[2011] IEHC 417.

THE HIGH COURT

JUDICIAL REVIEW

[2009 334 J.R.]

BETWEEN

B S,

O S AND

T S (A MINOR, SUING BY HIS MOTHER AND NEXT FRIEND O S)

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Decision of Ms. Justice M. H. Clark delivered the 13th day of October 2011

1. The first two applicants are a married couple and the third applicant is their Irish citizen son. This is their application to quash by order of *certiorari* the decision of the Minister for Justice, Equality and Law Reform (the Minister) of the 12th March, 2010 refusing to revoke the deportation order of the 4th December, 2002 which was carried into effect on the 13th February, 2003.

2. Leave to seek judicial review was granted on an *ex parte* basis the 30th March 2010. The grounds on which such leave was granted were essentially 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. The actual grounds appear at the end of this judgment.

3. The substantive hearing took place on the 1st and 2nd July, 2010 and was adjourned to and finally heard on the 13th and 14th July 2011. Ms Sunniva

McDonagh, S.C. with Mr Colm O'Dwyer, B.L. appeared for the applicants and Ms Sara Moorhead, S.C. and Ms. Siobhan Stack B.L. appeared for the respondent.

Background

4. The background to this somewhat unusual case is that the first applicant was deported as a failed asylum seeker as far back as early 2003. He is a Nigerian citizen born in 1983 and he currently resides in the greater Lagos area of Nigeria. The second applicant who is also Nigerian was born there in July 1982. She came to Ireland in 1999/2000 and in April 2000 she gave birth to her first son M who is an Irish citizen by birth. She was granted leave to remain on the basis of M's birth. Mr. S's arrival in Ireland seems unconnected with that of the second applicant. He entered the country illegally and claimed asylum and then lived in Ireland during the period 2001 to 2003. The first and second applicants seem to have formed a relationship during 2002 and were married on the 8th January, 2003. The third named applicant T is their Irish born son. The wife avers that the first applicant is not M's father with whom she has no contact and that he remains in Nigeria. At the time of writing this judgment the second applicant has become an Irish citizen by naturalisation.

5. Mr. S's asylum history is less than satisfactory. After his arrival he went "under the radar"; he did not respond to any correspondence and did not attend his interviews before the ORAC nor did he in any way seek to advance his asylum claim. Inevitably, that claim was deemed withdrawn and the Minister declared his application refused. Mr. S contacted the Refugee Legal Services in July 2002 to seek advice on the renewal of his residence permit and was then informed that the Minister had already determined to refuse his application for refugee status and that he intended making a deportation order. The RLS therefore applied on his behalf on the 13th August, 2002 for leave to remain in Ireland on humanitarian grounds. However,

they had little information on which to make such representations and were forced to rely on the thin biographical details provided in Mr. S's original claim. If Mr. S had formed a relationship with the second applicant by then, he certainly made no mention of any such relationship to the RLS.

6. Not surprisingly, the leave to remain application was refused and on the 4th December, 2002 the Minister made a deportation order against him. The above recited facts were then complicated by the fact that the two applicants called into the RLS offices after the submissions had been forwarded to the Minister, when they enquired whether the fact that they were in a relationship would make any difference to Mr. S's application for leave to remain. Clearly, the fact of a mere relationship would carry little weight for leave to remain and it is therefore understandable that no further submissions were made to the Minister on his behalf. The applicants again attended the RLS offices after they were made aware that the Minister had made an order to deport Mr. S and this time informed the RLS that they intended to marry in January 2003 and that the second applicant was pregnant. This information was not relayed to the Minister and no application to revoke was made.

7. On the 8th January, 2003 Mr S and the second applicant were married and on 13th February, 2003 Mr S was arrested without warning and deported the following day. On the 16th July, 2003 Mrs S gave birth to their Irish citizen son, the third named applicant T. Mr S is named as his father on the child's birth certificate.

8. As the deportation order was never challenged, the applicants do not make the case that the Minister was at fault in determining to deport the first applicant on the information available to him. When they eventually sought revocation they relied mainly on the assertion that their legal representatives were aware in or around the

notification of the deportation order that they intended to marry and that the second applicant who was lawfully in the state as the mother of a citizen child was pregnant.

9. Their assertions are somewhat consistent with a copy of the RLS file which was exhibited to this court. However, the file also reveals that an appointment was made for Mr. S to attend at the office on the 23rd December 2002 well after the deportation order was notified to him and after he made known his intention to marry. Mr S failed to attend then, or on any other date. Marriage and birth certificates exhibited confirm that the applicants were married on the 8th January, 2003 and their son T was born here on the 16th July, 2003.

10. No further steps were taken and the matter lay until some time in 2005 when Mrs. S travelled to Nigeria in search of her husband. She located him in a condition of homelessness and abject poverty. Having reconnected with him, she settled him into rented accommodation and has since then been sending regular sums for his support. She has visited him every year since apart from 2007. On three occasions their son Ttravelled with her while her older son M travelled twice. In 2008, her husband sought a D visa from the Irish Embassy in Abuja to join his wife in Ireland. His application failed as his records showed that he had been deported from Ireland in 2003 and was required thereafter to remain outside the state. Another Nigerian living in Ireland then directed Mrs. S to her present solicitor Ms. Elizabeth Mitrow who advised on the need for revocation on the deportation order pursuant to s. 3(11) of the Immigration Act 1999.

The Revocation Application

11. On the 29th January, 2009 Mrs S's solicitors applied for revocation of the deportation made against Mr S in December 2002. The representations made sought to minimise his failure to pursue his asylum claim by outlining the fact that Mr Swas

an unaccompanied minor when he arrived in this country. As mentioned previously, the main claim for revocation was that the Minister had never been made aware that Mr. S was married and his wife was pregnant with his Irish citizen child, at the date of his deportation. Thereafter, the extensive submissions relied on the situation of his family who were living in Ireland without the husband and father. The Minister was informed that Mrs S finds her personal circumstances as a single parent with two sons extremely challenging as she misses her husband desperately and had seen her GP for treatment of depression. She was in frequent telephone contact with her husband and visited him regularly. Her financial situation as a full time care assistant was stated to be secure enough for her to support Mr S and her sons if he were permitted to re-enter the State and further, that his help in rearing the children would be beneficial to the family. The application was supported by documentation showing that the wife had visited Nigeria several times either with her sons or on her own; that her boys were at school here; that she had sought naturalisation and that she had funds in her bank account and was supporting her husband by regular money transfers to Nigeria. The Minister was reminded that the family was protected both by Articles 41 and 42 of the Constitution and by Article 8 of the Human Rights Convention and that there would be insurmountable obstacles to the family living together in Nigeria having regard to the children's health, education and well-being in the country of their birth compared with conditions on the ground in Nigeria. Supporting country of origin information was then sent on to the Minister.

The Refusal to Revoke

12. On the 20th March, 2009 the Minister notified Mrs S of his refusal to revoke the deportation order. As is usual, the letter was attached to a copy of the examination of Mr S's file pursuant to s .3(11) of the Immigration Act 1999. That examination

recites all of the facts known and received by the Minister's office and repeats much of the content of the submissions made in support of the application to revoke.

13. The analysis of the application indicates that the submissions did not find favour because:

(a) it was not accepted that the affirmation of the deportation order would interfere with Mr. S's Article 8 rights,

(b) such interference would be in accordance with law, to pursue a pressing need and a legitimate aim and to be necessary in a democratic society,

(c) affirmation of the deportation order would be proportionate to that legitimate aim as T was entitled to Nigerian citizenship and was of an adaptable age and could return with his family to enjoy family life where his father lived and where his mother had spent most of her life.

(d) M the older child was also stated to be entitled to Nigerian citizenship.

(e) A comparison was drawn with the facts of *Uner v. The Netherlands* [1] where the children involved were young and had lived for a relatively short time with their father and where the ECHR found that if the applicant's partner were to stay in the Netherlands with the children, the disruption to their family life would not be of the same impact as if he had been living with them for a much longer time.

(f) This family had spent a very limited time together

[1] [2006] ECHR 46419/99 18 October 2006

(g) At the date of their marriage, the parties knew of the deportation order and of Mr. S's precarious immigration status and on the basis of well established UK case law

(h) the disruption to their family life would not be of the same impact as if Mr. S had been living with them for a much longer time if the deportation order was affirmed.

(i) there was no less restrictive process available which would achieve the legitimate aim of the State to maintain control of its own border and operate a regulation system for the control, processing and monitoring of non-nationals in Ireland. This was identified as a substantial reason requiring the affirmation of the deportation order made against Mr S.

The Applicants' arguments

14. Ms. Sunniva McDonagh, S.C. for the applicants argues the Minister did not appreciate the nature of their application and applied himself to the wrong question. In support of this premise, they take objection to a series of statements and comments found in the narrative of the analysis which they say is indicative of a failure on the part of the Minister's agents to appreciate the true nature of the application. That application was to revoke the long executed deportation order so that the husband would be permitted to return and join his settled family here. They argue that the Minister's reasoning for his decision was appropriate to the deportation of a person actually in the State and not to the application before him. They objected to reliance by the Minister's agents on the ECtHR decision of *Ajayi v. U.K.* [2]

"Another important consideration will also be whether the marriage, albeit manifestly not one of convenience, was contracted at a time when the parties

[2] [1999] ECHR 27633/95 22 June 1999:

were aware of the immigration status of one of them was such that the persistence of the marriage within the host state would from the outside be precarious. The Court considers that where this is the case, 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."

And also the comment later in the text:-

"In essence, how this case relates to Mr. B S's particular situation is that where the deportation process has begun, an individual cannot seek to rely on family ties established in order to avoid the deportation process"

and at a later stage when following an exploration of the *Mahmood* [3] decisions it was stated:

"From the above case law, it is evident that where an individual establishes family ties in a state while fully aware that he has no lawful residency, or entitlement to such in the state, it will only be in exceptional circumstances that the enforcement of an existing deportation order will be contrary to or in breach of Article 8. I find that there circumstances in the applicant's case (sic). "

15. Again, it was argued that when considering the constitutional rights of the Irish citizen children in this case, the Minister's agent relied on the decision of the Supreme Court in *A.O. and D.L. v Minister for Justice* [4] and used the sentence which is frequently encountered in negative recommendations on the application of the

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[3] *(R v Secretary of State for the Home Department, ex parte Amjad Mahmood* [2000] EWCA Civ 315) , *Isiko* (*R v Secretary of State for the Home Department ex parte Peter Isiko and Susan & Shemy Isiko* [2000] EWCA Civ 346) and *Abdulaziz* (*Abdulaziz, Cabales and Balkandali v. The United Kingdom [1985] ECHR 9214/80; 9473/81; 9474/81, 28 May 1985)*

[4] [2003] 1 IR 1

father of a citizen who is outside the IBC/05 scheme to remain when his refugee claim has failed:

> *"It does not flow from the rights of the child that the family or parents and siblings of Irish children have the right to reside in Ireland. The Minister may determine to deport the immigrant family, notwithstanding the effective removal of the Irish citizen children, without violating the children's rights. While there is an obligation on the Minister to consider each case on its individual merits, he is entitled to take into account the consequence of allowing a particular applicant to remain in the State where that would inevitably lead to similar decisions in other cases. If the Minister is satisfied for good and sufficient reason that the common good requires that the non-national parent should be removed from the State, or in this case kept out of the State, even if that means that in order to preserve the family unit the Irish citizen child must also leave the State, then that is an order he is entitled to make."*

16. The applicants argue that notwithstanding the addendum, "*or in this case kept out of the State*" these comments and the reference to the particular case law is indicative of a misconstruction and misunderstanding of the actual application and the submissions made and fails to grapple with the facts of a man who had been living apart from his family for the last seven years.

17. Ms. McDonagh's second argument which really is a development of the first, is that the Minister did not truly consider the individual facts contained in the submission nor did he actually address his mind to the issue that the deportation order ought to be revoked in order that Mr. S could join his wife and two citizen children who were long-term resident in the State. Following on from that, it is submitted that

the Minister failed to consider at all the right of the citizen children to the care and company of their father. His reason for rejecting those rights was to state that they the citizen children were of an adaptable age and were entitled to Nigerian citizenship.

18. Finally it was argued that the decision to uphold the deportation was disproportionate in that the permanent exclusion of Mr. S from Ireland in effect meant that this family could never enjoy family life in Ireland. The children would, although citizens and settled migrants be obliged to leave a country where they had put down deep roots to face an uncertain future in Nigeria if they wished to enjoy family life. The Minister had simply failed to consider whether it would be reasonable to expect this family to move to Nigeria in circumstances where the wife has a steady job which provides a good standard of living for her children who are at school here and have never lived outside of Ireland.

Preliminary steps taken

19. As Mr. S had not sworn any affidavits, the *bona fides* of this application were quite understandably met with a great deal of scepticism by the Minister. Further affidavits were then filed by leave of this court and further exhibits were introduced. Both Mr. and Mrs. S swore affidavits and Mrs. S was extensively cross examined on the contents of her affidavit. The hearing then proceeded on the basis that the person described as B S is the same person who was deported, that their marriage was valid: that T is the son of that marriage; that Mrs. S has lived continuously in the State since the deportation of her husband in February 2003; that she has visited Nigeria five times since then; that she supports her husband who is unemployed and that he lives in Lagos in Nigeria and has lived there since his deportation.

The Respondent's arguments

20. The respondent's submissions rely heavily on Mr. S's poor asylum history and rely on the fact - which is not disputed by the applicants - that these applicants have enjoyed very little family life with him. They were married for 5 weeks when the husband was deported. The husband has, at most, seen his son three times. The respondent asserts that the fault for not disclosing the relationship lies with the two adult applicants for failing to re-attend for an appointment made for them and not with the RLS. The Respondent quite reasonably raises the issue of a seven year delay in seeking to revoke the deportation and he defends his position that all the submissions made to revoke the deportation order were fully considered. He defends the reasonableness and proportionality of the decision that this family could join the father in Nigeria if they wished to enjoy a family life together when that determination is balanced against the legitimate interests of the state in controlling its own borders and in operating a regulated system for the control processing and monitoring of non-nationals in the state. The Respondent further argues that all the issues in this case have been determined in *Alli* and *Asibor*[5], two cases which came to this court as "test" cases.

21. During the course of these arguments, the application of the principles restated in *Alli* and *Asibor* was questioned because of the recent decision of the European Court of Justice in the case of *Gerardo Ruiz Zambrano* Case [6],where the issue of what exactly EU citizenship entails was examined. The applicants argue that it is now highly questionable whether decisions which follow on from AO and DL including the *Alli* and *Asibor* decisions can survive the declaratory decision in the *Zambrano* case. There, the ECJ was asked to consider whether the full recognition of

[5] *Alli v the Minister for Justice Equality and Law Reform* (High Court Unreported Clark J [2009] IEHC 595 2 December 2009) and*Asibor*[5] *v the Minister for Justice Equality and Law Reform* (High Court Unreported Clark J [2009] IEHC 594 2 December 2009)

[6] C-34/09 [2011] ECR I-0000 8 March 2011

rights which flow from Union Citizenship means that an infant EU citizen has a right, based on EU law rather than national law, to reside anywhere within the territory of the Union including the Member State of his nationality and if so, whether ensuring that he can exercise that right effectively, requires the granting of residence to his third country national parents if there would otherwise be a substantial breach of fundamental rights.

22. Following the *Zambrano* decision which declared that the children in question had those rights, the Respondent made a public statement to the effect that he would review the cases of the fathers of citizen children who were outside the IBC05 scheme and who were awaiting decisions on the challenges to the validity of deportation orders. That statement which was published on the Minister's site on the internet reads as follows;

> "Given the importance of the ruling in the Zambrano case, I have decided, with the support of my Government colleagues, to make a brief public statement outlining the consideration being given to cases involving Irish minor dependant citizen children who have a non-national third country parent or parents.
>
> One possible approach in these matters is to wait for pending cases to be determined by the Irish Courts and for the Courts to interpret and apply the Court of Justice ruling. That is an entirely justifiable approach from a legal standpoint. However in this case the Government has agreed that there needs to be a more proactive approach and that it should make a clear statement of its intention to take early action in these cases, insofar as it is unnecessary to await rulings of the Courts. We should not tie up the courts unnecessarily or ask eligible families to wait longer than necessary.
>
> Accordingly I have asked my officials to carry out an urgent examination of all cases before the courts (approximately 120 at present) involving Irish citizen children to which the Zambrano judgment may be relevant.
>
> The Government has agreed with my proposal that early decisions in appropriate cases to which the Zambrano judgement applies be made without waiting for further rulings of the Courts.
>
> I have also asked my officials to examine the cases in the Department in which the possibility of deportation is being considered in order to

ascertain the number of cases in which there is an Irish citizen child and to which the Zambrano judgment is relevant. In addition, consideration will be given to those cases of Irish Citizen children who have left the state whose parents were refused permission to remain.

This initiative is being taken in the best interests of the welfare of eligible minor Irish citizen children and to ensure that the taxpayer is not exposed to any unnecessary additional legal costs.

23. The Court was further informed that since then, almost all such fathers have been given leave to remain in this state and that both Mr. Alli and Mr. Asibor were offered the right to return from Nigeria and join their families in Ireland. Other identified cases involving non-nationals where the same or similar issues arose were said to have benefited from the *Zambrano* decision. However, notwithstanding the Respondent's statement and the permission granted to many fathers to remain with their families, no concessions were made in this case.

24. Both parties then made further submissions on the effect of the *Zambrano* decision on this case, and in particular addressed the issue of whether the fact that Mr. S was outside the state and was being supported by the wife could make the children his "dependants" within the meaning of that decision. The court was made aware of the current cases pending before the Court of Justice (CJEU) where clarification of the extent of EU citizen rights was sought in the light of the recent *Shirley McCarthy* decision which it was argued creates some confusion as to the extent of the *Zambrano* ruling. The applicants argue that the ruling applies to the parents of every EU citizen child with non-national parents while the respondents argue that all EU rulings rely on their own facts and are not of general application. They submit that the agreed facts in this case simply do not come within the decision and the ruling therefore has no relevance or application to this case. Although all parties await further clarification on the full extent of the *Zambrano* decision from the CJEU, it is fair to say that at the

re-convened hearing the applicants appeared to place a heavier reliance on their original arguments on the family's constitutional and Article 8 rights than on the *Zambrano* ruling. In particular, the applicants rely on their constitutionally protected Article 41 family rights based on marriage.

The Court's Assessment

25. It is first necessary to state that the same or very similar questions which were addressed by the CJEU in *Zambrano* have exercised the courts in this jurisdiction in relation to the extent of the constitutional rights of an Irish born child to live in this country where his non-national parents are unlawfully in the State. There has been a long series of decisions since at least *Pok Sun Shum v. Ireland*[7] *Osheku v. Ireland*; *Fajujonu v. The Minister; A.O. and D.L. v. The Minister; Oguekwe v. The Minister* and *Dimbo v. The Minister* where these issues were addressed.

26. The decisions of the Supreme Court to date have been that the clear right of a citizen child to reside and be educated in the state of his birth does not necessarily extend to his non – national parents. As constitutional rights are not absolute, they may sometimes have to concede to other conflicting guaranteed rights. In every case where such a conflict occurs, there must be a balancing of those rights with the right of the state to control its borders and operate a fair immigration policy which accords with the common good. As stated by Denham J. in *Oguekwe*

> *"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*

[7] *Pok Sun Shum v. Ireland*[7] [1986] I.L.R.M. 593; *Osheku v. Ireland* [1986] 1 I.R.733; *Fajujonu v. The Minister* [1990] 2 I.R. 151, *A.O. and D.L. v. The Minister* [2003] 1 I.R. 1, *Oguekwe v. The Minister* [2008] 3 IR 795 and *Dimbo v. The Minister* [2008] I.E.S.C. 26

child must leave the State. However, the decision should not be disproportionate to the ends sought to be achieved."

27. With the introduction of the Human Rights Act 2003, it has been recognised that the jurisprudence of the ECHR on family life under Article 8 shows a very similar line of reasoning as that applied by the Irish courts on family rights under the Constitution. In the detailed decisions made by this Court in the *Alli* and *Asibor cases,* the Court examined the Supreme Court authorities on the constitutional rights of children whose parents are facing deportation and compared these rights with rights to family life under the ECHR. The applicants in those cases had argued that the Minister had applied the wrong test when he found that there were no insurmountable obstacles to the family joining the fathers facing deportation to the family enjoying family life in Nigeria. This Court held that the ECHR decisions on the *no insurmountable obstacles* test as being the equivalent of the test of reasonable and proportionate stating that:-.

> *"[the Mahmood] principles include two sides of the same coin, i.e. the deportation would be unlikely to infringe Article 8 if there were no insurmountable obstacles to the members of the family joining the deportee even if they suffer some inconvenience and the corollary principle, that the deportation would be likely to infringe Article 8 rights if the family member being deported had long term residence in the State and it would be unreasonable to expect his other family members to follow.*
>
> *[.]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. Determining which side of the coin applies necessitates an examination of the facts of the particular family and a realistic and reasonable assessment of why they cannot live together in their country of origin. This can only be done on a case by case basis."*

28. Applying that reasoning, the Court held that in the analysis of a citizen child's rights there was no real difference between the insurmountable obstacles test and the test of reasonableness and proportionality. That is the approach which will be

taken to the Applicants' original arguments relating to the alleged failure of the Minister to either address the actual issue in the application or to consider the constitutional rights of T and M as Irish citizen members of a family. These constitutional rights pre-exist any EU citizen rights and are not confined to the exercise of free movement rights nor are they constrained by economic dependence. While the application of the *Zambrano* decision to deportation cases has not been considered by domestic courts to date, it is fair to say that no application of EU law arose in the revocation application before the Minister. The Court refrains from making any determination on the applicability of the *Zambrano* ruling to this or any similar application.

29. The application before the Minister did not seek to justify the applicant's weak asylum history nor did it maximise the time the family had been together but rather it sought to bring – for the first time – to the Minister's attention to the fact that B S had in early 2003 married a lawful resident who had been here since 1999, that he was the father of a citizen child who has lived here since he was born in July 2003 and he was step-father to another Irish citizen who was almost 10.

30. The Minister was presented with a very different set of facts from those previously before him when he decided to deport a young man who had demonstrated a wholly casual approach to his claim for asylum. At the very least, the new information revealed that young man was more than six years older, he had a wife and citizen son and step-son living and being educated in Ireland and most important; his wife was economically independent, she was no longer receiving social welfare supports and had applied for naturalisation. His family in Ireland were clearly settled here. This new information had to be viewed in the context that in 2003, nurturing parents of citizen children were generally permitted to remain in this state with their

children. If the fact of the marriage and the expected birth of a citizen child had been notified to the Minister, the likelihood is that the father/husband would have been granted leave to remain and would not have been deported.

32. Regrettably, the Minister's analysis gives every appearance of affording no more than a recital of these facts with no indication that the major changes in previously available information were understood. The format of the consideration of the application gives little assurance of any appreciation that this was not a challenge to his deportation and he was not seeking to remain on humanitarian grounds but rather, that he wished the Minister to lift the life long exclusion from Ireland which followed the deportation order. The existence of his constitutionally protected family in Ireland was not recognised as a fundamental change of circumstances since he was deported in early 2003. Considering the completely fresh set of facts presented with the entirely newly identified constitutional rights, it is almost inconceivable that the Minister is standing over the near mechanical recital they received. Those identified constitutional rights deserved a more significant recognition in the purported balancing exercise which followed. It cannot be a sufficient examination of a child's constitutional rights to say that they are not absolute and that each child is entitled to Nigerian citizenship and that the child T was of an adaptable age when those children at nine and six were Irish citizens living in Ireland since their birth with their mother who had been here for ten years.

33. The Court is driven to the conclusion that the identification of the constitutional rights involved and the significantly changed circumstances was not followed by a true examination of those circumstances nor did that examination accord with the requirements restated by Denham J. (as she then was,) in *Oguekwe* where she outlined the obligation to *"weigh the factors and principles in a fair and*

just manner to achieve a reasonable and proportionate decision." A fair and just consideration would have included an assessment of the length of time the family had spent in the state and whether the children were at school here. While those facts are not determinative of rights of non-national parents, they are facts to be considered when balancing the constitutional rights of a citizen child with those of the state in order to ensure harmonious interpretation of such rights and to arrive at a proportionate decision. In the language of the Strasbourg Court, a fair balance has to be struck between the competing interests of the individual and of the community as a whole.

34. The surrounding facts to be considered were that the wife is the mother of two citizen children who have lived here all their lives apart from short vacations in Nigeria. The wife has lived here since 1999 and is the breadwinner in permanent full time employment. This family was formed when the parents married in 2003 and while they have spent almost no time together as a married couple in Ireland due to the husband's deportation, the wife has visited her husband every year apart from 2007. She is a settled migrant here demonstrated by her application for naturalisation. Her children aged then nine and six are both at primary school here. They only know the Irish system of education. The husband did not make a precipitous application for a visa to join his family immediately after his deportation but rather waited seven years before doing so. It cannot be fanciful to suppose that the husband waited until his wife was in a position to fully support him here before he applied to join her nor should the fact that she gave herself and her family five different opportunities to weigh up the advantages or otherwise to her family in returning to Nigeria to enjoy family life against continuing their life in Ireland be ignored. By reason of her frequent trips to Nigeria she, more than most applicants, was able to make a reasoned

and informed choice regarding where her citizen children's best interests would be served in their rearing and education. She is not merely a person making a choice of where she would like to live but rather a mother of citizen children who have lived here for an extended period.

35. The father in this case was seeking to join his family legally. The possibility that the Minister would consider revoking the deportation order so that a limited visa could be granted was simply not examined and the effect of the permanent exclusion of this father from visiting his family was not even mentioned. The finding that "there was no less restrictive process available which would achieve the legitimate aim of the State to maintain control of its own border and operate a regulation system for the control, processing and monitoring of non-nationals in Ireland" was not in fact an accurate statement. In this case, there was a less restrictive process available as Mr. S could have been given leave to re-enter for a limited period with conditions attached which could have been subject to renewal, provided he did not become a charge on the state and was of good behaviour.

36. The life long effect of a deportation order became obliquely relevant in the Supreme Court decision of *Cirpaci v. Minister* for Justice [8] where the refusal to revoke the deportation order of the recently married husband of an Irish citizen was considered. Fennelly J. who delivered the judgment of the Supreme Court had regard for the Minister's undoubted wide discretion to revoke any deportation order. He considered that when the constitutional rights of a family and of children are identified, the Minister is obliged to conduct a careful consideration of those facts but that ultimately, it was for the Minister to decide how the balance should be struck between the competing considerations. In doing so, he was bound to respect the

[8] [2005] 2 ILRM 547

principle of proportionality. The Supreme Court observed that when the Minister refused Mr. Cirpaci's application for revocation, he did not shut the door on the Appellants. On the facts of that case, the Minister remained ready to consider such further evidence as might be submitted to him on the issue of an appreciable period of cohabitation. That recognition by Fennelly J. that the door was not closed was one of the determinants in the Supreme Court's finding that the Minister's refusal to revoke was proportionate and reasonable. No such life line was afforded to these applicants who had a citizen child and whose marriage has endured six years with cohabitation occurring during five holidays.

37. The effect of the decision not to revoke the deportation order means that if the family are to live together in a unit, they must abandon their right to live here and uproot and go to Nigeria. In Nigeria they will return to a father who is dependent on his wife's earnings in Ireland and they will leave their education and their financial security behind them. The alternative is never to have the husband living with them apart from holidays in Nigeria. This cannot be a proportionate decision when measured against the conflicting right of the State to operate a fair immigration system. The balance in this case must fall in favour of the family's strong constitutional rights to live in the country of their citizenship. The position of this family as settled migrants under Article 8 of the ECHR represents the other side of the coin in the insurmountable obstacles test where it would be unreasonable and therefore disproportionate to expect this family to live forever without the husband and father or to leave Ireland and return to Nigeria.

38. While justifiable criticism can properly be laid at the door of the first and second applicants for their delay in seeking the revocation of the deportation order and for their own failure to disclose their relationship and marriage plans to the RLS

at the appropriate time, the Court finds that the original arguments made by the applicants are valid. The main ground for setting aside and quashing the Respondent's decision is that he quite simply misunderstood or mischaracterised the nature of the application. The Court is persuaded that the Respondent did not actually appreciate that this was an application to revoke the deportation order in order that the life time ban from entering the state might be lifted thus permitting the husband to apply for a visa to join his long time legally resident family here.

39. The decision will be quashed by an order of certiorari on grounds 3, 4, 6, 8 and 9,

D. H. Clark approved & Names Redacted