denying that there were any constitutional rights to reside with one's spouse involved."

24. In relation to the ground advanced on behalf of the applicants that an incorrect test of "insurmountable obstacles" was applied in the assessment in relation to Article 8 ECHR, the High Court judge, having considered a number of UK decisions, concluded at para. 31:

> "31. I fully agree with the decisions of the House of Lords and the Court of Appeal of England and Wales that the proper test to decide the contest between State rights and family rights, and in particular, to decide

> whether a national of a deporting or excluding State should join his or her partner in a third country is not assessed by reference to an insurmountable obstacles standard, but rather by applying the age-old and most reliable of legal standards in administrative law: is it reasonable to expect a spouse to join the removed or excluded spouse in his or her country of residence? Thus the respondent erred in law because he refused to revoke the Deportation Order on the basis of the failure to demonstrate the existence of an insurmountable obstacle to the second named applicant's emigration to Nigeria to take up his family life with his wife. There is no such test."

25. Later in the judgment in *Gorry* he expressly agreed with the decision of Clark J. in *Alli & Anor. v. Minister for Justice, Equality & Law Reform* [2009] IEHC 595 where she stated:

> "The applicants in these two cases have sought to equate 'insurmountable obstacles' with a mountain that cannot be climbed whereas the reality is that the jurisprudence of the ECtHR views an 'insurmountable' problem as being no more than a significant difficulty which cannot easily be overcome. Minor or significant inconvenience is not seen as an obstacle that would render deportation impermissible under Article 8 of the ECHR. The ECtHR jurisprudence shows that it would normally be considered unreasonable for a family to go to great lengths to be able to continue family life together."

26. The trial judge also considered other grounds advanced and found in favour of the applicants, including in relation to the exercise of his discretion notwithstanding the unlawful behaviour of Mrs. Gorry in both remaining in the State as an evader and, as was demonstrated in the evidence, entering the State unlawfully subsequent to the decision not to revoke the deportation order. He concluded that he should not refuse to exercise his discretion in favour of making the order of *certiorari* by reason of the legal errors in the manner in which the application for revocation was assessed.

27. Prior to considering the submissions on appeal on behalf of the Minister it is necessary to consider briefly both the facts of *A.B.M.* and High Court judgment delivered by Humphreys J. as the conclusions reached on the Article 41 and Article 8 issues referred to above differed from those of Mac Eochaidh J., and the Minister submits that this Court should uphold the approach of Humphreys J. in *A.B.M.*

A.B.M. and B.A. v. Minister

28. B.A. was a national of Nigeria and came to Ireland and applied for asylum in September, 2000. The application was refused by the Refugee Applications Commissioner in August, 2002. B.A. appears to have remained in the State. In June, 2007, she was given permission to remain in the State.

29. In the meantime, in September, 2006 A.B.M. applied for asylum, claiming he had recently arrived in the State having left Nigeria in 1999 for Italy *via* Togo. In March, 2007 the Refugee Applications Commissioner refused his claim for asylum.

30. In September, 2007 A.B.M.'s appeal to the Refugee Appeals Tribunal was refused. In October, 2007 he submitted an application for subsidiary protection. This was refused in April, 2008. A deportation order was made on 18th June, 2008 and notified to him by letter dated 24th June, 2008, and he was required to present himself to the Garda National Immigration Bureau on 15th July, 2008. He failed to do so and thereafter became an evader until July, 2015.

31. In August, 2013 B.A. became an Irish citizen.

32. In January, 2014 A.B.M., whilst continuing to evade GNIB, requested the Minister,

under s. 3(11) of the 1999 Act, to revoke the deportation order.

33. The parties were married in Ireland in a civil ceremony on 9th February, 2015. On 21st October, 2006 they had entered into a "religious marriage" in Ireland. It is not contended that the 2006 marriage was a lawful marriage in Ireland for the purposes of Article 41 of the Constitution. However no issue is raised against the lawfulness of the 2015 marriage.

34. On 13th July, 2015 a submission recommending that the deportation order remain in place was completed and a decision taken on the same day that the deportation order be affirmed. An undertaking was given not to deport A.B.M. until consideration of the application under s. 3(11) had taken place. By letter dated 20th July A.B.M. was notified that the decision to make a deportation order remained unchanged. The applicants claim that the Minister was informed on 17th July 2015 that B.A. was pregnant.

35. Leave was granted on 27th July 2015. An injunction was refused by the High Court on 4th August 2015 and A.B.M. was deported in September, 2015.

36. In the *A.B.M.* application the consideration given in the assessment made on behalf of the Minister similarly considered first all the relevant facts, then the position under Article 8 ECHR and later under Article 41 of the Constitution.

37. In the assessment under Article 8, reference was made to the parties' knowledge at the time of their civil marriage in 2015 that A.B.M.'s status in the State was precarious, and to the principle derived from ECtHR case law that where this is the position "it is likely only to be in the most exceptional circumstances that the removal of the non-national spouse would constitute a violation of Article 8".

38. The insurmountable obstacles test was also referred to and applied. The decision maker referred to the meaning of insurmountable obstacles as stated in the ECtHR judgment *in Boultif v. Switzerland* (Application No. 54273/00) at para 48: "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". The consideration in *A.B.M.* then stated:

> "This is the test applied when determining whether family life can be established elsewhere. In particular, to be considered when determining whether there are any "insurmountable obstacles" to establishing family life elsewhere is whether, where an obstacle exists, realistically or reasonably, it is an obstacle which is able to be surmounted."

39. The consideration then notes that the applicants do not have children together but both have children from previous marriages who continue to reside in Nigeria. It also identifies as options open to B.A. to relocate with her husband to Nigeria, to visit him there on holidays (subject to any visa requirements which might be waived as she is Nigerian by birth), or to remain in Ireland. Whilst there is no express conclusion on the absence of insurmountable obstacles in the sense used above, the implication is that they do not exist. Similarly there is no express finding of an absence of "exceptional circumstances" having regard to the applicants' knowledge of the precarious status of A.B.M. at the date of their marriage, but again by implication that is the conclusion in the consideration.

40. In relation to rights under the Constitution, the consideration records that B.A. is an Irish citizen, that the marriage occurred on 9th February, 2015, and that consequently "it is accepted that the couple constitute a family within the meaning of Article 41 of the

Constitution." It then states:

> "With regard to the rights of a non-national married to an Irish national or a person entitled to reside in the State, it is accepted that family rights under Article 41 of the Constitution arise. However, these rights are not absolute and may be restricted. As found by the courts, there appears to be no authority which supports the proposition that an Irish citizen, or a person entitled to reside in the State, may have a right, under Article 41 of the Constitution, to reside with his or her spouse in this jurisdiction. Reference is made to the consideration of the position of the couple, as well as the rights of the State under Article 8 in the consideration above and the conclusions reached therein."

The ultimate conclusion was that there existed substantial reasons associated with the common good, and in particular control of immigration, which required the deportation order in respect of A.B.M. to be affirmed.

41. The grounds upon which leave to apply for judicial review was granted by the High Court included errors of law in reaching the decision in a manner contrary to Article 41 of the Constitution, and that the insurmountable obstacles test was not the correct legal test to apply in deciding [for the purposes of Article 8 ECHR] whether family life might be maintained elsewhere.

High Court Judgment in A.B.M.

42. The applicants, in support of their submission that the Minister was in error in his approach to Article 41 of the Constitution, relied principally on the High Court judgment in *Gorry* and its analysis at para. 44 that "[t]he starting point in any consideration where a mixed Irish and non-Irish nationality couple seeks to live in Ireland is that they have a *prima facie* right to do so by virtue of Article 41 of the Constitution".

43. Humphreys J. in A.B.M, in disagreeing with the above conclusion in *Gorry*, relied firstly on what he considered to have been substantial qualification by Mac Eochaidh J. in a later judgment in the case of *S.A. v. Minister for Justice and Equality (No. 2)* [2015] IEHC 226. I do not propose referring to that judgment as the Court was informed that the decision was to be the subject matter of an appeal to this Court. He then continued:

> "26. It has been a constant refrain of the European Court of Human Rights that there is no automatic obligation on a State to respect the choice of place of residence decided upon by a particular family: see *Jeunesse v. Netherlands* (Application no. 12738/10, Grand Chamber of the European Court of Human Rights, 3rd October, 2014) at para. 103. The State, in such situations has to be afforded a certain margin of appreciation: see *Jeunesse*, para. 106; *Tuquabo-Tekle v. Netherlands* (Application no. 60665/00, European Court of Human Rights, 1st December, 2005) at para. 42; and also *Ahmut v. Netherlands* (Application no. 21702/93, European Court of Human Rights, 28th November 1996), at para. 63. There is no logical reason why there should be a significantly different position under Article 41 of the Constitution. It is true, of course, that Article 41 uses somewhat more emphatic language than art. 8 of the ECHR, but neither provision exists in a vacuum. Even Article 41 cannot be interpreted in such a way as to fail to cohere with the overriding objective of an ordered society.
>
> 27. It is one thing to say that a married couple, or partners in a domestic relationship, have a legitimate interest in living together, which should be given due regard by the State. It is quite another to assert that they have

a "*prima facie* right" in that regard.

28. Voluntary assumption of risk is the key element here. Parties who choose to either get married or become involved in equivalent domestic relationships must be taken to do so in the knowledge of whatever factual and legal obstacles might exist to their living together. Differing nationalities, lack of legal status, liability to imprisonment, extradition, or European Arrest Warrant proceedings, financial difficulties which curtail the practical options for cohabitation and many other issues are matters that such parties must be taken to have had regard to.

29. In his decision in *X.A. (a minor) v. Minister for Justice, Equality & Law Reform* [2011] IEHC 397 (Unreported, High Court, 25th October, 2011), Hogan J. speaks sternly about the need for the courts to vindicate rights where couples are being forcibly separated by the State (followed in his later judgment in *E.A. v. Minister for Justice and Equality* [2012] IEHC 371 (Unreported, High Court, 7th September, 2012))

30. However, it is not the State that forcibly separates a couple where one of the parties, at all material times, had a precarious immigration status and one does not. It is the parties themselves who have primary responsibility for the situation where they entered into a relationship which is built on such shaky foundations.

31. It would be destructive of any ordered immigration control system if a person could convert his or her *prima facie* illegal status into a *prima facie* legal one merely by the expedient of either getting married or entering into an art. 8 type relationship with a person who has an entitlement to be in the State.

. . .

35. The notion of a "*prima facie* right" to reside in Ireland deriving from the very status of marriage itself, as referred to in *Gorry*, needs, I think, slight rephrasing. In my view, there is no such *prima facie* right. Presence in the State which is unlawful cannot be converted into the lawful or *prima facie* lawful merely by a ceremony of marriage. A married couple, one of whom is a citizen, should receive *prima facie* acknowledgment and consideration of their status under Article 41 of the Constitution, but that does not mean either that a deportation decision has to be phrased in any particular way (still less to use terms such as "*prima facie*"), or that such acknowledgment amounts to a right or even a *prima facie* right in any particular case or precludes the deportation of any particular applicant. Cases fall on a spectrum. For example, a sham marriage to an Irish national conducted for immigration purposes confers no rights on an applicant to resist deportation, whether pursuant to Article 41 or otherwise. A last-ditch marriage by an illegal immigrant may confer no rights to resist deportation. A non-national who marries an Irish citizen prior to his or her arrival in the State is arguably in a marginally stronger position, and a settled migrant stronger still.

36. In any event, even if the applicants can assert some form of (in my view, non-existent) *prima facie* right (as opposed to acknowledgement), Mac Eochaidh J. in *Gorry* ... recognised that it can be outweighed by countervailing considerations. . .

Is there an error in the Minister's reasoning?

> 37. The applicants rely on the discussion in *Gorry* which is critical of a passage in the Minister's analysis which is quoted at para. 43 of that decision, and which includes the phrase that *"there appears to be no authority which supports the proposition that an Irish citizen or a person entitled to reside in the State may have a right under Article 41 of the Constitution to reside with his or her spouse in this jurisdiction".* However, that quotation is part of a longer passage, the earlier part of which is quoted in a separate part of the judgment in *Gorry* at para. 37. This includes the phrase that *"it is accepted that family rights under Article 41 of the Constitution arise. However, these rights are not absolute and may be restricted".*
>
> 38. Mac Eochaidh J. took the view that the sentence quoted in isolation at para. 43 was in error. As set out above, I do not consider that it was in error, but in any event, if one reads that in the context of the earlier sentence, it is clear that the Minister's analysis is sensitive to the possibility that Article 41 rights exist, although they are not absolute. Where is the error in that reasoning? It is very hard to discern.
>
> 39. What appears to be unquestionable is that the State has an entitlement to give effect to the immigration control system. In particular circumstances, applicants may have rights under Article 41 of the Constitution or art. 8 of the ECHR to which the Minister should have regard, where those rights exist. It is for the Minister in the first instance to put those rights into the balance against the State's legitimate entitlement to enforce the immigration control system in a reasonable and proportionate manner. As with any administrative decision, reasonableness and proportionality are, in the first place, a matter for the Minister. The court should only intervene if the Minister's assessment is clearly unlawful."

44. Humphreys J. ultimately concluded on the facts of that case, and by reference to a number of other decisions, that the Minister's balancing exercise as set out in the assessment of file had not failed to pay sufficient attention to, or consider appropriately, constitutional issues, and in particular Article 41.

45. On the issue of the lawfulness of the insurmountable obstacles test he concluded at paras. 50 – 52:

> "50. The insurmountable obstacles question has been set out in numerous decisions of the European Court of Human Rights, and noted with approval in *Alli v. Minister for Justice, Equality and Law Reform* [2009] IEHC 595 (Unreported, High Court, 2nd December, 2009) per Clark J. at para. 98 and *Dos Santos v. Minister for Justice* [2014] IEHC 559 (Unreported, High Court, 19th November, 2014) per McDermott J. at paras. 61 to 81. Furthermore, the Supreme Court in *Oguekwe v. Minister for Justice* [2008] 3 IR 795 (Denham J.), cited with approval a quotation from Lord Phillips in *R. (Mahmood) v. Secretary of State for the Home Department* [2001] 1 WLR 840, which posed the insurmountable obstacles question (see also: *A.A. v. Minister for Justice, Equality and Law Reform* [2005] 4 IR 564 (Clarke J.)).
>
> 51. I agree with Mac Eochaidh J. that there is no "insurmountable obstacles" test, in the sense of a determinative bar which an applicant must meet or fail to meet. Rather the question of insurmountable

obstacles is just one of a basket of criteria or questions that can be asked as to the overall circumstances. The absence of insurmountable obstacles does not and should not guarantee rejection of a claim.

52. A decision is not invalid simply by referring to insurmountable obstacles. (See also my recent decision in *S.T.E. v. Minister for Justice and Equality* [2016] IEHC 379 (Unreported, High Court, 24th June, 2016)). Furthermore, the substance of this decision addresses the issue of proportionality and therefore it is not invalid under this heading."

Appeal Issues

46. It is important at the outset to emphasise that the constitutional issues raised by this appeal and by the appeal in *A.B.M.* relate, for the most part, exclusively to the situation where the Minister is required to make an immigration decision in relation to a non-national who is a lawful spouse of an Irish citizen, *i.e.*, that the couple were lawfully married either in Ireland or have been lawfully married elsewhere, and that marriage is recognised in Ireland.

47. It is not in dispute that the applicants in *Gorry* and in *A.B.M.* are each such a couple, and hence constitute a family within the meaning of Article 41 of the Constitution. That position was correctly identified in each of the assessments under review in *Gorry* and *A.B.M.*

48. What is in dispute is the nature of the rights which the Irish citizen spouse and the family (including the non-national spouse) possess under the Constitution, and how those rights must be approached by the Minister in considering whether or not the non-national spouse may be permitted to remain or reside in the State. To put it another way, the obligations imposed on the State by the Constitution in considering such an application are in controversy on this appeal.

49. Linked to the constitutional issues in dispute is the question as to whether the Minister's obligations when considering constitutional rights in such an application differ from those which apply when considering the application with regard to the State's obligation pursuant to Article 8 ECHR.

50. The second discrete issue in dispute is the appropriate test to be applied by the Minister in considering and deciding the application in accordance with the State's obligations pursuant to Article 8 ECHR, as he is required to do by s. 3 of the 2003 Act. In particular, the application of the so-called "insurmountable obstacles test" to the facts of these cases gave rise to disagreement between the parties.

51. The parties are agreed that the constitutional issues have not been considered in recent times by an appellate court. Fennelly J. in *T.C. (nÉe McC) and A.C. v. Minister for Justice Equality & Law Reform* [2005] 4 IR 109 , [2005] IESC 42 (as *Cirpaci*) made certain observations in relation to these issues, which are agreed to be *obiter* and to which I will refer below.

Constitution and Article 8 ECHR

52. Prior to considering the issues in dispute, I want to draw attention to certain differences in the legal bases for the Minister's obligations, having regard to the rights held by Irish citizens and by the family under the Constitution, and the Minister's obligations under s. 3 of the 2003 Act, having regard to Article 8 EHCR.

53. To state the obvious, the rights of an individual and a family pursuant to the

Constitution, and the obligations thereby imposed on the State and Minister, are part of the domestic law of the State. However, by contrast, the State has undertaken international obligations by ratifying the ECHR, but, it has not been made part of the domestic law of the State as such in accordance with Art. 29.6 of the Constitution. The Oireachtas has, rather, elected to give effect to the ECHR by means of the 2003 Act in a particular way. The long title of the 2003 Act explains the object of that Act as being one "to enable further effect to be given, subject to the Constitution, to certain provisions of the Convention . . .".

54. The way in which the 2003 Act gives effect to the ECHR, relevant to the issues on this appeal, is the obligation placed on the Minister by s.3 to perform his functions "in a manner compatible with the State's obligations under the Convention provisions". It is nonetheless relevant to recall that the applicants do not have rights in Irish law given them directly by Article 8 ECHR, as they (or at least the Irish citizen applicants) have pursuant to the Constitution. The first and more detailed consideration given in the decisions under review to Article 8 ECHR, and then the more limited consideration of constitutional rights, implies a misunderstanding of this position.

55. The Supreme Court has made clear that the approach which effectively treats Article 8 ECHR as a directly applicable provision which can be enforced as if it were part of the law of the State is wrong: see *McD. v. L.* [2009] IESC 81, [2010] 2 IR 199, *per* Murray C.J. p.250.

56. It appears to follow that where a married couple (a family within the meaning of Article 41 of the Constitution), one of whom is an Irish citizen, make an application to the Minister, in reliance in part on constitutional rights, to permit the non-national spouse reside in the State, that the Minister should first consider the application in the context of the constitutional rights of the applicants and obligations imposed on the State by the relevant articles of the Constitution. Following this, should it prove necessary to do so, the Minister may then also consider the application in the context of the Minister's obligation pursuant to s. 3 of the 2003 Act to decide the matter in a manner consistent with the State's obligations under the ECHR.

57. These general principles are also of importance because the analyses relating to Article 41 of the Constitution in the assessments on behalf of the Minister in both *Gorry* and *A.B.M.*, in the paragraphs cited above, appear to assume that the rights of the applicants and obligations imposed on the Minister in relation to Article 41 and Article 8 ECHR are similar or even identical. Indeed. Humphreys J. at para. 26 of his judgment in *A.B.M.*, whilst acknowledging that Article 41 "uses somewhat more emphatic language than Art. 8 of the ECHR", expresses the view that "there is no logical reason why there should be a significantly different position under Art. 41 of the Constitution". I respectfully disagree. For the reasons set out below, the obligations of the Minister pursuant to the Constitution and pursuant to s. 3 of the 2003 Act (to comply with the State's obligations under Article 8 ECHR), in assessing an application to permit a non-national spouse of a citizen to reside in the State, differ materially.

Constitutional Issue

58. The essential questions are (i) what are the constitutional rights of the citizen and of the family (comprising the citizen and his non-national married spouse) that the Minister is obliged to take into account when deciding on the application to permit the non-national spouse reside in Ireland and (ii) what relevant obligations are imposed thereby on the State.

59. Part of the apparent difference in approach between the trial judges in *Gorry* and *A.B.M.* is a difference of terminology. As already set out, in *Gorry* the trial judge expressed an initial view that "an Irish national married to a non-Irish national has a

constitutional right to reside in Ireland with that other person, subject to lawful regulation. The right is not absolute…" Later he identified as the starting point of any consideration that such a couple "have a *prima facie* right to [live in Ireland] by virtue of Art. 41 of the Constitution".

60. In *A.B.M.* the trial judge was of the view that the notion of a "*prima facie* right" to reside in Ireland deriving from the very status of marriage itself needs "slight rephrasing". He considered that no such *prima facie* right to live in Ireland exists, but then stated "a married couple, one of whom is a citizen, should receive *prima facie* acknowledgement and consideration of their status under Art. 41 of the Constitution…" Both judges, I consider, correctly expressed the view that no relevant constitutional right is absolute and that cases fall on a spectrum which by implication will lead to different results in any decision to be made.

61. The identification of the constitutional rights of the applicants which must be taken into account and the obligations imposed on the Minister in deciding an application which in substance is an application by a married couple, one of whom is an Irish citizen, for permission for the non-national spouse to enter or reside in Ireland is complex. I describe the generic applications in this way for the purposes of identifying the relevant principles; although I appreciate that in practice an application may often be by the non-national spouse in reliance on marriage to the Irish citizen and may include other applications such as to revoke a deportation order.

62. The starting point must be the relevant articles of the Constitution. The first undisputed constitutional right is the right of the Irish citizen to live in Ireland. That right is accepted as inherent in citizenship and may be considered as deriving from Article 2 and Article 9 of the Constitution. It may also be a personal right attracting the benefit of the guarantee in Article 40.3.1. Whilst not absolute in the sense that an Irish citizen may, by reason of Ireland's international obligations or its obligations (pursuant, for example, to the EU European Arrest Warrant regime), be the subject of extradition or surrender, absent such an obligation on the State the right of a citizen to enter and live in Ireland is not one which may be restricted by the State. Hence, in the context of an application to permit the citizen's spouse to live with him or her in Ireland, it may be considered to be an absolute right of the citizen, unlike the next set of rights considered.

63. The next set of rights of the applicants is that deriving principally from Article 41 of the Constitution and in some respects also from Article 40.3.1.

64. Article 41, insofar as is relevant, provides:

> "1. 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
>
> 2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.
>
> …
>
> 3. 1° The State pledges itself to guard with special care the institution of
>
> Marriage, on which the Family is founded, and to protect it against

attack."

65. Each married couple are a "Family" within the meaning of Article 41: *Murray v. Ireland* [1985] 1 I.R. 532 at p. 537, *per* Costello J., and approved of by the Supreme Court in the same case.

66. The recognition and guarantee of protection given to the family unit in Article 41.1 creates rights both for the individual members of the family and for the family as a unit. In *Murray* in the Supreme Court [1991] ILRM 465, Finlay C.J. at p. 472 accepted that the constitutional protection of the institution of marriage "necessarily involves a constitutional protection of certain marital rights. They include the right of cohabitation…" In the same case in the High Court, Costello J. had referred (at p. 538) to "the exercise by the Family, of its imprescriptible and inalienable right to integrity as a unit group…"

67. Notwithstanding the recognition of the family as a unit group and moral institution possessing "inalienable and imprescriptible rights", it is well established that such rights are not absolute and can be even severely restricted by the State, either by reason of rights of other persons or in the interests of the common good. A common example of the former is where a parent who abuses may be restricted in his or her access or exercise of parental authority in relation to a child of the family in the interests of that child. Similarly the right of cohabitation of a violent spouse may be restricted in the interests of the rights of the other spouse, *inter alia*, to the protection of the person in Article 40.3.2 and the associated right to bodily integrity. In the *Murray* case to which I have made reference, the marital rights of the individuals who were both serving life sentences were restricted in the interests of the common good by reason of their convictions and imprisonment.

68. For present purposes it appears to me that the guarantee given by the State in Article 41.1.2 "to protect the Family, in its constitution and authority…" is of primary importance. The protection of the family "in its constitution" appears to be in the sense of the composition of the family and, in the case of a family comprising a couple without children, closely aligned with the individual's right of cohabitation. The individual spouse's right of cohabitation may also be a personal right which the State guarantees in Article 40.3.1 "as far as practicable" to defend and vindicate.

69. The guarantee to protect the family in its authority was considered by the Supreme Court in *North Western Health Board v. H.W.* [2001] 3 IR 622, albeit in the context of the rights of parents to make decisions affecting the welfare of their child. On the question of authority, Murray J. at p. 737 stated:

> "One of the inherent objects of the Constitution is the protection of liberties. Article 41.2 in providing that 'The State, therefore, guarantees to protect the Family in its constitution and authority…' provides a guarantee for the liberty of the family to function as an autonomous moral institution within society and, in the context of this case, protects its authority from being compromised in a manner which would arbitrarily undermine the liberty so guaranteed."

70. As also stated by Keane C.J. in North Western Health Board v. H.W. [2001] 3 IR 622 at p. 687:

> "The rights acknowledged in Article 41 are both the rights of the family as an institution, and the rights of its individual members, which also are guaranteed in Article 42, under the heading 'Education', and which also derive protection from other articles of the Constitution, most notably Article 40.3."

71. In *Re Article 26 and the Matrimonial Homes Bill 1993* [1994] 1 I.R. 305 the

Supreme Court concluded that certain of the provisions of the Bill would have had the effect of automatically cancelling a joint decision made by both spouses as part of the authority of the family in relation to the ownership of the family home. The Court stated at p. 326:

> "That having regard to the extreme importance of the authority of the family acknowledged by Article 41, and the fact that the right of the family to make decisions within its authority was accepted by Article 41 of the Constitution as being inalienable, imprescriptible and antecedent and superior to all positive law, the Bill did not constitute reasonably proportionate intervention by the State with the rights of the family, and constituted a failure by the State to protect the authority of the family; and that the potentially indiscriminate alteration of what must be many joint decisions validly made within the authority of the family concerning the ownership of the family home could not reasonably be justified, even by such an important aspect of the common good."

72. The decision of the family at issue in this appeal is a decision that the family should live in Ireland. That is a decision which a married couple have a right to take and which is within the authority of their family. Their ability to implement the decision may, however, not fully lie within their control. In the case of Mr. and Mrs. Gorry, the decision could be implemented by them insofar as Mr. Gorry is concerned. The situation is somewhat different so far as Mrs. Gorry is concerned, since as a non-national she has no right to be in Ireland unless she obtains permission from the Minister (or there is some other EU or international legal obligation imposed on Ireland, a consideration which does not apply to the present case).

73. The requirement that a non-national obtain such permission is currently imposed by s. 4 of the Immigration Act 2004. However, as has been consistently held by the courts, the right to control aliens, their entry into the State, their departure, and their activities within the State, is part of the inherent power of the State as a sovereign state: see *Pok Sun Shun v. Ireland* [1986] ILRM 593, at 599, *per* Costello J. In *AO and DL v. Minister for Justice* [2003] 1 I.R. 1, Keane C.J., at p. 24, having cited with approval the reasoning of Costello J. in *Pok Sun Shun* , then stated:

> "While the power to expel or deport non-nationals inheres in the State as a sovereign state, and not because it has been conferred on particular organs of the State by statute, it has, almost from the foundation of the State, been regulated by statute."

74. Having regard to the inherent power of the State, as a sovereign state, to control the entry of non-nationals into the State, it does not appear to me correct, in the absence of any express right given in the Constitution to a citizen to have a non-national spouse reside with him or her in the State without the need to obtain the relevant visa or other permission required by statute, to state that the Irish citizen has a constitutional right to have the non-national spouse reside with him or her in Ireland.

75. Even if one considers the right of the family to be protected in its composition pursuant to Article 41, or to put it another way, the married couple's right to cohabitate, or the citizen's individual personal right to cohabit with his spouse, and take into account the citizen's right to live in Ireland, it still does not appear to me to give him an automatic right pursuant to the Constitution to cohabit with his non-national spouse in Ireland. Such an individual right would appear to be contrary to the inherent power of the State to control immigration subject to international obligations. This is so even if one considers that any such constitutional right is not an absolute right and may be limited.

76. Neither does it appear to me correct or helpful to state that the couple have a *prima facie* constitutional right to live in Ireland pursuant to Article 41. I understand the trial judge in *Gorry* to have been using it in the sense of a constitutional right which is not

absolute or which is subject to regulation, but nevertheless an identified constitutional right.

77. Rather, it appears to me that the correct analysis of the rights which a couple such as Mr. and Mrs. Gorry have pursuant to the Constitution, and, in particular, Articles 2, 9, 40.3.1 and 41, and the obligations which those constitutional provisions impose on the Minister in considering and assessing their application that Mrs. Gorry, as a non-national, be permitted to reside in Ireland with Mr. Gorry as his spouse, are the following.

78. Mr. and Mrs. Gorry, as a lawfully married couple and a family within the meaning of Article 41, and Mr. Gorry as an Irish citizen, have constitutionally protected rights to have the Minister consider and decide their application with due regard to:

> (i) the guarantee given by the State in Article 41.1.2 to protect the family in its constitution and authority;
>
> (ii) a recognition that Mr. and Mrs. Gorry are a family, a fundamental unit group of our society possessing inalienable and imprescriptible rights which rights include a right to cohabit which is also an individual right of the citizen spouse which the State must, as far as practicable, defend and vindicate (Article 41.1 and Article 40.3.1)
>
> (iii) a recognition that the decision that the family should live in Ireland is a decision which they have a right to take and which the State has guaranteed in Article 41.1 to protect; and
>
> (iv) a recognition of the right of the Irish citizen to live at all times in Ireland as part of what Article 2 refers to as his "birth right . . . to be part of the Irish Nation" and the absence of any right of the State (absent international obligations which do not apply) to limit that right.

79. The Constitution places corresponding obligations on the Minister to take the decision as to whether or not to permit the non-national spouse reside in Ireland with due regard to each of the above constitutional rights of the applicants. However, the State guarantee to protect the spousal authority does not oblige the Minister to give effect to their decision to live in Ireland. The Minister is also entitled to take into account other relevant considerations in accordance with the State's interest in the common good. Most frequently these may be considerations relevant to the State's inherent power to control the entry of non-national persons to the State. Depending on the facts, there may be other relevant considerations such as prevention of crime or, as Hogan J. observed in *O'Leary v. Minister for Justice, Equality and Law Reform* [2011] IEHC 256, ensuring that non-nationals do not become a charge on our system of social security. The latter considerations might properly give rise to imposition of conditions to be met.

80. The above approach appears to me consistent, both with the rights of the Irish citizen and the family of which he is a member under the Constitution, the obligations imposed on the State by the Constitution, and the inherent power of the State, as a sovereign state, now regulated by statute, to control the entry of non-nationals into the State and, where appropriate, to expel them from the State by deportation.

81. In reaching this conclusion, I have taken into account the view expressed by Fennelly J., albeit *obiter*, in *T.C. (nÉe Mc C.) & Ors. v. Minister for Justice* [2005] 4 IR 109, [2005] IESC 42 (as *Cirpaci v. Minister for Justice*), that in some factual situations a Minister may be obliged to come to a conclusion to permit a married couple comprising a

citizen and non-national spouse to live together in the State. At pp. 119-120 he stated:

> "At one extreme an Irish citizen might contract a marriage, valid under the laws of a remote jurisdiction, while on holiday there. Could such a person, within days of the marriage, insist, to the point of demanding that the brevity of the marital relationship was irrelevant, that his or her new spouse be granted a visa admitting him or her to reside in the State? At the other extreme would be an Irish citizen, who had lived abroad for many years, perhaps for his or her entire working life. Such a person has, as a citizen, an undoubted right to return to reside in Ireland on retirement or earlier. It is not necessary to pose the constitutional question whether that person would have the right to be accompanied by his or her foreign spouse of many years. For my own part, I have no doubt that such a right exists. It would not, of course, be absolute. The foreign spouse might be a notorious criminal. It is enough to say that, in the most benign of such circumstances, the Minister would be entitled and possibly bound, in exercising the statutory powers applicable to such situations, to give favourable consideration to a claim that such a person be permitted to be accompanied by his or her spouse."

82. As pointed out by Fennelly J. in *Cirpaci*, and referred to by the trial judges in both *Gorry* and A.B.M., there is a wide spectrum of circumstances in which a married couple, comprising a citizen and non-national, may decide that they wish to live in Ireland and seek the permission of the Minister for the non-national to do so. I recognise that in certain factual circumstances, the Constitution, and in particular Article 2, Article 40.3.1 and Article 41 may, in practice, impose an obligation on the State (acting through the Minister) to permit a non-national reside with his or her citizen spouse in the State, in the sense that a reasonable and proportionate decision taken by the Minister, having regard to the rights and obligations set out above, could only lead to one decision. The example given by Fennelly J. in *Cirpaci* may be one such example. Whilst he has expressed the *obiter* view that this may be a constitutional right of the Irish citizen, I would respectfully suggest that it might be better considered as an obligation imposed on the State pursuant to the guarantees expressly given by the Constitution to an individual citizen in Article 40.3.1 and in Article 41 to protect a family in its constitution and authority.

83. The Minister, in taking any such decision, must consider and ultimately weigh the constitutional rights of the applicants, a family within the meaning of Article 41, one of whom is a citizen, and those relevant interests of the State in the achievement and preservation of the common good in a fair and just manner to achieve a reasonable and proportionate decision on all the relevant facts.

84. The approach which in my view is constitutionally correct also appears capable of being applied in a practical way. It is essentially a two stage approach. First to identify the relevant constitutional rights of the applicants. For the reasons set out, these flow simply from a lawful marriage between two adults one of whom is an Irish citizen and the other a non-national. The rights I have identified are not dependent on other factual issues such as the circumstances or length of the marriage or immigration record of the non-national. Once married the couple are a family within the meaning of Article 41 and are entitled to all the rights identified.

85. The second stage is the consideration and assessment to be given by the Minister in accordance with the obligations imposed on the State by those rights and the entitlement to take into account relevant State interests in the common good including control of immigration. It is in this second stage that the facts such as circumstances or length of the marriage and immigration record of the non-national, including at the time of marriage, may fall to be taken into account so as to balance in a fair and just manner

the rights of the applicants and those of the State, and reach a reasonable and proportionate decision.

86. Accordingly, I have concluded that it is not correct to state, as did the trial judge in *Gorry*, that a family comprising a married couple, one of whom is an Irish citizen and the other a non-national, have a *prima facie* right to live in Ireland pursuant to Article 41 of the Constitution. Rather, they have rights to have the decision taken by the Minister in accordance with the rights which the Irish citizen has, and they as a family have, pursuant to the Constitution and the obligations imposed on the State by the Constitution and the rights inherent in the State in relation to the control of entry to the State by non-nationals. It follows that I would not uphold the reasoning by which the trial judge decided that the consideration given by the Minister's decision pursuant to Article 41 was not in accordance with law.

87. It does not follow, however, that the consideration given by the Minister to the application in relation to the constitutional rights of the applicants was in accordance with law. As appears from the decision set out, essentially, the Minister applied the same approach to the State's obligations in relation to the constitutional rights of the applicants as was done in relation to his obligations pursuant to s. 3 of the 2003 Act, having regard to Article 8 ECHR. That approach was upheld by Humphreys J. in *A.B.M.* I do not consider that to be the correct approach for the following reasons.

88. I have already set out what is required of the Minister pursuant, in particular, to Article 41 of the Constitution. It obliges the Minister to take the decision, having regard to the obligation of the State to protect the family in its constitution and authority. The latter obligation includes an obligation to recognise that the decision that the family should live in Ireland is a decision which they have a right to take and which the State has guaranteed in Article 41.1 to protect. It also requires, as stated, that the Minister recognise the right of the Irish citizen to live in Ireland and to cohabit with his spouse, and the State's obligation, as far as practicable, to defend and vindicate such rights when reaching his decision. That appears to me to be a different starting point, and imposes different obligations on the Minister in relation to the decision taken by the family that they live in Ireland, than does the statutory obligation imposed on him by s. 3 of the 2003 Act, having regard to the State's obligations under Article 8 ECHR.

89. Article 8 ECHR provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic 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."

90. Article 8 ECHR does not distinguish between a family based on marriage and one that is not based on marriage. The distinction in the obligations of the Minister relevant to this appeal only arise where the family is one based on marriage, and therefore a family within the meaning of Article 41 of the Constitution. They also exist by reason of the fact that one spouse is a citizen of Ireland.

91. The obligation imposed on the State pursuant to Article 8 ECHR in relation to family life is a restraint on interference with an individual's right to respect for his family life. Even taking into account the fact that the wording of Article 41.1.1 of the Constitution,

in its recognition of the family as a "moral institution" possessing "inalienable and imprescriptible rights, antecedent and superior to all positive law" may not be intended to be taken absolutely literally, nevertheless, it appears to me to be a stronger recognition of a family based on marriage as a unit than the right of respect for family life included in Article 8 ECHR. Further, the wording of Article 41.2 cannot be overlooked in its more straightforward wording of a guarantee to protect the family "in its constitution and authority, as the necessary basis of social order and as indispensible to the welfare of the Nation and the State". That appears to me to be a stronger pledge by the State than the obligation undertaken pursuant to Article 8 ECHR in which it agrees not to interfere with the right to respect for family life, save as permitted under Article 8.2. Protection connotes more than respect.

92. The practical effect of this in relation to the required approach to an application to the Minister to permit a non-national married spouse of a citizen reside in the State, or to revoke a deportation order, or not to expel a non-national, is that under Article 41, the starting point of the Minister must be in accordance with the principles set out above; the recognition to be given to the rights of the family based on marriage; the guarantee to protect the family in its constitution and authority, including its right to take a decision that the family live in Ireland, and the constitutionally protected rights of the Irish citizen to live in Ireland and to cohabit with his spouse. Those rights impose obligations on the State *inter alia* to respect and protect the right of the couple to decide that their family live in Ireland. That does not mean of course that the Minister is obliged to permit this happen by issuing the relevant visa or other permission. However, it is the starting point of the Minister's consideration and must be weighed in the balance.

93. By contrast, in accordance with the judgments of ECtHR, the starting point under Article 8 is that it does not impose any general obligation on a Contracting State to respect the choice of residence of married couples. Further, if family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of family life within the host state would from the outset be precarious, then it is only in "exceptional circumstances" that the removal of the non-national family member will constitute a violation of Article 8, see *Jeunesse v. The Netherlands* (Application No. 12738/10) [2014] ECHR 1036, (2015) 60 EHRR 17 at paras. 107 and 108.

94. That appears to me to be a different starting point from that required of the Minister in relation to the constitutional rights and obligations. In saying this, I am not intending to suggest that the Minister may not take into account the fact that at the time when an Irish citizen married a non-national, the latter was a person with an immigration history in relation to the State which might militate against him or her if and when permission was sought from the Minister for that person to reside with the Irish citizen spouse in Ireland. That may well be a relevant factor for the Minister to take into account and to put into the balance in the interests of the common good and control of non-nationals. However, it does not import a requirement that the married couple, comprising the Irish citizen and non-national, establish "exceptional circumstances" which would warrant the Minister making a decision in favour of permitting the non-national to reside in Ireland. It is simply one of a number of factors to be put into the balance in reaching a proportionate decision having regard to the constitutional rights of the citizen, the family of which he is a member and the relevant State interest in the common good.

95. Where one spouse is a citizen an inevitable feature of any decision of the Minister to refuse permission to a non-national spouse is that it interferes with at least one constitutional right of that citizen. In practical terms the citizen has a choice of continuing to live in Ireland without his spouse (thus interfering with his right of cohabitation) or leaving Ireland to live with his spouse abroad (thus interfering with his

right to live in the State). Any administrative decision which interferes with a constitutional right must do so as little as possible and be proportionate. See *inter alia* : *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 IR 701, at p.753 *per* Denham J.

96. Accordingly, I have concluded that in the *Gorry* case, the consideration given by the Minister in the decision made to the constitutional rights of Mr. and Mrs. Gorry, both in the case of Mr. Gorry individually, and to them both as a family pursuant to Article 41, and other relevant articles of the Constitution, was not in accordance with law.

Insurmountable Obstacles

97. I now turn to consider the decision of the trial judge that the Minister erred in law because he refused to revoke the deportation order of Mrs. Gorry on the basis of the failure to demonstrate the existence of an insurmountable obstacle to Mr. Gorry's emigration to Nigeria to take up his family life with his wife. This, I must emphasise, only arises if the Minister, having considered the constitutionally protected rights, decides to refuse permission and comes to consider the application pursuant to his statutory obligations under s. 3 of the 2003 Act, having regard to Article 8 ECHR.

98. The trial judge decided that the test of "insurmountable obstacles" was no longer to be applied in relation to the question as to whether or not deportation is permissible under Article 8 by reference to certain decisions of the English Court of Appeal. The submission on behalf of the Minister was that, first, the Irish courts, in interpreting and applying the Convention provisions, are obliged to take judicial notice of decisions of the ECtHR and due account of the principles laid down by those decisions. Second, it was submitted that the ECtHR continues to apply the insurmountable obstacles test as exemplified by the judgment of the Grand Chamber in *Jeunesse* at para. 107 already referred to. Third, he submitted that the United Kingdom Supreme Court had, subsequent to the judgments of the Court of Appeal and House of Lords referred to by the trial judge, continued to apply the insurmountable obstacles test in *R.(Agyarko)v Secretary of State for Home Department* [2017] UKSC 11.

99. I accept, as correct, the submissions made in this respect on behalf of the Minister. This Court, in interpreting and applying the ECHR provisions pursuant to s. 4 of the 2003 Act, is obliged to take judicial notice of judgments of the ECtHR and take due account of the principles laid down in those judgments. It is also correct that the ECtHR has continued to use as a phrase "insurmountable obstacles" as it did in *Jeunesse* at para. 107.

100. However, the difference between the test which the trial judge considered to be the correct legal test, namely, "is it reasonable to expect a spouse to join the removed or excluded spouse in his or her country of residence" and the test of insurmountable obstacles as applied by ECtHR may again be more one of nomenclature rather than of substance. It is not necessary for the purpose of this appeal to consider in any detail how ECtHR has in practice applied the so-called insurmountable obstacles test. A consideration of the individual decisions demonstrates that it is very fact-specific. Clark J. in *Alli*, as set out above, considered it to be "no more than a significant difficulty which cannot easily be overcome" whilst "minor or significant inconvenience" would not meet the test of insurmountable obstacles.

101. Having regard to the view which I have taken of the impermissible approach of the Minister to the decision taken, having regard to the constitutional provisions, and by reason of the fact that Mr. Gorry no longer seeks to have Mrs. Gorry live with him in Ireland it is unnecessary to consider whether, on the particular facts in *Gorry*, there was a proper application of the principles having regard, in particular, to the conclusion on the facts that Mr. Gorry had "been receiving treatment in the State for a heart condition and also for a kidney complaint and that he may have difficulty in accessing the same

level of medical treatment for his condition in Nigeria as he is currently receiving in Ireland".

102. I would draw attention to what appears to be a slightly different approach in the decision taken by the Minister in *A.B.M.* where, in relation to the insurmountable obstacles test, as stated by the ECtHR in *Boultif*, the assessor stated that what is to be considered "when determining whether there are any insurmountable obstacles to establishing family life elsewhere is whether, where an obstacle exists, realistically or reasonably it is an obstacle which is able to be surmounted".

103. This, as appears, is close to the approach of Clark J. in *Alli* and one which is capable of practical application to identified obstacles and consistent with the application of the test by ECtHR in its judgments. In *Jeunesse* at para. 120, albeit in a context also of obligations to take decisions in relation to families which include children in the best interests of the children, the ECtHR nevertheless stated:

> "120. In examining whether there were insurmountable obstacles for the applicant and her family to settle in Suriname, the domestic authorities had some regard for the situation of the applicant's children (see paragraphs 23 (under 2.19 and 2.21), 28 and 34 (under 2.4.5) above). However, the Court considers that they fell short of what is required in such cases and it reiterates that national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any such removal in order to give effective protection and sufficient weight to the best interests of the children directly affected by it (see above § 109). The Court is not convinced that actual evidence on such matters was considered and assessed by the domestic authorities. Accordingly, it must conclude that insufficient weight was given to the best interests of the applicant's children in the decision of the domestic authorities to refuse the applicant's request for a residence permit."

104. I draw attention to the obligations of domestic authorities stated by the ECtHR above in the context of the application of the insurmountable obstacles test to assess evidence in relation to both the practicality and feasibility of the family moving to the country of the non-national. The third matter to be assessed is the proportionality of the removal of the non-national where it would require such a move in order to keep the family together. I recognise that in the case of a potential move of a family with children a more stringent application of the proportionally assessment may be required by the "best interests" of the children principle. However that does not appear to take away from the fact that the ECtHR considers that in considering "insurmountable obstacles", what is required is to look at both the "practicality and feasibility" of the family, or more particularly in this instance the Irish citizen, moving to live in Nigeria.

Conclusion

105. For the reasons set out in this judgment I have concluded that:

> (1) The Minister did not consider the constitutional rights of the applicants, Mr. and Mrs. Gorry, in accordance with law.
>
> (2) Mr. Gorry as an Irish citizen does not have an automatic right pursuant to the Constitution to cohabit with his non-national spouse in Ireland. Such a constitutional right would appear to be contrary to the inherent power of the State to control immigration subject to international obligations. This is so even if one considers that any such constitutional right is a prima facie right or is not an absolute right and may be limited.

(3) However Mr. and Mrs. Gorry, as a lawfully married couple and a family within the meaning of Article 41, and Mr. Gorry as an Irish citizen, have constitutionally protected rights to have the Minister consider and decide their application with due regard to:

(i) the guarantee given by the State in Article 41.1.2 to protect the family in its constitution and authority;

(ii) a recognition that Mr. and Mrs. Gorry are a family, a fundamental unit group of our society possessing inalienable and imprescriptible rights which rights include a right to cohabit which is also an individual right of the citizen spouse which the State must, as far as practicable, defend and vindicate (Article 41.1 and Article 40.3.1)

(iii) a recognition that the decision that the family should live in Ireland is a decision which they have a right to take and which the State has guaranteed in Article 41.1 to protect; and

(iv) a recognition of the right of the Irish citizen to live at all times in Ireland as part of what Article 2 refers to as his "birth right . . . to be part of the Irish Nation" and the absence of any right of the State (absent international obligations which do not apply) to limit that right.

(4) The Constitution places corresponding obligations on the Minister to take the decision as to whether or not to permit the non-national spouse of an Irish citizen reside in Ireland with due regard to each of the above constitutional rights of the applicants. However, the Minister, in taking the decision, may also take into account other relevant considerations in accordance with the State's interests in the common good.

(5) The "insurmountable obstacles" test set out by the European Court of Human Rights remains applicable to a consideration by the Minister (if necessary) of the application pursuant to his obligations under s. 3 of the European Convention on Human Rights Act 2003 having regard to Article 8 of the European Convention on Human Rights relating to deportation of the non-national spouse of an Irish citizen.

Relief

106. By reason of the legally incorrect approach to the assessment, consideration and determination of the application of Mr. and Mrs. Gorry pursuant to the constitutional rights and obligations identified above, which are central to the decision which had to be taken by the Minister, notwithstanding that I would not uphold the trial judge's reasoning therefore, I have concluded that the order of *certiorari* should be upheld.

107. As, however, the proceedings are now moot by reason of the separation of Mr. and Mrs. Gorry and the fact that Mr. Gorry, the Irish citizen, is no longer seeking to have Mrs. Gorry live with him in Ireland, then in these special circumstances the order of *certiorari* notwithstanding, the matter should not be remitted to the Minister for a further decision.

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 27th day of October 2017

1. This is an appeal brought by the Minister for Justice and Equality against the decision of MacEochaidh J. delivered on 30th January 2014: see *Gorry v. Minister for Justice and Equality* [2014] IEHC 29. I have had the benefit of reading in advance the judgment which Finlay Geoghegan J. has just delivered and with which I also agree. I gratefully adopt her summary of the facts and her analysis of the difficult constitutional point which this appeal and the other related appeals present.

Article 8 ECHR and Article 41 of the Constitution

2. As Finlay Geoghegan J. has noted in her judgment, this matter arises from the marriage of Mr. Gorry, an Irish national, to Ms. Gorry, a Nigerian citizen. After their marriage the couple decided that they would live in Ireland and Ms. Gorry sought residence permission in this State for this purpose. Mr. Gorry had previously travelled to Nigeria, but he found the heat and the humidity in that country did not suit his pre-existing medical condition. Indeed, according to the applicants, after one trip to Nigeria in 2010 Mr. Gorry became very unwell and he was medically advised against further travel to that region.

3. The claims of the Gorrys were considered by the Minister for Justice and Equality in her file note of 6th July 2012. In that note the claim of Ms. Gorry, a Nigerian national, to have her earlier deportation order revoked and to have an entitlement to reside in Ireland is first analysed at some length by reference to Article 8 ECHR and then, subsequently, by reference to Article 41 of the Constitution. It is difficult to avoid the impression from reading the Minister's file note that she took the view that Article 8 ECHR was to be treated as being directly applicable in our domestic law and, in substance, the principal source of protection of the right to family life, with Article 41 in effect relegated to a subsidiary position.

4. Article 41 was, moreover, treated by the Minister as amounting in substance to having the same legal status and legal content as Article 8 ECHR, so that the claim by reference to Article 41 was treated more or less as supplementary to the ECHR claim. No attempt was made by the Minister to subject the constitutional claim to any detailed analysis independently of that of Article 8 ECHR, beyond observing that there was no authority for the proposition that Article 41 of the Constitution conferred a right upon a citizen to reside in Ireland with his or her spouse:

> "As found by the Courts, there appears to be no authority which supports the proposition that an Irish citizen or a person entitled to reside in the State may have a right under Article 41 of the Constitution to reside with his or her spouse in this jurisdiction. Reference is made to the consideration of the position of the couple, as well as the rights of the State under Article 8 [ECHR] consideration above and the conclusions reached therein."

5. One cannot help thinking that there has been an inversion of the appropriate legal norms on the part of the Minister, along with some confusion regarding the legal status of the ECHR in the domestic law of the State. It may accordingly be appropriate to re-state some key legal propositions in this area. Before doing so, it is important to stress that the analysis which follows is premised entirely on the existence of a valid and regular marriage which would be so recognised under the law of this State. It also assumes that the marriage in question is a genuine and subsisting one.

6. First, the European Convention of Human Rights has not in *itself* been made part of the domestic law of the State for the purposes of Article 29.6 of the Constitution. The Oireachtas has rather elected to give effect to the ECHR by means of the European Convention of Human Rights Act 2003 ("the 2003 Act") in a particular way. The Long Title of the 2003 Act explains the object of that Act as being one "to enable further effect to be given, subject to the Constitution, to certain provisions of the Constitution." The Long Title of the 2003 Act accordingly recognises the primacy of the Constitution so far as the protection of fundamental rights is concerned. This primacy is underscored by s. 5(1) of the 2003 Act which provides that a declaration of Convention incompatibility may be made only "where no other legal remedy is adequate and available", *i.e.*, thereby implying that a plaintiff must first pursue his constitutional remedies and that it is only where such are inadequate or unavailable that the Convention issue should then be determined.

7. This was the very point which was made by the Supreme Court in *Carmody v. Minister for Justice and Equality* [2009] IESC 71, [2010] 1 IR 635 where Murray C.J. stated:

> "Where a citizen's constitutional rights are violated, statute law or some other rule of law may provide a remedy which vindicates such rights. Where a statute or a rule of law does not provide a remedy for the violation of such a right the citizen is entitled to rely on the provisions of the Constitution for a remedy in vindication of the right. That is what the appellant has done in this case in relying on the provisions of the Constitution, and the principles which flow from it, as affording him a remedy for the alleged breach of his rights. It hardly needs to be said that the provisions of the Act of 2003 cannot compromise in any way the interpretation or application of the Constitution, a principle which is acknowledged in the Long Title to the [2003] Act which states that the effect of the Act is "subject to the Constitution.
>
> Accordingly the Court is satisfied that when a party makes a claim that an Act or any of its provisions is invalid for being repugnant to the Constitution and at the same time makes an application for a declaration of incompatibility of such Act or some of its provisions with the State's obligations under the Convention, the issue of constitutionality must first be decided. If a Court concludes that the statutory provisions in issue are incompatible with the Constitution and such a finding will resolve the issues between the parties as regards all the statutory provisions impugned, then that is the remedy which the Constitution envisages the party should have. Any such declaration means that the provisions in question are invalid and do not have the force of law. The question of a declaration pursuant to s. 5 concerning such provisions cannot then arise. If, in such a case, a Court decides that the statutory provisions impugned are not inconsistent with the Constitution then it is open to the Court to consider the application for a declaration pursuant to s. 5 if the provisions of the section including the absence of any other legal remedy, are otherwise met."

8. It is necessarily implicit in this that where (as here) litigants make a claim that their constitutional rights have been infringed, it is this claim which should be considered first by the Minister and it is only in the event that the constitutional claim should fail that the Convention issue should then be considered. Any other approach takes from the primacy of the Constitution as the fundamental law of the State and the principal repository of the protection of fundamental rights in this jurisdiction.

9. Second, the Minister's approach effectively treats Article 8 ECHR as a directly applicable provision which can be directly enforced as if it were part of the law of the State. As the Supreme Court has frequently made clear, this approach to the ECHR is fundamentally wrong: see, *e.g.*, *McD v. L.* [2009] IESC 71, [2010] 2 IR 199; *MD v. Ireland* [2012] IESC 10, [2012] 1 I.R. 167. The Minister's task under the 2003 Act is instead rather to ensure that he performs his statutory functions "in a manner compatible with the State's obligations under the Convention provisions": see s. 3(1) of the 2003 Act.

10. Third, the Minister's analysis assumes that the content and structure of Article 41 of the Constitution is in all material respects substantially similar to that of Article 8 ECHR. The file note makes no attempt to consider or analyse the relevant constitutional provisions. It may be helpful next to consider and compare the relevant provisions of both Article 41 and Article 8 ECHR.

Article 41 of the Constitution and Article 8 ECHR: a comparison

11. Article 8 ECHR provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic 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."

12. Article 41.1 of the Constitution provides:

> "1. The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
>
> 2. The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."

13. Article 41.3 pledges that the State will guard the institution of marriage with special care.

14. It is obvious that there is a good deal of overlap between these constitutional provisions and Article 8 ECHR, as it is clear that both endeavour to protect family life. There are nonetheless clear differences between these provisions: the most obvious difference, perhaps, is that Article 8 ECHR protects all forms of family life, including *de facto* families (see, *e.g.*, *Keegan v. Ireland* (1994) 18 EHRR 342), whereas the constitutional protection in Article 41 extends only to the family based on marriage: see, *e.g.*, *WOR v. EH (Guardianship)* [1996] 2 I.R. 248.

15. But so far as the family based on marriage is concerned, there are clear differences of approach. Article 8(1) ECHR speaks simply of the right to "respect" for family life, whereas Article 41.1 describes the family as a "moral institution" possessing "inalienable and imprescriptible rights, antecedent and superior to all positive law." As I have observed elsewhere (see, *e.g*, *Wicklow County Council v. Fortune* [2012] IEHC 406), these latter terms are clear echoes of similar phrases used in the constitutional traditions of continental Europe in the 19th and early 20th century and they are used in

a general philosophical, rhetorical and perhaps even lyrical sense.

16. It cannot be supposed that the drafters who used these often high-sounding phrases meant that these words were to be taken absolutely literally. Rights so described can of necessity sometimes be breached, taken away or lost through passage of time. The very language of Article 42A.2 is itself testament to this. It was never intended, for example, that a parent who abused or abandoned a child could not lose access or custody in respect of that child, even if these parental rights were described as "inalienable", just as much as in a slightly different setting it could not plausibly be argued that a private home built without appropriate planning permission could never be demolished or (subject to important safeguards) a family home re-possessed by a bank, no matter what Article 40.5 said about the "inviolability" of the dwelling: see, *e.g.*, the comments of McKechnie J. in this respect in *Meath County Council v. Murray* [2017] IESC 25, [2017] 2 I.L.R.M. 297, 335-337.

17. Yet even if these phrases in Article 41 were not meant to be taken absolutely literally, nonetheless their underlying purpose nevertheless cannot be discounted or ignored. The drafters of the Constitution clearly intended thereby to secure the maximum possible degree of protection which might realistically be secured to the protection of family life in a modern society. It is difficult to see how the drafters could have used any stronger and more emphatic language. Unless, therefore, language is to lose all meaning, the fact that Article 8 ECHR refers simply to "respect" for family life, whereas Article 41.1 speaks in more emphatic terms of the rights of the family as being "inalienable and imprescriptible", is itself an important consideration which cannot be ignored or set aside.

18. Second, it should be observed that the family is described by Article 41.1 as a "moral" institution – language which finds no direct counterpart at all in Article 8 ECHR. As I observed in *O'Leary v. Minister for Justice and Equality (No.1)* [2011] IEHC 256 – a case concerning the question of whether an Irish citizen had the right to bring her elderly and frail South African national parents into the State - this feature of Article 41.1 pre-supposes:

> "….. a system of natural love and support based on ties of blood, kinship and friendship. …..Providing support for parents in advancing years is one dimension of the moral nature of the family as an institution. This precept has been a cornerstone of our moral understanding for at least 2,000 years and it has deep roots in all societies, religions and social systems. By enacting Article 41 of the Constitution, the People clearly espoused a desire to protect the family and to uphold these deeply cherished fundamental values associated with family life…"

19. Co-habitation and joint decision-making of the married couple are also quite obviously - and, if anything, even more fundamental - features of the family as a moral institution in this sense.

20. Third, it is clear that spousal autonomy in respect of all decisions affecting the family is a core constitutional value. This, in essence, is what is embraced by Article 41.1.2 when it speaks of protecting the Family "in its constitution and authority". These are terms and concepts which again find no direct expression in Article 8 ECHR.

21. The reference here to "constitution" of the family is plainly used in the sense of the composition of the family. This is underscored by the Irish text of the Constitution ("… ráthaíonn an Stát comhsuíomh agus údarás an Teaghlaigh a chaomhnú…"), since the word "comhsuíomh" is simply a verbal noun implying composition (literally, "sitting together"): see Ó Cearúil*, Bunreacht na hÉireann: A Study of the Irish Text* (Dublin, 1999) at 594. The reference to "authority" is a reference to the authority of the marital

couple to make joint decisions concerning their family life.

22. The principle of spousal autonomy thus includes, for example, the right of a couple to make joint decisions about the ownership of a family home as part of the "authority" of the family in Article 41.1.2 which the State guarantees to support: see *Re Article 26 and the Matrimonial Homes Bill 1993* [1994] 1 I.R. 305. The same is true of decisions made by the couple regarding family planning and contraception as these are also part of that "authority" as well: see *McGee v. Attorney General* [1974] IR 284.

23. The general approach of the courts in respect of that principle of spousal autonomy was well summed up by Murray J. in *North Western Health Board v. H.W*. [2001] 3 IR 622, 738:

> "I think it is well established in our case law that the authority and autonomy explicitly recognised by the Constitution as residing in the family as an institution in our society means that the parents of children have primary responsibility for the upbringing and welfare generally of their children. When exercising their authority in that regard they take precedence over the State and its institutions….the family is endowed with an authority which the Constitution recognises as being superior even to the authority of the State itself. That is not to say that the authority of parents is absolute or that they are immune from State intervention in all circumstances when exercising that authority….."

24. While these comments were made in the context of parental autonomy over children, these principles also apply to other decisions made by the family in respect of its composition and autonomy. One of these decisions concerns decisions as to where the couple will live. In this context, it should be observed that one part of the "birthright" of every Irish citizen is to live and reside in Ireland should he or she choose to do so: this much is necessarily assumed and directly implied by both Article 2 and Article 9 of the Constitution.

25. While the State is thus obliged to protect this family autonomy, it is clear from the wording of Article 41.1.2 that this autonomy is subject to social order and ensuring the welfare of the Nation and the State. All of this presupposes that the State cannot be expected to protect or give effect to that particular family decision regarding choice of family residence where it is established that State intervention to advance other important social goals (including immigration control) is objectively justified.

26. Considerations of the social order envisaged by Article 41.1.2 include the deterrence of crime, the manipulation of the immigration system, the control of the entry by foreign nationals into the State and the maintenance of the integrity of the social security and health systems. An example of the latter condition is provided by the decision in *O'Leary*.

27. In that case the Minister had denied permission to two South African nationals to enter the State. The foreign nationals in question were frail and elderly who lived in an isolated South African community where they were vulnerable to criminal gangs and were some distance from medical facilities. Not unnaturally, their daughter (who was an Irish citizen) wanted them to come and live with her and her husband in Ireland so that they could be cared for and looked after by her.

28. That decision clearly engaged the Article 41 rights which I have just described. Given that these parents were of good character and, in view of their age, did not present potential competition in the labour market, it could be said that the State's interests based on social order in preventing or interfering with that decision were not as pressing as in some other cases. Yet, as I put it in my judgment, the State was

nonetheless entitled to insist that the elderly parents:

> "….would not be charges on any public funds. Given that our system of health care for the elderly presupposes a form of intergenerational dependence - so that the tax and social security contributions of the present generation of taxpayers is premised on the implicit solidarity to be shown by the next generation of taxpayers when the present generation retires – it is only fair that the State should be able to insist that persons who made no such contributions to this State (or, where appropriate, another EU or EEA State) while employed should [not] be able to do so in their retirement years. This means that the Minister would be entitled to insist as part of any visa condition that the Lemieres [the parents] would not seek to draw on public funds or avail of the wider Irish social security system. The Minister would be further entitled that the Lemieres have up to date and comprehensive private health insurance to ensure that there was no drain on public resources in the health care field."

29. It is against that general background that the Minister's decision falls to be considered. It is incorrect to say that the couple are entitled to insist as a matter of constitutional entitlement that their choice of residence must always be accepted by the State. But it is equally incorrect to say – as the Minister in effect did - that the couple's choice need not be respected unless it is shown that there would be "insurmountable obstacles" to the Irish citizen moving to the country of the third country national, which is essentially the test applied by the European Court of Human Rights in a line of Article 8 ECHR cases ranging from *Boultif v. Switzerland* [2001] ECHR 497, (2001) 33 EHRR 50 to *Jeunnesse v. Netherlands* [2014] ECHR 1036, (2015) 60 EHRR 17. For all the reasons I have just stated, Article 41 of the Constitution goes further than Article 8 ECHR in this regard.

30. What is required here is something of a via media between these potentially competing positions. Unlike the position under Article 8 ECHR, the starting point is that the couple's choice of country of residence must be considered and given considerable weight by the Minister, not least given that in this context at least the right of the Irish citizen to reside in Ireland is for all practical purposes an absolute one. The Minister must then take account of and balance other competing State interests – ranging from the suppression of crime, maintaining the integrity of the asylum system, guarding against unfair competition in the labour market from third country nationals and protecting the social security system. The fact that the couple married when the immigration status of the non-national was known to be precarious is yet another factor which can be weighed in the balance, although *in itself* it is not necessarily always a dispositive feature. This balancing process must furthermore be proportionate and must respect the constitutional rights of the parties in the *Meadows* sense of this term (*Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 510).

Conclusions

31. In summary, therefore, I agree with the conclusions of Finlay Geoghegan J. that the Minister erred in law in assessing the Gorrys' constitutional rights under Article 41 of the Constitution for all the reasons I have just stated. One can sum this all up by saying that the Minister fell into error by assuming (i) that Article 8 ECHR was directly effective and that it was the primary source of fundamental rights protection; (ii) that Article 41 of the Constitution and Article 8 ECHR are co-extensive for this purpose and (iii) that Article 41 goes no further than Article 8 ECHR in saying that the State is not obliged to respect a married couple's choice of residence unless the "insurmountable obstacles" test is satisfied.

32. In the light of the fact, however, that the couple have now separated after the commencement of these proceedings I further agree with Finlay Geoghegan J. that in these circumstances it no longer necessary to remit the matter to the Minister for a fresh consideration pursuant to Ord. 84, r. 21(1) RSC.

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