H93



# High Court of Ireland Decisions



**Judgment Title:** F.E [A Minor] & Ors -v- The Minister for Justice and Law Reform

**Neutral Citation:** [2013] IEHC 93

**High Court Record Number:** 2009 966 JR

**Date of Delivery:** 28/02/2013

**Court:** High Court

**Composition of Court:**

**Judgment by:** McDermott J.

**Status of Judgment:** Approved

Neutral Citation [2013] IEHC 93

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2009 No. 966 J.R.]**

**BETWEEN**

**F.E. (A MINOR ACTING BY HER FATHER AND NEXT FRIEND, M.E.) AND B.E. (A**

**MINOR ACTING BY HIS FATHER AND NEXT FRIEND, M.E.) AND M.A.E. (A MINOR ACTING BY HIS FATHER AND NEXT FRIEND, M.E.) AND M.E. AND E.E**

**APPLICANTS**

**AND**

**THE MINISTER FOR JUSTICE AND LAW REFORM**

**RESPONDENT**

**JUDGMENT of Mr. Justice McDermott delivered the 28th day of February, 2013**

1. This is an application for an order of *certiorari* by way of judicial review quashing the deportation order issued against the fourth named applicant, M.E., on 27th August, 2009. A declaration is also sought that the legal and/or constitutional rights of the applicants and/or their family rights under the European Convention on Human Rights have been infringed. Leave to apply for judicial review was granted on 16th February, 2011 (Hogan J.) on the single ground that:-

> "The decision of the respondent to make a deportation order against the fourth named applicant on the basis that the legitimate aim of the State to prevent crime and disorder constituted a substantial reason associated with the common good which required his deportation, having regard to the conviction recorded against him, was disproportionate in all the circumstances, in that it infringed the applicants' Constitutional and Convention rights."

**Background**

2. M.E., the fourth named applicant, is a citizen of Nigeria born on the 1st January, 1978. He arrived in Ireland on the 27th July, 2003, illegally and was refused leave to land. He applied for asylum but his application for a declaration of refugee status was refused. On the 9th February, 2005, M.E. applied for permission to remain in the state by reason of his parentage of an Irish born child pursuant to the IBC/05 Scheme. This Scheme enabled a non-national to apply for leave to remain in the state on the basis of his parentage of an Irish born child, born before the 1st January, 2005.

3. M.E. is married to E.E., the fifth named respondent, who is the mother of his four children. She was born on the 13th January, 1983, and is also a Nigerian citizen. The first named applicant, F.E., a girl, was born in Ireland on the 1st August, 2003. The second named applicant, B. E., a boy, was born in Ireland on the 25th September, 2004. They are both Irish citizens. The third named applicant, M.A.E, was born on the 19th February, 2009 and is an Irish citizen on the basis that his mother was legally resident in the state for a period of at least three of the previous four years at the time of his birth. The couple's fourth child, B.O.E., a girl born on the 5th June, 2006, in Ireland is not an Irish citizen but is entitled to Nigerian citizenship.

4. Mrs. E.E. has been granted permission to remain in the state on the basis of her parentage of an Irish born child since 2005. That permission has been renewed and continues until the 18th November, 2013.

5. Initially, M.E. sought leave to remain under the IBC/05 Scheme by reference to his paternity of F.E. and B.E. and was granted leave to remain in the state for a period of two years from the 18th November, 2005.

6. Under the IBC/05 Scheme the permission to remain could be extended at the conclusion of the two year period at the discretion of the Minister. M.E. applied for an extension of the permission to remain on the 5th October, 2007. In his application he

confirmed that he had been convicted of a criminal offence since the date of his first application and that he was appealing against that conviction.

7. M.E. was convicted of the sexual assault of a woman that occurred on the 30th April, 2004. Following a contested trial, he was sentenced to a period of eighteen months imprisonment on the 26th February, 2007. The maximum sentence for such an offence is ten years imprisonment pursuant to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended by s. 37 of the Sex Offenders Act 2001.

8. The circumstances of the offence were that two African men grabbed a woman on the night of the 30th May, 2004, and held her down on the bonnet of a car. The first man with whom she had been speaking earlier in the night put his hand up her skirt and fondled her bottom. The second man, said to be M.E., came over to the car and fondled her breasts while the first man was still holding her. This was a first conviction for M.E.

9. M.E. was released from prison after thirteen months. He has not been the subject of any conviction subsequent to his release. However, he has been placed on the Sexual Offenders Register for a period of ten years from the date of conviction. Since his release he has lived with his wife and children and has provided them with all appropriate assistance and support as a father and husband. During the course of his imprisonment he was regularly visited by his family and his wife at all times has remained supportive of him.

10. Whilst in prison he made the application for an extension of the permission to remain in the state on the 5th October, 2007. His then permission was due to expire on the 18th November, 2007.

11. By letter dated the 24th April, 2008, M.E. was informed by the Minister for Justice, Equality and Law Reform that his application to renew the temporary permission granted on the 18th November, 2005, had been refused. The letter stated:-

> "It is the requirement for granting temporary permission to remain in the State under the IBC/05 Scheme, and for renewal of that permission, that the applicant must have obeyed the laws of the State and not been convicted of any offence or involved in criminal activity. I note that you were convicted on 26th February, 2007, of attacking and sexually assaulting a female and sentenced to eighteen months imprisonment. On this basis I am satisfied that you do not meet the criteria for the renewal of the temporary permission to remain in the State granted to you on 18/11/2005 and accordingly, your application is hereby refused."

12. By letter dated the 26th May, 2009, M.E. received formal notification that the Minister proposed to consider the making of a deportation order in his case.

13. On the 10th July, 2009, M.E.'s solicitors submitted an application for permission to remain in the state pursuant to s. 3 of the Immigration Act, 1999, primarily on the basis that M.E. was the parent of Irish born children. By letter dated the 27th August, 2009, M.E. was notified that the Minister had decided to make a deportation order against him under s. 3 of the Act, and furnished with a copy of the order and a copy of the Minister's considerations pursuant to s. 3 of the Act and s. 5 of the Refugee Act 1996. The documentation contained the examination of file made under s. 3 of the Immigration Act 1999, as amended. It is that deportation order that is challenged in these proceedings.

**The Deportation Order**

14. The Minister signed the deportation order on 20th August, 2009, following the preparation and submission of an examination of the applicant's file under s. 3 of the Immigration Act 1999, which was completed by Mr. Eamon Foley of the Repatriation Unit on the 28th July, 2009. Following its completion that report was reviewed by Mr. Shay

Fitzgerald on the same date and by Mr. Ben Ryan, Assistant Principal Officer, on 29th July, 2009. The examination of file recommended a deportation order in respect of M.E. It considered each of the matters required to be assessed under s. 3(6) of the Immigration Act 1999, the applicant's right to private life and family rights under Article 8(1) of the European Convention on Human Rights and the constitutional rights of the family and the Irish born children under Articles 40, 41 and 42 of the Constitution. It is important to consider how each of these issues was assessed in the course of the examination of the file.

**The Decision to Deport**

15. The dominating factor in this family's case is that M.E. has been convicted of a serious criminal offence. The nature and circumstances of this assault were clearly matters which the Minister could properly consider when making the deportation order. Though in his submission to the Minister "deep sorrow" was expressed on his behalf to anyone affected by the crime, M.E. continued to maintain his innocence of the offence. Extensive submissions were made on behalf of M.E. that he should be allowed to remain in the state for humanitarian reasons and in order to ensure the preservation of his family unit and the welfare of his children. Submissions were also made that he should not be deported on the basis of the age of his children, the duration of his and the family's residence in the state, the fact that as the father of a very young family his wife and children required his continuing support materially and emotionally, and his and his family's extensive efforts to integrate within the local community.

16. Mrs. E. supported her husband's case. She understandably found it very difficult to cope with very young children whilst he was in prison and she suffered a miscarriage during this time. She submitted to the Minister that she and her husband were completely committed to each other and the children. She described him as a devoted father. Numerous representations from others attesting to other aspects of his good character were submitted including his willingness to work and his potential for employment if allowed to remain in the state. He had not been the subject of any further convictions following his release from prison, had rejoined his family and tried to rebuild his life with them.

17. The family and domestic circumstances of M.E. were considered in accordance with s. 3(6)(c) of the Act and the family history was accurately recorded. The nature of M.E.'s connection with the state was considered under s. 3(6)(d). It was noted that this connection lay in his application for asylum and that he was the parent of three Irish citizen children. He had been granted permission to remain in the state for two years on the basis of his parentage of an Irish born child but this permission was not renewed because he was convicted of attacking and sexually assaulting a female, sentenced to eighteen months imprisonment and placed on the Sexual Offenders Register. In those circumstances it had been determined that M.E. did not meet the criteria for the renewal of the temporary permission to remain in the state granted to him.

18. Under s. 3(6)(e) his employment record was considered and it was noted that he had been employed in Nigeria for six years as a farmer and businessman. He had engaged in several training courses since his arrival in Ireland, had completed a number of FAS and City & Guild courses and had worked for a supermarket between 2006 and 2007. A reference had been submitted in which M.E. was offered a permanent job if his residency were to be renewed in which he could upgrade his welding skills and avail of other training. It was noted that it was not possible to guarantee the honouring of this offer or how enduring this employment would be in the current prevailing economic climate. Under s. 3(6)(g) M.E.'s character and conduct outside the state was briefly set out and his conviction and sentence repeated.

19. Under s. 3(6)(h) an assessment was made under the heading of humanitarian considerations. A submission had been made by M.E.'s solicitors that E.E. had experienced

a miscarriage after a five month pregnancy and it was accepted that this loss would have been extremely difficult for Mrs. E and M.E. It was noted that M.E. had been residing in the state for the previous six years and had made a commendable effort to integrate in the local community and that Mrs. E.E. had permission to remain in the state. It had been submitted that there were significant humanitarian reasons why M.E. should remain in the state "particularly for the preservation of the family unit and the welfare of his family". It was concluded that there was no humanitarian information on file to suggest that M.E. should not be returned to Nigeria.

20. Representations made by or on behalf of M.E. were also considered under s. 3(6)(i) and these included submissions on behalf of M.E. made by his solicitor and E.E. together with a number of references. The main points recorded related to the applicants' family history. Some of it was repetitious. It was submitted that M.E. had played an important role as a father in the upbringing of his children since his arrival. He had formed very close bonds with his children. The children were then very young ranging in age from four months to six years. In particular, it was emphasised that he provided significant support to his wife who had suffered a miscarriage. She would be left with the difficult task of looking after four very young children if he were to be deported. At the time she was commencing a two year employment training course and M.E.'s presence was necessary in order to mind the baby who was then four months old. It was also submitted that he had been integrating into life in Ireland and had made efforts to increase his work skills with a view to obtaining a job in the future. References were considered from friends and acquaintances who attested positively to M.E.'s otherwise good character.

21. Under s. 3(6)(j) it was concluded that it was in the interest of the common good to uphold the integrity of the asylum and immigration procedures of the state. Under s. 3(6)(k) it was acknowledged that considerations of national security had no bearing on the case. However, it was again noted that M.E. had been convicted of a serious criminal offence and therefore, "public policy regarding the prevention of disorder and crime has a bearing on this case".

22. It was accepted in the report that the making of a deportation order in respect of M.E. engaged his rights to respect for family and private life under Article 8(1) of the Convention. The examination of file contains an extensive review of the potential effect of deportation upon the applicant's Article 8(1) rights. In respect of private life, having rehearsed the facts of the case, it was determined that any proposed interference was in accordance with Irish law and pursued a pressing need and a legitimate aim which was the prevention of disorder and crime. It was then considered whether deportation was "necessary in a democratic society" in pursuit of that need and whether it was proportionate. It was concluded that there was no less restrictive process available which would achieve the legitimate aim of the state to prevent disorder and crime other than deportation.

23. A similar approach was adopted to M.E.'s right to family life under Article 8(1). The important issue of proportionality was considered in detail in the report.

24. Regard was had as to whether there were any insurmountable obstacles to the family living together in M.E.'s country of origin, Nigeria. Once again the relevant details of the family were set out and considered. In particular, the three Irish citizen children who were then aged six years, four years and four months were considered to be at an adaptable age should they leave Ireland to live in Nigeria. Their sister, who was not an Irish citizen child, was aged three and was also considered to be of an adaptable age. Two of the children were said to have already started school, though no further details were submitted in respect of their educational progress and it was assumed that they were in the early stages of primary school. In that regard, country of origin information had been submitted in respect of the potential general living conditions of the family should they return to Nigeria including security, social, justice and public health conditions and

educational services available for children of that age. This country of origin information was extensively relied upon in the compiling of the report and considerable attention was paid to it. It was determined, taking into consideration the personal circumstances of the Irish citizen children and their mother and in particular, the young ages of the children, that there were no insurmountable obstacles to the family being able to establish family life in Nigeria. It was also noted that Mrs. E. had the choice to continue to reside in the state with her children since she had permission to remain in the state.

25. M.E.'s parental responsibilities towards the children were also considered as were the family rights of the three Irish citizen children. Some consideration was also given to the fact that to grant permission to remain would have an impact on the health and welfare systems of the state and might lead to similar decisions in other cases. The conclusion was also reached in respect of family rights under Article 8, that considering all the factors relating to the position of the family and "in particular the citizen children" as well as factors relating to the rights of the state, there was no less restrictive process available which would achieve the legitimate aim of the state to prevent disorder and crime. That aim was considered to be a substantial reason associated with the common good that required deportation in this case.

26. The examination of the file then considered the constitutional rights of the Irish born children under Articles 40, 41 and 42 of the Constitution. It correctly identified the constitutional rights of the three children to reside in the state, to be reared and educated with due regard to their welfare, to the society, care and company of their parents as well as the protection of the family pursuant to Article 41. It was correctly stated that these constitutional rights of the Irish born children were not absolute and must be weighed against the rights of the state. It was noted that the state has a right to control the entry, presence and exit of foreign nationals subject to the Constitution and to international agreements. The state was entitled to deport an immigrant family even though it may result in the effective removal of an Irish citizen child. The examination of file acknowledged that the Minister was entitled to take into account the consequences of allowing a particular applicant to remain in the state. It was correctly accepted that if the Minister were satisfied for good and sufficient reason that the common good requires that a non-national parent be removed from the state, he was entitled to make that order even if it meant that in order to preserve the family unit the Irish citizen child must also leave the state.

27. In weighing these rights it was determined that in respect of the serious offence for which M.E. was convicted and sentenced and the legitimate aim of the state to prevent disorder and crime, there was a substantial reason associated with the common good which required the deportation of M.E.

**Criminal Conduct and the Power to Deport – a Substantial Reason**

28. The criminal conduct in respect of which the Minister exercised his discretion to refuse to extend the permission of the applicant to remain in the state and subsequently ordered that he be deported was solely the responsibility of M.E. He committed an offence the serious nature of which may be gauged by the imposition of a sentence of eighteen months imprisonment and his inclusion on the Sexual Offenders Register for a period of ten years. When he applied for the initial permission to remain he was obliged to make a declaration that he would obey the laws of the State as a condition of any permission granted to him to remain in the state. Yet, even as he applied for that permission to remain and made the declaration required of him, the offence of the 30th April, 2004, had already been committed. He has now served that sentence. During the course of his imprisonment his normal family life was disrupted for a period of thirteen months between February, 2007 and April, 2008, family contact was severely reduced and his wife and children were deprived of the daily normal support that a prisoner might otherwise have been able to offer as a husband and father. In normal circumstances upon release after thirteen months of his sentence, M.E. might have expected to resume his role in the

family if that were possible. Clearly, notwithstanding the offence that he had committed, his family welcomed him back and wished to have his continued presence, affection, and support as a father and husband into the future.

29. The decision to deport a foreign national who has committed a criminal offence may only be made by the respondent. It is not the imposition of penalty as part of the sentencing process. It is important to distinguish M.E.'s conviction and sentence in accordance with criminal law and procedure from the decision to deport made under s. 3 of the Immigration Act 1999.

30. Following conviction a trial judge is entitled to make a recommendation that the convicted person be deported, but has no power to order deportation. A judge in imposing a suspended sentence may make it a condition of the suspension that the convicted person leave the country within a specified time or immediately and for a specified period, but this is a condition that may only be realistically deployed when the offender has indicated a willingness to do so as a condition of the suspension or partial suspension of his sentence of imprisonment. The use of this condition as a sentencing tool was challenged by the Director of Public Prosecutions in *The People (DPP) v. Alexiou* [2003] 3 I.R. 513. The accused was convicted of the offence of unlawful possession of cannabis resin for the purpose of sale or supply on a plea of guilty and was sentenced to four years imprisonment suspended on condition that he leave the state immediately. An application was brought by the Director of Public Prosecutions to review this sentence on the grounds of undue leniency. It was contended by the Director of Public Prosecutions that the power to make a deportation order was vested in the Minister for Justice, Equality and Law Reform under s. 3(2) of the Immigration Act 1999, and that the trial judge had no jurisdiction to impose a condition on the accused that he leave the state immediately. It was for the Minister to consider the making of the order "when deportation had been recommended by a court in the state". The Court of Criminal Appeal rejected the proposition that the condition imposed by the trial judge was equivalent to an order for the deportation of the accused and intruded upon the executive power of the Minister. The court acknowledged that there was a common practice in the criminal courts that non-nationals could be bound over to leave the state for a specified period, though different considerations arose in respect of Irish citizens and European Union nationals. The court noted that though it was not concerned with an abstract view of the conditions which can be imposed when a sentence is suspended:-

> "…for the purposes of this case it may be said that conditions which are attached to suspended sentences usually reflect either something which the accused is bound to do in any case, such as to be of good behaviour and observe the law, or something which he has told the court he intends or wishes to do. This approach undoubtedly reflects a prudent concern on the part of the courts to avoid the risk of imposing a condition which would be tantamount to imposing a penalty not envisaged by the law. This could arise in the case, for example, of a non-national who was habitually resident in the state and in which he had worked for many years and raised his family. Where the only penalty prescribed by law was a fine or imprisonment, a suspended sentence conditional on such a person leaving the state against his express wishes, could be considered so extraneous to the penalties imposed by law and beyond the discretionary powers of sentencing vested in a trial judge. If, in such a case, the nature of the offence appeared to the judge to be one which called into question the appropriateness of the accused being permitted to reside in the country, then he would have available to him the statutory power to make a recommendation to the Minister for Justice, Equality and Law Reform that he be deported. It would then be for the Minister, in his executive discretion, to decide on that matter.

> Different considerations arise where an accused, who, prior to his conviction, had little or no connection with this country and he is required, as a condition of a suspended sentence, to return to the country of which he is a citizen or in which he has been habitually resident. Although it may be a subsidiary part of the trial judge's considerations, such an order does have the advantage of further eliminating the risk that the offender might commit further offences in this country or be a further burden on the taxpayer. Of course all of these matters depend on the circumstances of the case including any declared intention of an accused to return to his own country as soon as he is free to do so. It should be noted that the court is here considering the kind of condition and form of order which a court may make and it is not being suggested that a convicted person be given a suspended sentence simply because he is a non-national with no connection with this country. That…depends on the gravity of the offence and the circumstances of the case." (p. 526)

31. The Court of Criminal Appeal stated that if imposing a condition that a convicted person leave the country, the court should confine itself to a defined period of time. It stated:-

> "The court, however, does take the view that imposing an open-ended condition that the accused never return to this country is not, in principle, good practice. If a condition requiring a convicted person to leave the country is imposed the better practice would be to do so for a defined period of time proportionate to the offence. Otherwise there is a risk that such a condition could have a disproportionate punitive effect. Many years later such a person might have good reason to return to the country for a short period of time. There are many hypotheses, whether it be to attend a three day conference or visit a dying relative. That a visit for such purposes could lead to the final imposition of a severe custodial sentence could have a disproportionate effect. Such an order might also unduly circumscribe the powers of the Minister for Justice to grant non-nationals leave to enter the state for specific purposes. Of course it would always be open to the Minister in the exercise of his discretionary powers, to refuse such a person leave to enter the state if he considered that the earlier conviction warranted such a refusal."

32. The power to deport non-nationals convicted of criminal offences lies with the Minister for Justice and Law Reform alone. The jurisdiction vested in a criminal court to impose conditions upon a non-national convict to leave the state is very limited. The power is exercised within a much narrower band of sentencing principles than those that apply when considering the deportation of a non-national under s. 3 of the Immigration Act 1999.

33. The Minister is entitled under s. 3 to apply a broad range of policy considerations including those related to the common good, the prevention of disorder and crime and the application of immigration policy. It is clear that criminal conduct on the part of a non-national, whether it be a parent of an Irish citizen child or not, may within these wide principles provide the basis for a decision to deport. Section 3(1) of the Immigration Act 1999, empowers the Minister to "require any non-national specified in the Order to leave the State within such period as may be specified in the Order and to remain thereafter out of the State". Under s. 3(2) of the Act, a deportation order may be made in respect of, *inter alios*,:-

> (a) A person who has served or is serving a term of imprisonment imposed on him or her by a court in the state,
>
> (b) A person whose deportation has been recommended by a court in the

State before which such person was indicted for or charged with any crime or offence,

…

(f) A person whose application for asylum has been refused by the Minister,

…

(h) A person who, in the opinion of the Minister, has contravened a restriction or condition imposed on him or her in respect of landing in or entering into or leave to stay in the State,

(i) A person whose deportation would, in the opinion of the Minister, be conducive to the common good."

34. In this case, the deportation order was considered following the refusal of an extension of the permission previously granted to M.E. to remain in the state. Once this extension was refused his status was that of a failed asylum seeker and as such the Minister was entitled to consider his deportation under s. 3(2)(f) of the Act. As part of that decision making process the Minister took into account M.E.'s conviction and concluded that his deportation would be in the common good and in accordance with the state's legitimate interests in the prevention of crime and disorder.

35. It is clear from the terms of s. 3 that there is no limitation of time on the deportation order made under the section. Its duration could be lifelong subject only to the fact that under s. 3(11) of the Act the Minister may make an order revoking the deportation order. Thus, at any time following the making of the deportation order or subsequent to his/her deportation, a deportee may apply to have the deportation order revoked and the Minister may exercise his discretion to do so. This may happen for any number of reasons relating to changed circumstances including family events.

36. It should also be noted that the deportation order under consideration in this case was made solely against M.E. and there is no obligation of any kind imposed by that order upon the children or Mrs. E.E. to leave the state. On the contrary, the court has been informed by counsel for the applicant that M.E. and E.E. have decided that whatever the result of these proceedings, E.E. and the children of the family will remain in the state if M.E. is obliged to return to Nigeria. Thus, there is no argument to be made that by reason of the removal of M.E. from the jurisdiction, E.E. and the children would be obliged or forced to return to Nigeria by reason of their being dependent upon him.

37. Two examples of cases in which the Minister was found to have deported offenders lawfully were cited to the court. In *Falvey & Ors v. Minister for Justice, Equality and Law Reform & Ors* [2009] IEHC 528, Dunne J. considered whether the respondent had acted disproportionately in placing undue weight on the applicant's criminal convictions. It was accepted that criminal convictions were relevant factors to be weighed in the balance by the respondent when considering deportation. The court refused leave to apply for judicial review in circumstances in which the applicant had been convicted of minor criminal offences and was the father of two Irish citizen children. The court did not accept that the respondent's decision to deport the applicant was disproportionate having regard to the nature of the criminal offences involved. The court noted that other factors had been considered by the Minister including the rights of the children, important country of origin information, the implementation of immigration policy, the right of the state to maintain control of its own borders and operate a regulated system of control, the processing and monitoring of non-nationals in the state and other relevant factors. The *Falvey* case is an illustration of how the criminal convictions of a non-national parent of an Irish citizen child may properly be considered in the exercise of the power to deport. Once the decision to

deport is made in accordance with the guideline principles set out in *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795 and other cases, the decision will be regarded as lawful.

38. In *S.O. & O.O. & Ors v. Minister for Justice, Equality and Law Reform* [2010] IEHC 343, Cooke J. refused an application for leave to apply for judicial review. A 28 day sentence had been imposed upon the applicant in respect of road traffic offences and a suspended sentence of six months imprisonment for possession of drugs with intent to supply. The emphasis in the examination of file note in respect of the applicant prior to the making of the order was not upon the sentence imposed but upon what was regarded as a "prolonged and flagrant disregard of the criminal laws of Ireland, giving rise to compelling public interest in his deportation". Cooke J. determined that it was not sufficient in order to raise a "substantial ground" merely to allege in the face of a statement of reasons such as that contained in the file note that the contested order was unreasonable because its consequences were disproportionate or the analysis was unsatisfactory or that the consideration of the representations was inadequate:-

> "The burden of establishing a specific illegality remains with the applicant." (at pp. 25 - 26)

Cooke J. determined that the file note addressed in detail all of the relevant considerations required to be taken into account under s. 3(6) of the 1999 Act and then considered, assessed and balanced the matters put to the Minister as pertinent to the rights of the family members under Article 8 of the Convention and the constitutional rights of the Irish citizen children. He concluded that the *Oguekwe* guidelines had been carefully followed and substantial reasons associated with the common good namely, the prevention of disorder and crime and the protection of economic wellbeing of the state had been expressly identified in the analysis carried out. (paras. 55 – 56)

39. In this case the applicant's conviction is the dominating circumstance that prompted consideration and ultimately the making of the decision to deport. The court is satisfied that M.E.'s conviction of a serious sexual assault and the imposition of a sentence of 18 months imprisonment constitutes a substantial reason associated with the common good which justified consideration of his deportation even though he is the parent of Irish citizen children. Of course, the respondent in determining whether to deport the applicant was obliged to give appropriate consideration to the constitutional rights of the Irish citizen children and the other factors set out in the *Oguekwe* decision.

**The Constitution**

40. It is clear that M.E. and E.E., a married couple and their four children, three of whom are Irish born citizens, constitute a family under the Constitution. The Irish born citizen children F.E., B.E. and M.A.E. clearly have a right to reside within the state, to be reared and educated with due regard to their welfare and a constitutional right to the society, care and company of their parents. They are entitled to all of the protections conferred upon them as members of a family under Article 41 of the Constitution. However, these rights are not absolute as Murray J. stated in *A.O. & D.L. v. Minister for Justice* [2003] I.R. 1 at p. 91:-

> "A child or infant of non-national parents has, *prima facie*, a right to remain in the state. While in the state such a child has the right to the company and parentage of its parents. These rights are not absolute but are qualified. The rights do not confer on the non-national parent any constitutional or other right to remain in the state. The rights referred to are qualified in the sense that the respondent, having had due regard to those rights and taking account of all relevant factual circumstances, may decide, for good and sufficient reason, associated with the common good, that the non-national parents be deported, even if this necessarily has the effect that the child who is a citizen leaves the state with its parents. In deciding whether there is such good and sufficient reason in the interests of

> the common good for deporting the non-national parents, the respondent should ensure that his decision to deport, in the circumstances of the case, is not disproportionate to the ends sought to be achieved."

41. In *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795, the non-national father of an Irish born citizen child was refused permission to remain in the state under the IBC/05 Scheme. Representations were made that he be allowed to remain on the basis that deportation would divide his family, his son would be forced to leave the state thereby denying him his rights as a citizen and that it was not safe for the father or mother to return to Nigeria. Later, the child's mother was granted residency under the IBC/05 Scheme but the Minister ordered the deportation of the father. The father was deemed by the Minister not to come within the terms of the IBC/05 Scheme.

42. The Supreme Court considered the extent to which the Minister was obliged to have regard to the personal rights of an Irish citizen child under Article 40.3.1 of the Constitution when considering a deportation order against the non-national parent. These rights included:-

> "1. The right to live in the state.
>
> 2. The right to be reared and educated with due regard to his/her welfare including a right to have his/her welfare considered in the sense of what is in his/her best interests in decisions affecting him/her.
>
> 3. Where as in the case of the applicants herein the parents are married to each other, the rights which as an individual the child derives from being a member of the family within the meaning of Article 41."

Denham J. indicated that these rights were not absolute and had be weighed and balanced in the context of all the circumstances of the case. The decision maker was obliged to include the following elements in determining such a case:-

> "(i) It must consider the facts relevant to the personal rights of the citizen child protected by Article 40.3 of the Constitution if necessary by due inquiry in a fair and proper manner; and
>
> (ii) It must identify the substantial reason at the relevant time, which requires the deportation of the non-national parent of the Irish citizen; and
>
> (iii) It must demonstrate that the respondent considered deportation having regard to each of the above, to be a reasonable and proportionate decision."

Each case was to be determined on its own circumstances in accordance with law.

43. The Supreme Court Considered how the court should apply the principles of reasonableness and proportionality when a decision limits or encroaches upon a persons constitutional rights *in Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701. Fennelly J. stated that a court should consider any challenge to an administrative decision on substantive grounds in the following manner:-

> "I would say that a court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied on the basis of evidence produced by the applicant, that the decision is unreasonable in the sense that it plainly and unambiguously flies in the face of fundamental reason and common sense. I use the word "substantive", to distinguish from procedural grounds and not to imply that the courts have jurisdiction to trespass on the administrative preserve of

> the decision maker. This test, properly applied, permits the person challenging the decision to complain of the extent to which the decision encroaches on rights or interests of those affected. In those cases, the courts will consider whether the applicant shows that the encroachment is not justified. Justification will be commensurate with the extent of the encroachment. The burden of proof remains on the applicant to satisfy the court that the decision is unreasonable in the sense of the language of Henchy J.. The applicant must discharge that burden by producing relevant and cogent evidence…."

The reference to the language of Henchy J. is to the *State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642 in which he had emphasised that courts could intervene to quash decisions on grounds of unreasonableness where the conclusion simply did not follow from an original premise.

44. Murray C.J. stated at para. 62:-

> "It is inherent in the principle of proportionality that where there are grave or serious limitations on the rights and, in particular, the fundamental rights of individuals as a consequence of an administrative decision the more substantial must be the countervailing considerations that justify it."

The learned Chief Justice also stated at para. 70:-

> "I am of the view that the principle of proportionality is a principle that may be applied for the purpose of determining whether, in the circumstances of a particular case, an administrative decision may properly be considered to flow from the premises on which it is based and to be in accord with fundamental reason and commonsense. In applying the principle of proportionality in this context I believe the court may have regard to the degree of discretion conferred on the decision maker. In having regard to the degree of discretion a margin of appreciation should be allowed to the decision maker in choosing an effective means of fulfilling any legitimate policy objectives."

45. In that regard Denham J. (as she then was) considered the standard of judicial scrutiny appropriate to a case in which constitutional rights were engaged. In construing whether a decision was reasonable she stated at para. 171:-

> "It is part of that analysis to determine whether it was within the implied constitutional limitation of jurisdiction which affects rights, whether the decision was proportionate."

The learned judge defined the applicable test at para. 180:-

> "This test includes the implied constitutional limitation of jurisdiction of all decision making which affects rights and duties. *Inter alia*, the decision maker should not disregard fundamental reason or commonsense in reaching his or her decision. The constitutional limitation of jurisdiction arises, *inter alia*, from the duty of the courts to protect constitutional rights. 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 objectives 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."

46. In *Isof v. Minister for Justice, Equality and Law Reform (No.2)* [2010] IEHC 457, Cooke J. considered the application of the Meadows decision in respect of cases under the

Immigration Act 1999, as follows:-

> "Where the validity of an administrative or quasi judicial decision comes before the court on judicial review, the court's starting point is the decision itself; the basis upon which it has been reached and the process by which it has been decided. It does not have before it an appeal against the decision, much less a merits based appeal by way of re-adjudication of the original issue. Its jurisdiction is based upon the content of the decision and the law applicable thereto. Where the challenge to the decision is based upon the assertion that it has the effect of intruding disproportionately upon the fundamental rights of those affected by it, it is the duty of the court to assess whether the applicant demonstrates that it is disproportionate in the sense of being irrational or unreasonable according to the *Keegan/O'Keeffe* test. It does so by reference to the evidence, information and documentation available to or procurable by the decision maker at the time. It does not take account of new information or evidence which has been available since the decision was made. (In the case of a deportation order, the remedy in that regard lies in an application for revocation under s. 3(11) of the Immigration Act 1999, a decision on which is itself susceptible of judicial review for proportionality where necessary) In the judgment of the court no material difference exists between the evaluation of proportionality as regards the interference with "qualified rights" (as in the present case) and "absolute rights" (as in the case of *Meadows*). If constitutional rights are in issue (whether absolute or qualified) it is the function and duty of the High Court to vindicate them. The same can be said for rights entitled to protection under the European Convention on Human Rights and the need for the High Court, in compliance with Article 13 of the Convention, to provide an effective remedy for that protection…"

47. Cooke J. noted that the Supreme Court in *Meadows* had rejected the need to alter the "intensity" or level of judicial review to be applied in cases in which fundamental rights or convention rights were engaged. He stated:-

> "It remains the case however, …that judicial practice in the exercise of the judicial review function is capable of adapting to accommodate the need to examine the substantive content of a decision having impact on fundamental rights in order to evaluate the lawfulness of its encroachment on those rights without thereby supplanting the administrative decision with a new decision of its own…By examining the substance of the effect of an interference brought about by an administrative decision on fundamental rights of an applicant for judicial review in order to assess whether it goes beyond a lawful encroachment, the court is not substituting its own view of what the decision ought to be but is testing it by reference to what is objectively reasonable and common sense."

This approach was adopted and applied by Hogan J. in *Efe v. Minister for Justice, Equality and Law Reform, Attorney General and Ireland (No.2)* [2011] 2 I.R. 798.

48. In *Alli (A minor) v. Minister for Justice* [2010] 4 I.R. 45, Clark J. considered the application of the test of proportionality and the balancing of competing rights of children and those of their family with the state's rights and obligations in the context of a failed asylum seeker. The learned judge concluded that proportionality in the context of the balancing of constitutional and Convention rights:-

> "…requires a consideration of all the facts and circumstances of the case so as to ensure that the interference by the state with the fundamental right is necessary in a democratic society, in pursuance of a pressing social need and goes no further than is necessary to achieve those aims."

49. The court is satisfied that the evidence in this case establishes that the constitutional rights of the parents and their Irish born children were fully considered in accordance with the principles outlined above. The examination of the file already summarised contains a careful consideration of their circumstances, the relationship between children and

parents, matters relevant to the children's education, and the potential consequences for the applicants of any deportation order made against M.E.. Consideration was also given to the effect of a deportation order upon the exercise by the parents of their parental and other family rights guaranteed by the Constitution. It is not for the court to substitute its own decision but to ensure that it was reached in accordance with law. The question is whether any interference with these constitutional rights as a result of the making of a deportation order was disproportionate in the sense that it constituted an unlawful encroachment on those rights. The respondent was entitled to take into account the broader considerations of public policy such as the prevention of disorder or crime, the integrity of the immigration system, its consistency and fairness to others in the state and other matters relating to the common good when considering the applicants' constitutional rights. The respondent was also entitled to take into account the consequences of allowing a particular applicant to remain in the state where that would inevitably lead to similar decisions in other cases. It is clear from the examination of file submitted to the Minister that all relevant facts and submissions were considered.

50. M.E. arrived in Ireland in July, 2003 and had been in the state less than five years when he was informed that his temporary permission to remain in the state would not be renewed in April, 2008 and approximately six years when the order for deportation was made on 20th August, 2009. During that time he spent some thirteen months in custody while serving his sentence. Once his permission to reside lapsed he had no right to remain in the state. Further, the criminal conviction was a matter which the Minister was entitled to consider as a substantial ground justifying his deportation on the basis of the common good and the prevention of disorder and crime. The rights of the family and the children were considered and weighed with the respondent's entitlement and the furtherance of legitimate state interests and it was concluded that:-

> "There is no less restrictive process available which would achieve the legitimate aim of the state to prevent disorder or crime."

The conclusion was also reached that there was no insurmountable obstacle to the family travelling to Nigeria and establishing family life there and in particular that it was not unreasonable having regard to the age of the children and other circumstances of Nigerian life that this should occur. The best interests of the children were considered to the extent appropriate by the respondent in making that decision. The importance of the applicants' family rights and the rights of the children under the constitution was fully acknowledged: they were accurately identified and the impact of deportation upon them was considered. It is implicit in these rights that the children have a right to the care, support and society of their father and that this is in their best interest in normal circumstances. Unfortunately, this is not always achievable and disruption may take place for a number of reasons such as foreign work-placement, family separation or divorce or imprisonment. The reality is that deportation will cause disruption of family life and the decision-maker must take account of the rights of the children when determining whether the interference occasioned by deportation is justified in the sense of being reasonable and proportionate and impair these rights as little as possible. It is clear in this case that the physical, social and educational interests of the children were considered and assessed in that regard. The fact that E.E. had the right to reside in the state with the children was also a significant factor in the decision. The court is satisfied that the applicant has failed to establish that the decision taken by the respondent in this regard is not objectively reasonable and has failed to demonstrate that this decision will intrude upon the fundamental rights of the applicants disproportionately.

51. The issue of proportionality also arises in considering the duty of the state to respect the rights of the applicant as considered by the European Court of Human Rights under Article 8 of the Convention.

**Article 8 of the European Convention on Human Rights**

52. Article 8 of the European Convention on Human Rights in so far as it is relevant,

provides:-

> "1. Everyone has the right to respect for his private and family life…
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others."

53. In *Boultif v. Switzerland* [2001] 33 EHRR 1179, the European Court of Human Rights examined in detail the factors that might be relevant to the assessment of proportionality in considering the application of Article 8 in a deportation case arising out of a criminal conviction. The decision maker must determine a number of matters:-

> (1) Whether there was an interference with the applicant's right under Article 8 of the Convention:
>
> (2) Whether the interference was "in accordance with the law";
>
> (3) Whether the interference pursued a legitimate aim;
>
> (4) Whether the interference was "necessary in a democratic society" – this involves an inquiry as to whether the interests of national security, public safety, the economic wellbeing of the country, the prevention of disorder or crime or the protection of health and morals or the protection of the rights and freedoms of others are engaged.

54. The court noted that the Convention did not guarantee the right of an alien to enter or to reside in a particular country. However, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8(1) of the Convention. The removal will infringe the Convention if it does not meet the requirements of para. 2 of Article 8. The court in *Boultif* held that a fair balance must be struck between the relevant interests namely, the applicant's right to respect for his family life, on the one hand, and the prevention of disorder or crime, on the other. It established a number of guiding principles in order to examine whether the deportation was necessary in a democratic society and stated at para. 48:-

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

55. In *Uner v. the Netherlands* (2007) 45 EHRR, the European Court of Human Rights when applying the criteria set out in *Boultif* stated that it wished to make explicit two further criteria which may be implicit in those identified in the *Boultif* judgment: namely:-

> (i) The best interests and wellbeing of the children, in particular the seriousness of the difficulties which any children of the applicant are likely

to encounter in the country to which the applicant is to be expelled; and

(ii) The solidity of social, cultural and family ties of the host country and with the country of destination." (para. 58)

56. A number of decisions of the European Court of Human Rights were relied upon by both parties. The Minister has a legal duty under s. 3 of the European Convention on Human Rights Act 2003, not to exercise his statutory power in a manner that is inconsistent with the state's obligations under the provisions of the Convention. Many of the cases relied upon concern applicants who had long term residence in the countries from which they were deported.

57. In *Moustaquim v. Belgium* (1991) 13 EHRR 802, the applicant was a Moroccan national born in 1963 who arrived in Belgium with his mother in July, 1965 to live with his immigrant father. He resided in Belgium with his seven siblings, three of whom were born in Belgium. He was a persistent juvenile offender. He was convicted in 1981 of twenty charges of theft and burglary and sentenced to 26 months imprisonment. He spent shorter periods in prison before this conviction on ten different occasions. He was released in 1984, then twenty one. A deportation order had been made against him whilst he was in prison. The court found that there had been a breach of the applicant's family rights under Article 8. It placed particular emphasis on the fact that the offences were committed whilst he was a juvenile over a period of eleven months. He had been in Belgium since he was two and his entire family resided in Belgium, where he had been educated. He had little or no connection with Morocco. The court determined that deportation did not maintain a proper balance between the applicant's family rights and the legitimate state interest in preventing crime and disorder (paras. 44-48).

58. In *Beljoudi v. France* (1992) 14 EHRR 801, the applicant was born in France to Algerian parents in 1950. His mother and siblings were long term French residents. His sister was a French national. He had French nationality until 1963, when he lost it by operation of law as his parents had not made an appropriate declaration on his behalf. He had a long history of serious criminal convictions between 1969 and 1991 in respect of which he had received sentences ranging from six months to eight years imprisonment, the latter for aggravated theft. In 1979 a deportation order was issued against him on the basis that his presence in France was a threat to public order. This order was of indefinite duration similar to the order made under s. 3(1) of the Immigration Act 1999. The European Court of Human Rights determined that deportation was a disproportionate measure and in breach of Article 8 of family rights. It emphasised that the applicant had spent his whole life in France including 20 years of married life. He and his wife had no ties with Algeria at all.

59. In *Yilmaz v. Germany* (2004) 38 E.H.R.R. 23, the applicant was a Turkish national born in Germany whose parents and sisters also lived in Germany. In 1992 he obtained an unlimited permission to reside there. In 1999 he formed a relationship with a German national with whom he had a son. In 1996 he received a suspended sentence for offences including four counts of aggravated robbery. Later in 1996 he received a sentence of three years imprisonment for aggravated assault, occasioning bodily harm and joint coercion to engage in sexual acts. He was released in 1997. In 1998 an order was made excluding him indefinitely from Germany. He was twenty two. Once again, the court in finding a breach of Article 8 found that the deportation was disproportionate and emphasised the fact that the applicant had very little connection with Turkey and had spent all of his life in Germany. His child was very young and he had at the time of the deportation an unlimited permission to reside in Germany.

60. This consideration also weighed heavily with the court in its determination in the case of *Omojudi v. United Kingdom* (Application No. 1820/08 – judgment of 24th November, 2009) [2009] E.C.H.R. 1820. The applicant was born in Nigeria in 1960 and lived there

until 1982 when he arrived in the United Kingdom and was permitted a two months leave to enter as a student. This was extended to 1986. He was joined in the United Kingdom by his partner in 1983 and they married in 1987. They had three children born in 1986, 1991 and 1992 who were all born in the United Kingdom and were British citizens. The eldest child had a daughter. In 1989 the applicant was convicted and sentenced to four years imprisonment on theft and conspiracy to defraud charges and other matters. In 2005, notwithstanding these convictions both the applicant and his wife were granted indefinite leave to remain in the United Kingdom. In 2006 the applicant was convicted of sexual assault for which he was sentenced to fifteen months imprisonment and was registered as a sex offender. The offence was considered particularly serious as the applicant was in a position of trust at the time it was committed. A deportation order was made in 2007 on the basis that it was necessary for the prevention of disorder and crime and the protection of health and morals. The court placed particular emphasis on the fact that the applicant and his wife had lived in the United Kingdom since 1982 and 1983 respectively. Their ties with Nigeria had significantly weakened and they had much stronger ties to the United Kingdom. They had been granted indefinite leave to remain notwithstanding the applicant's criminal record as known to the authorities in 2005. The court attached considerable weight to the solidity of the applicant's family ties in the United Kingdom and the difficulties they would face if returned to Nigeria. Though he and his wife might be able to readjust to life there, the children were not of an adaptable age and would likely encounter significant difficulties if relocated to Nigeria. It was virtually impossible for the eldest to relocate as he had a young daughter born in the United Kingdom. It was noted that the applicant's wife had chosen to remain in the United Kingdom with the children and the granddaughter. It was acknowledged that contact could continue to be maintained and they could visit him in Nigeria from time to time but the disruption to their family life was not to be underestimated. The court concluded that there had been a violation of Article 8 having regard in particular to the circumstances of the applicant's family ties to the United Kingdom, his length of residence and the difficulty that his youngest children would face if they were to relocate to Nigeria.

61. In *A.W. Khan v. United Kingdom* [2010] ECHR 27, the court determined that the applicant a Pakistani who had arrived in the United Kingdom at the age of three, could not be deported at the age of 34 years notwithstanding the fact that he had been convicted of the importation of a significant quantity of heroin for which he received a severe sentence. He had not previously committed any serious criminal offences in the United Kingdom and had not committed offences following release from prison. It was determined that his good conduct since the commission of the offence had a "certain impact" on the assessment of risk which the applicant posed to society. He had no continuing ties to Pakistan. It was found that his deportation would not be proportionate in the circumstances.

62. It is to be noted that all of these cases concern applicants who had long term residence at the time deportation orders were made against them. That does not invariably work in the applicants favour. In *Boughanemi v. France* (Application No. 22070/93 – judgment of 24th April, 1996), the applicant was born in Tunisia in 1960. He was brought to France when he was eight and lived there until he was deported. He resided with his family and ten siblings. He was in a relationship with a French national and had one son born in 1993. Between 1981 and 1987 he was convicted of various offences including assault and living off the earnings of prostitution in aggravating circumstances (using violence) for which he was sentenced to three years imprisonment. A deportation order was made in 1988. In this case the applicant was found to have maintained strong contacts with Tunisia and the Tunisian community in France. He could speak Arabic. He had evinced no intention of seeking French nationality. Above all, the court placed particular importance on the fact that the deportation was made after he had been sentenced to a long period of imprisonment for very serious offences which weighed heavily against him.

63. In *Grant v. United Kingdom* (2009) ECHR 26, the applicant arrived in the United

Kingdom at the age of fourteen. It was proposed to deport him when he was forty four years old by reason of his extensive criminal history. Between 1983 and 2006 he had committed numerous petty offences. Between 1985 and 2006 he had sustained 32 convictions in respect of 52 offences involving various types of sentences including many short sentences not exceeding twelve months. In 2003 he was convicted of robbery and sentenced to twelve months imprisonment on a plea of guilty. In 1989 he had been considered for deportation following a conviction for supplying drugs with a low street value. A decision was taken not to deport him in 1990 but he was warned that if there were to be a further lapse into criminality, deportation would be reconsidered. By the time of his deportation he had fathered four children all of whom are British citizens and had a grandchild. His mother and two brothers lived in the United Kingdom. However, he had never cohabited with any of his children and though he enjoyed family life with his youngest daughter, deportation was unlikely to have had the same impact as if the applicant and his daughter had been living together as a family. With the exception of a four year period between 1991 and 1995, there was no prolonged period during which the applicant was out of prison and did not re-offend. The court found that a fair balance was struck by making the deportation order and the decision was deemed to be proportionate.

64. In *Khan v. United Kingdom* [2011] ECHR 2253, the court considered whether the deportation of a Pakistani man who had been given indefinite leave to remain in the United Kingdom was in accordance with his Article 8 family rights. He had resided in the United Kingdom since he was four, having arrived in 1978. His mother and siblings also resided in the United Kingdom and were nationalised British citizens. He had six children all brought up in the United Kingdom by two mothers between the ages of twelve and seventeen. He was in a relationship with a third British woman. He had been convicted of sexual interference with an underage girl and two counts of robbery. He had served a number of other prison terms between 1992 and 2007. The court held that because he had lived in the United Kingdom from an early age the state would have to establish a "serious reason" before such a deportation could be regarded as proportionate. The applicant's repeated offending indicated that his previous convictions and sentences had no rehabilitative effect and rendered "all the more compelling" the reasons to deport. The "serious reason" required to deport a settled immigrant was indicated by his serious convictions and recidivism. There was a real risk of serious offending and harm to the public. It was, therefore, proportionate in those circumstances to order his deportation. There was no violation of his Article 8 rights.

65. Reliance was also placed by the applicants in this case on the case of *Emre v. Switzerland (No.1)* (Application No. 42034/04 –Unreported E.C.H.R. 22nd May, 2008) and *(No.2)* (Application No. 5056/10 – judgment of 11th October, 2011) to the effect that life long expulsion will be subjected to particularly rigorous examination for compliance with the right to family life under Article 8. Once again, however, the facts of the case bear examination. It is noteworthy in that case that the applicant, a Turkish national, resided in Switzerland from the age of six, had completed his education and spent most of his life in Switzerland where he resided with his parents and brothers, one of whom was of Swiss nationality. He had been convicted of various offences including theft, firearms offences and assault. The court emphasised the weakness of the applicant's ties with his country of origin in finding that the final character of the deportation order was disproportionate.

66. The difficulties presented by these cases are perhaps even more readily apparent from the decision in *A.A. v. United Kingdom*,[2011] ECHR 1345. In that case the applicant, a Nigerian, joined his mother in the United Kingdom at the age of thirteen. At fifteen he was convicted of the rape of a thirteen year old with a group of other boys. He was sentenced to four years detention and registered as a sexual offender. In error while detained he was granted indefinite leave to remain in 2003. He was served with a notice of liability to deportation in September, 2003. Having been convicted and sentenced in September, 2002 he was reviewed in a parole assessment report in May, 2004 and assessed as having a low risk of re-offending and causing harm to the public. In July, 2004 he was served with a deportation order. The reason offered for his deportation was

that his conviction of a serious offence rendered it necessary in a democratic society and for the prevention of disorder and crime and the protection of health and morals that he be deported. It was indicated that his family and private life rights under Article 8 of the Convention had been weighed against the public interest. In August, 2004 he was released on license for good behaviour having served a total of two years and four months, including the period on remand. He continued with his education obtaining three A levels in the summer of 2005 and was once again assessed as having a low risk of re-offending. In August, 2005 the Asylum and Immigration Tribunal (AIT) allowed his appeal against the deportation order on the basis that it was not fair or proportionate. This decision was reconsidered and in April, 2007 the AIT decision was reversed. In January, 2008 the Court of Appeal refused leave to appeal. In the meantime he had commenced primary degree studies in September, 2005 and completed his primary degree in July, 2008. He completed a master's degree in December, 2009. He entered into employment with a local authority in April, 2010. In September, 2010 he was given notice of his deportation. No further action was taken pending the determination of the case before the European Court.

67. The court considered having regard to the age of the applicant that it was now appropriate to consider whether the decision was proportionate having regard to his right to private life rather than his family rights under Article 8. The court considered the relevant factors in the case to be:-

> • the nature and seriousness of the offence committed by the applicant;
>
> • the length of the applicant's stay in the United Kingdom;
>
> • the time which had elapsed since the offence was committed and the applicant's conduct during that period; and
>
> • the solidity of social, cultural and family ties with the host country, the country of destination."

68. The court emphasised that a very serious violent offence can justify expulsion even if committed by a minor (applying the case of *Maslov v. Austria* [2008] ECHR 546). The court accepted that the applicant's offence was serious. The fact that the offender was a minor at the time of the commission of the offence was relevant in assessing the overall proportionality of deportation. It also noted that where offences committed by a minor underlie an exclusion order, regard must be had to the best interests of the child. That included an obligation to facilitate his reintegration, an aim the court previously held would not be achieved by severing family or social ties through expulsion (*Maslov*). The applicant had been in the country since the age of thirteen for eleven years. The offence was committed within two years of his arrival. He had not committed any criminal offences since and had been assessed as a person who was at low risk of re-offending on a number of occasions. In effect, he had led a blameless life since the offence. The court stated that "the fact that a significant period of good conduct has elapsed following the commission of the offence necessarily has an impact on the assessment of the risk which the applicant poses to society". That factor was held to be "of particular importance when assessing whether the seriousness of the offence in itself is sufficient to justify the applicant's deportation for the prevention of disorder or crime". The court also noted that the applicant continued to work and reside in the United Kingdom with his mother and had close relationships with his two sisters and an uncle all resident in England. He had not visited Nigeria for eleven years and had no contact with his father since 1991. Interestingly, the court accepted that "at the time the AIT considered the applicant's appeal, he had been at liberty following his release from detention for less than three years and was in the second year of his undergraduate degree. The AIT decided at that time that the public interest in favour of deportation prevailed". The court considered that the AIT's assessment of the weight to be accorded to each of the relevant factors was

within its margin of appreciation, at the time the appeal was heard.

69. It is an important feature of *A.A.* that the applicant remained for a period of three and a half years following the conclusion of domestic proceedings in respect of his deportation in the United Kingdom and that no step was taken by the authorities in respect of his deportation in that time. The European Court of Human Rights held that notwithstanding the accepted propriety of the AIT decision in 2008, it was entitled to consider the proportionality of the decision as of the time of the proceedings before the court and to assess the compatibility with the Convention of the applicant's actual expulsion and "not of the final expulsion order". It stated:-

> "Any other approach would render the protection of the Convention theoretical and illusory by allowing contracting states to expel applicants months even years, after a final order had been made notwithstanding the fact that such expulsion would be disproportionate having regard to subsequent developments."

It noted that other remedies within the domestic legal system to challenge the deportation order were not canvassed before it. Therefore, the court considered it appropriate to assess the effect of the additional lapse of time on the proportionality of the applicant's deportation. In doing so, it found that while the state could deport a minor who has committed such a serious offence this "must be carefully weighed against the applicant's exemplary conduct and commendable efforts to rehabilitate himself and reintegrate into society over a period of seven years". In those circumstances the government was required to provide "further support for their contention that the applicant can reasonably be expected to cause disorder or to engage in criminal activities such as to render his deportation necessary in a democratic society". The government failed to do so and the court found that it would be a violation of Article 8 to deport him to Nigeria. In this case the court is satisfied that it is open to the applicant at any time following the making of the deportation order to apply to have it revoked or amended under the terms of s. 3(11) of the Act. (See *Efe* cited above at pp. 825-827)

70. The examination of file in this case contains a careful consideration of the various relevant and important factors outlined in *Boultif* and *Uner* as they apply to the applicants' rights to private and family life under Article 8. M.E. was present in Ireland on a temporary residence permit under the IBC/05 Scheme for a period of two years. He obtained that status notwithstanding the fact that he was a failed asylum seeker. It was a condition of his residence and of any renewal that he not commit criminal offences and he undertook not to do so when he first made application for residence. He had by that time already committed the offence for which he was convicted. Therefore, his presence in the state was very precarious before his application for renewal. Before coming to Ireland he spent most of his life in Nigeria. He came here at the age of 25 having been employed for a period of six years as a farmer/businessman in Nigeria. The deportation order was made against him in August, 2009 some six years after his arrival. The process was commenced whilst he was in prison. Of course, he spent thirteen months of the six years in the state in prison. Therefore, he is not to be regarded as a long term migrant at the time the deportation order was made. His situation is in no way comparable to the cases cited above involving persons convicted of offences and subject to deportation orders who were long term residents within their respective states since childhood or for very considerable parts of their lives.

71. Careful consideration was given in the examination of file to the potential effect on the removal or exclusion of M.E. from the state on the other applicants. The appropriate test of whether there were any "insurmountable obstacles" to establishing family life in Nigeria, that is whether it would be unreasonable to expect the other family members to follow M.E. to Nigeria was applied. (See *Alli* at para. 47). In that regard it was noted that the children were of an "adaptable age" should they leave the state to live in Nigeria. Two of the children were in the early stages of primary school. Following examination of

country of origin information, it was determined that primary and secondary education were available to children in Nigeria and that Nigeria had a functioning healthcare system and private healthcare facilities. It was also noted that the disruption to family life would not have the same impact as if M.E. had been living with his family for the full duration of his time in the state (a reference to his period of imprisonment). It was stated that each of the children was given an individual assessment in all respects and that having weighed and considered all of the factors relating to the position of the family, and in particular the citizen children, as well as factors relating to the rights of the state, there was no less restrictive process available to the Minister which would achieve the legitimate aim of the state to prevent disorder and crime other than deportation.

72. It was acknowledged fully that M.E. had made attempts to integrate and reintegrate into society following his conviction when he came out of prison in March, 2008. The nature of his relationship to his wife and children was carefully considered in the examination of file as were all the submissions made on his behalf. Notwithstanding these submissions, following a consideration of all of the facts and materials submitted the respondent identified the commission of this offence as a substantial reason for the deportation. The court is, therefore, satisfied that all relevant factors were considered appropriately in respect of the applicants' private and family rights under Article 8 of the Convention.

**The Oguekwe Guidelines**

73. In *Oguekwe* Denham J. set out a non-exhaustive list of "matters relevant for consideration" by the Minister when making a decision to deport the parent of an Irish born citizen child under s. 3 of the 1999 Act:-

> "1. The Minister should consider the circumstances of each case by due inquiry in a fair and proper manner as to the facts and factors affecting the family.
>
> 2. Save for exceptional cases, the Minister is not required to inquire into matters other than those which have been sent to him by and on behalf of applicants and which are on the file of the Department. The Minister is not required to inquire outside the documents furnished by and on behalf of the applicant, except in exceptional circumstances.
>
> 3. In a case such as this, where the father of an Irish born child citizen, the mother (who has been given residency) and the Irish born citizen child are applicants, the relevant factual matrix includes the facts relating to the personal rights of the Irish born citizen child, and of the family unit.
>
> 4. The facts to be considered include those expressly referred to in the relevant statutory scheme which in this case is the Act of 1999 (s. 3(6)).
>
> 5. The Minister should consider the potential interference with rights of the applicants. This will include consideration of the nature and history of the family unit.
>
> 6. The Minister should consider expressly the constitutional rights, including the personal rights, of the Irish born child, these rights include the right of the Irish born child to:-
>
> (a) reside in the state,

(b) be reared and educated with due regard to his welfare,

(c) the society, care and company of his parents, and

(d) protection of the family, pursuant to Article 41.

7. The Minister should deal expressly with the rights of the child in any decisions. Specific reference to the position of an Irish born child of a foreign national parent is required in decisions and documents relating to any decision to deport such foreign national parent.

8. The Minister should also consider the Convention rights of the applicants, including those of the Irish born child. These rights overlap to some extent and may be considered together with the constitutional rights.

9. Neither constitutional nor Convention rights of the applicants are absolute. They require to be considered in the context of the factual matrix of the case.

10. The Minister is not obliged to respect the choice of residence of a married couple.

11. The state's rights require also to be considered. The state has the right to control the entry, presence and exit of foreign nationals, subject to the Constitution and international agreements. Thus, the state may consider issues of national security, public policy, the integrity of the immigration scheme, its consistency and fairness to persons and the state. Fundamentally, also, the Minister should consider the common good, embracing both statutory and constitutional principles, and the principles of the Convention in the European context.

12. The Minister should weigh the factors and principles in a fair and just manner to achieve a reasonable and proportionate decision. While the Irish born child has the right to reside in the state, there may be a substantial reason, associated with the common good, for the Minister to make an order to deport a foreign national who is a parent of an Irish born child, even though the necessary consequence is that in order to remain a family unit the Irish born child must leave the state. However, the decision should not be disproportionate to the ends sought to be achieved.

13. The Minister should consider whether in all the circumstances of the case there is a substantial reason associated with the common good which requires the deportation of the foreign national parent. In such circumstances the Minister should take into consideration the personal circumstances of the Irish born child and the foreign national parents, including, in this case, whether it would be reasonable to expect family members to follow the first applicant to Nigeria.

14. The Minister should be satisfied that there is a substantial reason for deporting a foreign national parent, that the deportation is not disproportionate to the ends sought to be achieved, and that the order of deportation is a necessary measure for the purpose of achieving the common good.

15. The Minister should also take into account the common good and policy considerations which would lead to similar decisions in other cases.

16. There should be a substantial reason given for making an order of deportation of a parent of an Irish born child.

17. On judicial review of a decision of the Minister to make an order of deportation, the court does not exercise and substitute its own discretion. The court reviews the decision of the Minister to determine whether it is permitted by law, the Constitution and the Convention."

In that case the Supreme Court determined that there had been no express consideration of and a reasoned decision on the rights of the citizen child in reaching the decision to deport the child's father and granted relief.

74. These principles draw together all of the factors considered in this judgment concerning the constitutional and Convention rights of the applicants and how they are to be balanced and weighed with the right of the state in considering whether to deport the non-national parent of Irish citizen children. The court is satisfied having measured the decision to deport in this case against the guidelines that the decision of the Minister and the examination of file comply fully with the terms, spirit and purpose of the guidelines. The court is satisfied that the applicants have failed to establish for the reasons set out in this judgment that the decision to deport M.E. was unreasonable, irrational or disproportionate.

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