

ECHR AND IRISH LAW

Second Edition

Ursula Kilkelly BA, LL.M, PhD
Faculty of Law, University College, Cork

Published by
Jordan Publishing Limited
21 St Thomas Street
Bristol BS1 6JS

Whilst the publishers and the authors have taken every care in preparing the material included in this work, any statements made as to the legal or other implications of particular transactions are made in good faith purely for general guidance and cannot be regarded as a substitute for professional advice. Consequently, no liability can be accepted for loss or expense incurred as a result of relying in particular circumstances on statements made in this work.

© Jordan Publishing Ltd 2009

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any way or by any means, including photocopying or recording, without the written permission of the copyright holder, application for which should be addressed to the publisher.

Crown Copyright material is reproduced with kind permission of the Controller of Her Majesty's Stationery Office.

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978 1 84661 124 7

Typeset by Letterpart Ltd, Reigate, Surrey

Printed in Great Britain by Antony Rowe Limited, Chippenham, Wiltshire

Chapter 13

THE RIGHTS OF THE CHILD, IMMIGRATION AND ARTICLE 8 IN THE IRISH COURTS

*Siobhán Mullally & Liam Thornton**

INTRODUCTION

13.1 The rights claims arising from immigration and the protection of family life have given rise to significant debates on the meaning and scope of Article 8 of the European Convention on Human Rights (ECHR). In Strasbourg, claims to the protection of private and family life have led to the emergence of a growing body of case-law on the rights of transnational/migrant families and their children.¹ In recent times, the Irish courts have been called upon to adjudicate the claims of migrant families to protection under Article 8's guarantee to safeguard private and family life. This chapter will focus, in particular, on those cases involving migrant families with Irish born children. A common thread in these cases, has been the deference paid by the courts to the State's interest in immigration control and the limited recognition given to the best interests of the child. In this respect, as we shall see, the Irish courts have followed the recurring trend in the European Court of Human Rights (ECtHR) to inquire into parental status and behaviour in weighing the State's interest in immigration control against Article 8 claims. In this jurisprudence of the European Court, the perspective of the child is 'strikingly absent'.² More recently, however, there is some evidence that the court is concerned to defend

* Dr Siobhán Mullally, Co-Director, Centre for Criminal Justice and Human Rights and Senior Lecturer, Faculty of Law, University College Cork. Liam Thornton, Government of Ireland Scholar, 2005–2008, PhD Candidate, Centre for Criminal Justice and Human Rights, Faculty of Law, University College Cork and Research and Policy Review Officer, Irish Human Rights Commission (IHRC). The views expressed in this article are made in a personal capacity and may not necessarily reflect those of the IHRC.

¹ In *Austria v Italy* it was stated that the ECHR '... not only applies to a states' own nationals and those of other High Contracting Parties, but also to nationals of States not parties to the Convention and to stateless persons.' Article 1 of the ECHR. *Austria v Italy*, Yearbook IV (1961) as quoted in Zwaak 'General Survey of the European Convention' in Van Dijk *Theory and Practice of the European Convention on Human Rights* (Intersentia, 4th edn, 2006), pp 13–14.

² Bhabha, 'The Citizenship Deficit': on being a Citizen Child' (2003) 46 *Development*, p 8. See also Kilkelly 'The Best of Both Worlds for Children's Rights: Interpreting the European Convention on Human Rights in the light of the UN Convention on the Rights of the Child' (2001) 23(2) *Human Rights Quarterly* 308–326 and Kilkelly *The Child and the European Convention on Human Rights* (Ashgate Publishers, 1999) pp 218–221.

and vindicate children's rights, and to question the proportionality of states' immigration policies. As yet, however, this jurisprudence has had a limited impact on Irish law.

FAMILIES, MIGRATION AND THE LAW PRIOR TO THE ECHR ACT 2003

13.2 The question of the rights of citizen children and their undocumented migrant parents was discussed at greatest length in the 1990 decision of the Supreme Court in *Fajujonu*.³ Finlay CJ, speaking for the majority of the Supreme Court, concluded that where a non-national has resided for 'an appreciable time' in the State, his/her citizen children have a constitutional right to the 'company, care and parentage of their parents within a family unit.'⁴ Subject to the 'exigencies of the common good', this was a right which could be exercised within the State.⁵ Significantly, Finlay CJ concluded that the parents were entitled to assert a choice of residence on behalf of their infant citizen children in the interests of those infant children.⁶ Finlay CJ did not deny that the Minister for Justice could deport a family with citizen children where the interference with a constitutional right was necessary and in the interests of the common good. Any such interference, however, was only possible after 'due and proper consideration' and only where a grave and substantive reason associated with the common good could be established.⁷ Walsh J, concurring with the majority judgment, placed greater emphasis on the rights of the family as a constitutionally protected unit and the need to protect the integrity of the family. The children, he said, were of tender age, requiring the society of their parents. In the particular circumstances of this case, to move to expel the parents would be inconsistent with the constitutionally protected rights of the family.⁸

13.3 The findings of the Supreme Court, and in particular the judgment of Walsh J in the *Fajujonu* decision, reflect the cardinal value of citizenship for a child: the ability to enjoy the company, care and parentage of their parents within a family unit within the State.⁹ Following on from this judgment, applications for residence from undocumented migrant parents were routinely granted by the Minister for Justice, Equality and Law Reform. However, the

³ *Fajujonu v Minister for Justice* [1990] 2 IR 151, [1990] ILRM 234.

⁴ [1990] 2 IR 151 at 162.

⁵ Ibid.

⁶ Ibid at 163.

⁷ Ibid.

⁸ [1990] 2 IR 151 at 166. In a statement that is likely to have relevance to many families facing deportation proceedings in the future, Walsh J went on to point out that deportation proceedings could not be taken against a family that included citizen children simply because of poverty, particularly where that situation of poverty was induced by the absence of a work permit. In representations being made on behalf of the parents of Irish citizen children, many lawyers have been concerned to emphasise the employment potential of their clients, and, in particular, their ability to live independently of state funded welfare assistance.

⁹ Bhabha, above, p 13.

number of such parents claiming residency on the basis of Irish citizen children increased from approximately 1,500 in 1999 to over 6,000 in 2001.¹⁰ At the beginning of 2003, more than 11,500 applications for residence from undocumented migrant parents were pending with the Minister for Justice, Equality and Law Reform. As the numbers of families claiming residence rights increased, political pressure to deny these claims grew. Bowing to this pressure, the Minister for Justice, Equality and Law Reform began to refuse or stay applications, leading finally to the Supreme Court judgment, in January 2003, in the *L* and *O* cases.¹¹ The Supreme Court again revisited the residence and family rights of Irish citizen children. By then, birthright citizenship had been enshrined as a constitutional right, following the Belfast Agreement and the Nineteenth Amendment to the Constitution Act 1998.¹²

13.4 The *L* and *O* cases involved two families of Czech Roma and Nigerian origin, respectively. Each of these families had Irish citizen children, their children having been born in the State. Deportation proceedings were commenced against *L* and *O* following the failure of their asylum applications. Seeking a judicial review of the deportation orders, *L* and *O* both asserted a right to exercise a choice of residence on behalf of their citizen children. On behalf of their children, the applicants claimed the right to the company, care and parentage of their parents within the State. The significance of the questions raised in the case was not lost on the court as each of the seven-member bench delivered separate and lengthy opinions. The *Fajujonu* case was distinguished on the basis of the length of time the parents had lived within the State and the changing context of immigration in Ireland since the *Fajujonu* decision was delivered.¹³ Using the terms of Finlay CJ's judgment in *Fajujonu*, the majority of the Supreme Court concluded that neither the *L* nor the *O* families had lived in the State for 'an appreciable time', such as to give rise to a right to residence.¹⁴ The denial of the parents' claims to residence, they concluded, did not breach any constitutionally protected rights of the citizen children or the family unit.¹⁵ Keane CJ distinguished the nature of citizenship

¹⁰ *The Irish Times*, 'What's to befall these Irish children?' 9 April 2002.

¹¹ *L and O v Minister for Justice, Equality and Law Reform* [2003] IR 1.

¹² See Nineteenth Amendment to the Constitution Act, 1998. The full text of Article 2 now reads: It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.

¹³ [2003] IR 1, at 37 (per Keane CJ), [2003] IR 1, at 44 (per Denham J), [2003] IR 1 at 159–161 (per Hardiman J). Fennelly J (dissenting) stated that *Fajujonu* could not be distinguished and what the State sought to argue, was that its '... own sovereign rights are so urgent and compelling that they should prevail and be accorded precedence over the constitutional rights of the child'. [2003] IR 1, at 185.

¹⁴ [2003] IR 1, at 154 per Hardiman J.

¹⁵ In finding against the claims of *L* and *O*, the Supreme Court also invoked the need to protect the integrity of the Dublin Convention. Both *L* and *O* had originally submitted asylum applications in the UK prior to coming to Ireland. The UK had accepted responsibility for the determination of their asylum claims. As the dissenting judgments noted, however, the Dublin Convention provides a mechanism for allocating responsibility for asylum claims. It does not

claims enjoyed by children and adults. While an adult citizen had an automatic right to reside in the State, he said, the position of minors was ‘significantly different.’¹⁶ The right to reside within the State could not vest in a minor until he/she was capable of exercising such a right. While the parents could assert a choice of residence on behalf of their citizen children, any claims made by the parents were subject to the exigencies of the common good.¹⁷

13.5 Throughout the majority judgments, we see the court responding as though the questions raised concerned the rights and obligations of undocumented migrant parents, rather than the rights of a citizen child. Parental behaviour rather than the assessment of benefit from a child-centred viewpoint was taken as a legitimate basis for the exercise of discretionary immigration decisions.¹⁸ The *L* and *O* case had effectively allowed the State to rely on immigration control measures in seeking to undermine the rights of the citizen child. The rights to the care and company of parents, was subject to considerations of the common good and protection of the integrity of the Irish asylum system.¹⁹

THE ECHR AND PROTECTION OF THE IMMIGRANT FAMILY

13.6 When the *L* and *O* cases came before the Supreme Court, the European Convention on Human Rights Act 2003 (ECHR Act 2003) was not yet in force.²⁰ The Supreme Court, nonetheless, examined the jurisprudence arising under the Convention, the appellants having invoked the protections afforded by Article 8 to support their claim to family unity and to residence within the State. As Fennelly J noted, however, the case-law of the ECHR ‘does not provide an easy or automatic answer to any particular case of suggested violation of Article 8 ECHR’.²¹ To date, the jurisprudence of the ECtHR offers only limited protection to migrant families. The court has emphasised that Contracting States have a right as a matter of international law to control the entry, residence and expulsion of aliens.²²

13.7 *De la Mare* and *Kennelly* describe Article 8 of the ECHR as protecting a rag-bag of personal rights and interests from physical and bodily integrity, to

preclude a state from accepting an asylum claim if it so decides, even though an applicant has previously submitted a claim elsewhere within the EU, see [2003] IR 1 at 163 per Hardiman J.

¹⁶ [2003] IR 1, at 19 per Keane CJ.

¹⁷ Ibid, at 37 per Keane CJ; Ibid at 83–84, per Murray J.

¹⁸ See Bhabha above, p 13.

¹⁹ [2003] IR 1 at 62 per Denham J. Murray J noted that the protection of the integrity of the asylum system constituted a common good which the Minister could consider when deciding whether or not to make a deportation order against a non-Irish national parent of an Irish born child Ibid at 80–81.

²⁰ *European Convention on Human Rights Act 2003* was signed into law by President Mary McAleese on 30 June 2003.

²¹ [2003] IR 1, at 198.

²² *Vilvarajah et al v UK* (1991) 14 EHRR 248, para 102.

the recognition of an acquired gender, ability to express one's sexual orientation, protection of communications, reputation and preservation of family life.²³ The right to enjoy private and family life is a qualified right which can be limited by balancing the rights of the individual and the community as a whole.²⁴ In *Abdulaziz*²⁵ the ECtHR stated that Article 8 of the Convention does not allow non-citizens the right to enter the territory of a Contracting State.²⁶ The ECtHR adopted a cautious approach to the rights of transnational families, noting that in general Contracting States do not have to admit the non-national spouse into the territory of the state.²⁷ Within immigration matters, it is usually the case that the State will admit an interference with the enjoyment of family life. However, the State will seek to argue that such interference is permitted under Article 8(2) of the Convention.²⁸ The court will first examine whether the applicant(s) enjoy family life within the meaning of Article 8.²⁹ Secondly, the court will examine whether there is an interference with the right to enjoy family life. If such interference is established, the court will then assess whether it is on the basis of the express grounds within Article 8. Within immigration cases, the court has emphasised that the State enjoys a very wide margin of appreciation due to the right of the State to control immigration into that State.³⁰ It is the implementation of this margin of appreciation in given cases that has resulted in wide diversity in how the Strasbourg Court balances the rights of the State to control immigration and the right to respect for private and family life.

13.8 In *Poku v United Kingdom* the European Commission noted that factors such as immigration control and considerations of public order could justify exclusions or deportations that might otherwise amount to denials of the right to family life.³¹ In *Yousef v United Kingdom*³² the Commission again found

²³ De la Mare & Kennelly 'Article 8' in Lester & Pannick (eds) *Human Rights Law & Practice* (Butterworths, 2nd edn, 2004), p 261, para 4.8.2.

²⁴ *Gül v Switzerland* (1996) 22 EHRR 93, para 38.

²⁵ *Abdulaziz et al v UK* (1985) 7 EHRR 471.

²⁶ (1985) 7 EHRR 471, para 67.

²⁷ *Ibid*, para 68.

²⁸ Article 8(2) of the Convention states: 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

²⁹ In this respects, the court adopts an 'autonomous interpretation' of family life from that which may exist in different European States. Family life can be found within a traditional marital relationship; where the parties to a relationship are not married (*Johnston v Ireland* (1986) 9 EHRR 203); between a single parent and a child (*Marckx v Belgium* (1979) 2 EHRR 330); between a father and a child (*Berrehab v The Netherlands* (1988) 11 EHRR 322). In addition, the court has found familial relationships existed between a female to male transsexual and a child (*X, Y and Z v United Kingdom* (1997) 24 EHRR 143). Within the recent Irish High Court case of *McD v PL and BM* [2008] IEHC 96, Hedigan J, it was found that *de facto* family life existed between a child, a biological mother and the lesbian partner of the mother. See further Kilkelly, chapter 5 in this volume.

³⁰ *Abdulaziz et al v UK*, para 67.

³¹ [1996] 22 EHRR CD 94.

³² Application No 14830/89, decision adopted on 30 June 1992.

against the applicant, despite evidence submitted on his behalf demonstrating a 'strong and affectionate bond between the father and the child'.³³ The Commission's findings display a strong moralistic tone and a disapproval of Yousef's behaviour; while in the UK Yousef was unemployed, had a minor criminal conviction, and had failed to maintain consistent contact with his son because of his 'relationship with a second British woman'.³⁴ Missing from the Commission's findings is recognition of the damaging impact that deportation proceedings would have on Yousef's son. This is to be contrasted with the decision in *Berrehab*³⁵ where the ECtHR found that the Netherlands had violated the applicant's right to respect for his family life. Berrehab had lost his right to residence in the Netherlands following the breakdown of his marriage to a Dutch citizen. In finding in his favour, the court noted that he had been living and working in the Netherlands continuously for six years and had maintained strong links with his Dutch citizen child, including through contributions to her maintenance and education.³⁶ The court's reasoning is marked more by a concern to reward Berrehab's good behaviour, than to ensure protection of the child's best interests. A similar concern can be seen in the case of *Ciliz v The Netherlands*³⁷ where a Turkish national was denied the opportunity to develop an ongoing relationship with his Dutch son because of the initiation of deportation proceedings against him. Finding that the State had both a positive obligation to ensure that family life can continue between parents and children³⁸ and a negative obligation to refrain from measures that might cause family ties to rupture,³⁹ the court held that the Netherlands had interfered with Ciliz's right to family life and was in violation of its duties under Article 8.⁴⁰ However, more attention was paid to the behaviour of the parent than to the particular interests and needs of Ciliz's son.⁴¹ In *Al-Nashif v Bulgaria*⁴² the perspective of the children involved and their right to enjoy a family right is again absent from the court's judgment. In this case, although the court found that the deportation proceedings against Al-Nashif constituted

³³ Ibid.

³⁴ Ibid, para 43.

³⁵ *Berrehab v the Netherlands* (1988) 11 EHRR 322.

³⁶ (1988) 11 EHRR 322, paras 9–13 and para 29.

³⁷ [2000] 2 *Family Law Reports* 469.

³⁸ Ibid, para 61.

³⁹ Ibid, para 62.

⁴⁰ Ibid, para 72. For a full analysis of positive and negative obligations within the ECHR, see generally Mowbray *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, 2004). For an examination of the ECtHR case-law on positive obligations within immigration decisions and admission of family members, see p 171 *et seq.*

⁴¹ In this case, the initial behaviour of Mr Ciliz in ignoring his son and failing to keep to agreed visitation appointments were due to 'psychological difficulties'. The court noted that for almost a two year period, the applicant had been in contact with his son on average one to three times a week.

⁴² *Al-Nashif v Bulgaria* (2002) 36 EHRR 655.

an arbitrary interference with his right to family life,⁴³ there was little discussion in the case of the impact of the State's actions on the citizen children involved.

13.9 In the previous cases of *Gül*⁴⁴ and *Ahmut*⁴⁵ the court examined the effect of a deportation on a family by asking itself whether the 'only way' to continue to enjoy family life was within the expelling country.⁴⁶ In *Sen*,⁴⁷ however, we see a potentially significant shift in the jurisprudence and practice of the European Court to a 'most suitable way' test. The *Sen* case arose from a refusal by the Netherlands to grant admission to the 12 year-old child of Turkish parents, both of whom were legally resident in the Netherlands. The court explored the positive obligations on a Contracting State in relation to family reunification cases and refused to draw negative inferences from the parents' decision to leave their child behind in Turkey. The court, adopting a less stringent approach than in *Gül* and *Ahmut* asked what was 'the most suitable way' ('*le moyen le plus adéquat*') for family members to continue their life together.⁴⁸ Failure to allow entry by the child resulted in a breach of Article 8.⁴⁹

13.10 As such, the shift in the court's approach may not have been of assistance to *L* and *O*, even if it were considered by the Irish courts. The application of the 'most suitable way' test is likely to be of relevance, however,

⁴³ (2002) 36 EHRR 655, para 113 (recognition that the applicant did enjoy a family life with his wife and two children) and para 128 (the deportation regime established did not provide necessary safeguards against arbitrariness).

⁴⁴ *Gül v Switzerland* (1996) 22 EHRR 93. In this case there was no violation of Article 8 where Switzerland refused to allow the applicants' child entry into the country. While the court recognised that the option of moving back to Turkey for the applicants would cause some hardship, there was nothing preventing the couple from re-establishing family life in Turkey. Mowbray, note 42 states that the reason for the caution within this case was the early stage of development of the doctrine of positive obligations and an emphasis on the sovereignty of the state and political implications of decisions on admission or expulsion of migrant families.

⁴⁵ *Ahmut v The Netherlands* (1996) 24 EHRR 62. In this case, the applicant was a national of the Netherlands who sought entry for his young son. A majority in the case stated that since no insurmountable obstacles stood in the way of the father enjoying family life in Morocco, Article 8 of the Convention was not violated. In a dissenting opinion, Judge Martens referred to the case of *Gül* as an 'unfortunate precedent'. At para 7 of the dissent, Judge Martens stated that '... a father who is a Netherlands national [who] wants to live with and care for his 9 year-old child in the Netherlands both father and child are, in principle, entitled to have that decision respected.' Judge Martens saw no exception to this rule.

⁴⁶ See in particular *Gül* where at paras 38–41, the court stated that Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory. While the *Gül* family would face difficulties of re-establishing family life in Turkey, no obstacles prevented their return to Turkey.

⁴⁷ *Sen v The Netherlands* (2003) 36 EHRR 7. See generally, Van Walsum 'Comment on the *Sen* Case. How Wide is the Margin of Appreciation Regarding the Admission of Children for Purposes of Family Reunification?' (2002) *European Journal of Migration and Law* 1; Forde 'Family Rights and Immigration Law: A European Perspective' (2003) *Irish Journal of Family Law*, p 2. See also *JM v The Netherlands* 9 January 2001.

⁴⁸ (2003) 36 EHRR 7, para 40.

⁴⁹ (2003) 36 EHRR 7, paras 33–42.

in any challenges to the procedures introduced that allowed non-national parents of children to apply for residence under the Irish Born Child 05 Scheme (IBC 05 Scheme).⁵⁰

13.11 In *Solomon v the Netherlands*, the European Court held that the absence of any assurance that a non-national would be given a permanent right of residence would weigh heavily against a claim that the State is subject to a positive obligation to permit family reunification.⁵¹ The tenor of the judgment suggested a move away from ‘the most suitable way test. The admissibility decision of the ECtHR in *Chandra*⁵² further underlined a possible return to the ‘only way’ test. The *Chandra* case highlighted the continuing deference of the Strasbourg Court to the state interest in immigration control. In this case, the Netherlands sought to remove children from its jurisdiction where they had lived, undocumented, for a number of years. The children concerned had strong linguistic and cultural links with Indonesia and two of the children had attained the age of majority by the time of final decision. The court pointed out that Article 8 does not guarantee a right to choose the most suitable place to develop family life. Reasserting the arguments utilised by the majority in *Gül* and *Ahmut* in declaring the application inadmissible, the court noted that nothing prevented the mother of the children from returning to Indonesia. The fact that the children had resided illegally in the country for a number of years did not raise further issues under Article 8. Where criminal activities of applicants and their families are not at issue, the ECtHR instead considers the desires of a state for restrictive immigration controls. The consideration of the inherent sovereignty of a state within migration matters has been relied on against the rights of families to maintain and enjoy family life within a state. Even where issues of crime control are not present, there seems to be an overarching concern for the protection of the traditional international law right of states to control immigration.

13.12 As has been noted earlier, in the jurisprudence of the ECtHR, the perspective of the child is strikingly absent. However, the judgments in *Boultif*,⁵³ *Uner*⁵⁴ and *Maslov*⁵⁵ may indicate more focus on the rights of the child and the family unit, rather than concern for behaviour of a parent or emphasis on the rights of states to control immigration. In *Boultif*, the court set out the criteria to be applied in determining whether or not an expulsion order could meet the requirements of the permissible limitations on the protection of

⁵⁰ If residence was granted, a formal declaration was signed by the non-national parents to the effect that their residence within the State conferred no entitlement or legitimate expectation for any other person to enter the State. See www.inis.gov.ie for more information on the IBC 05 Scheme and the right to family reunification. The Campaign against the Deportation of Irish Born Children (CADIC) had called on the Minister for Justice, Equality and Law Reform to consider each application for family reunification on an individual basis, see www.childrensrights.ie.

⁵¹ *Solomon v The Netherlands* 5 September 2000.

⁵² *Chandra v the Netherlands* 13 May 2003.

⁵³ *Boultif v Switzerland* (2001) 33 EHRR 1179.

⁵⁴ *Uner v the Netherlands* 18 October 2006.

⁵⁵ *Maslov v Austria* 24 June 2008.

private and family life in Article 8. In this case, the court was considering the compatibility of the expulsion of the applicant with his right to family life along with his Swiss wife. The applicant was requested to leave Switzerland after serving prison time for a violent incident. The court specifically looked at grounds which could be considered to be 'necessary in a democratic society' and 'pursuant to a legitimate aim'. Unlike previous cases, where criminal convictions, in particular for violent incidents, had resulted in greater weight being given to the rights of states to deport for reasons of immigration and crime control,⁵⁶ personal redemption and good behaviour were deemed factors so exceptional as to prohibit expulsion and guard against a breach of the right to respect for family life.

13.13 The court said that states parties to the ECHR could examine the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he/she is to be expelled; the time elapsed since the offence was committed and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life; whether the spouse knew about the offence at the time when he/she entered into a family relationship; whether there are children of the marriage, and if so, their age; and the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.⁵⁷ In this case, the applicant had served time in prison, had been engaged in training prior to and during imprisonment, and had a good prison record. All of these militated against his expulsion from Switzerland.⁵⁸ When examining the possibility of the applicant and his Swiss wife relocating to Algeria, the court noted the lack of links that the applicant's wife would have in Algeria, as well as her lack of competence in Arabic.⁵⁹

13.14 In *Uner*, the Grand Chamber of the European Court made explicit two additional criteria to be considered where states are expelling an immigrant who may have established family life within a contracting state. The applicant in this case had two children and was in a relationship with the biological mother. After serving a prison sentence for manslaughter, the applicant was issued with an exclusion order for a ten year period. In addition to the criteria

⁵⁶ In this respects reference could be made to Jock Young who has highlighted the continuous correlation between immigration, asylum and crime relied upon by politicians in justifying the need for a strict system of immigration control wherein courts should be deferential to the role of a government in matters of migration. Young views the plurality of society, the supposed certainties of the past, the diversification of society and immigration of peoples as contributing to the essentialization and demonisation of the immigrant 'Other'. See Young *The Exclusive Society* (Sage, 1999).

⁵⁷ (2001) 33 EHRR 1179, para 48.

⁵⁸ Ibid, para 51.

⁵⁹ Ibid, paras 53–54. The Swiss authorities had argued that the applicant's wife could relocate to Italy where the applicant had been living (illegally). The European Court rejected this on the grounds that the Swiss authorities could not guarantee that the applicant and his wife would obtain the necessary authorisations to live legally in Italy.

outlined in *Boultif*, the court stated that the best interests of the child was also relevant, including the effect the expulsion of a parent would have on the parent-child relationship, along with the solidity of social, cultural and family ties with the host country and with the country of destination.⁶⁰ These, the court said, may already have been implicit in the *Boultif* criteria. The court went on to note that although Article 8 provides no absolute protection against expulsion for any category of aliens,⁶¹ regard would be had to the '... special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there.'⁶² Applying the *Boultif* principles and the additional principles enunciated, the court found that the expulsion of the applicant was proportionate to the aim to be achieved, and noted in particular that the expulsion order would expire in ten years; there was therefore no violation of Article 8. The failure to equate the rights of citizen children with those children who had spent most of their lives within the country militates against the notion of equal protection of Convention rights for all persons within a contracting state. The court's reasoning suggests that, while currently undefined, citizens of Contracting States do enjoy greater levels of Convention protection than non-citizens.⁶³ The dissenting judgment in *Uner* called for 'the same fair treatment' and 'a legal status as close as possible to that accorded to nationals' to be granted to the applicant.⁶⁴

13.15 In the 2008 judgment of the court in *Maslov*, greater weight was placed on the best interests of the child. The court concluded that where expulsion measures against a juvenile offender are concerned, the obligation to take the best interests of the child into account includes an obligation to facilitate his or her reintegration, in line with Article 40 of the Convention on the Rights of the Child, which makes reintegration an aim to be pursued by the juvenile justice system. In the court's view, reintegration would not be achieved by severing family or social ties through expulsion. Expulsion remains a means of last resort in the case of a juvenile offender.⁶⁵ The court stated that regardless of the length of lawful residence within the expelling state, migrants may not necessarily enjoy 'family life' there within the meaning of Article 8.⁶⁶ However, the court noted that 'the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8.'⁶⁷ Deportation proceedings that do not necessarily constitute an interference with family life within the meaning of

⁶⁰ *Uner v the Netherlands* [GC] 18 October 2006, para 57.

⁶¹ *Ibid*, para 55.

⁶² *Ibid*, para 58.

⁶³ However, arguably the contention by Lambert remains valid that '[i]t appears that issues of nationality, residence or domicile are irrelevant to a determination of a claim of a violation of the ECHR.' However the extent to which this could be considered accurate within migration matters and protection of the family life is not clear. See Lambert *The Position of Aliens in relation to the European Convention on Human Rights* (COE Publishing, 3rd edn, 2006) p 9.

⁶⁴ Dissenting Judgment, para 5.

⁶⁵ *Maslov v Austria* 24 June 2008, para 83.

⁶⁶ *Ibid*, para 74.

⁶⁷ *Ibid*, para 63.

Article 8 may nonetheless engage the protection of private life.⁶⁸ The court once again looked towards the behaviour of the applicant. However, unlike *Uner*, the court deemed the criminal activity to be at the lower end of the scale, noting in particular the non-violent nature of the offences.⁶⁹ Parental status and behaviour remained relevant. In this case, however, it was not such as to outweigh the best interests of the child.

13.16 The length of time that an individual spends in the host country is clearly a key factor in assessing the strength of personal and family life and the proportionality of any interference. The Irish superior courts' approach to the consideration of the rights of the child within immigration and deportation processes have been heavily influenced by the decision of the English Court of Appeal in *Mahmood*.⁷⁰ In *Mahmood*, Lord Phillips MR concluded that removal or exclusion of one family member from a Contracting State would not necessarily infringe Article 8 provided that there were 'no insurmountable obstacles' to the family living together in the country of origin of the excluded family member.⁷¹ The ordinary hardship endured in any deportation or expulsion proceedings was not enough to engage the protection of Article 8. The disputes arising are characterised primarily as involving conflicting claims between undocumented migrant parents and the Contracting State. The recognition of the child as a bearer of rights in such cases would, of course, transform the terms of the debate. As yet, this has not happened.

13.17 Along with the lack of sufficient consideration of the best interests of the child, the jurisprudence of the ECtHR has placed heavy emphasis on the right of states to control inward migration. In a recent judgment, the House of Lords concluded that an asylum seeker's claims under Article 8 had not been accurately or adequately addressed when deciding whether to uphold a decision

⁶⁸ Ibid, para 63.

⁶⁹ Ibid, para 84.

⁷⁰ *Mahmood v Secretary of State for the Home Department* [2001] 1 WLR 840.

⁷¹ [2001] 1 WLR 840 at 861. Lord Phillips expanded on this and listed the various considerations which should be taken into account when examining the power to deport persons from a State where they may enjoy family life. '... I have drawn the following conclusions as to the approach of the Commission and the European Court of Human Rights to potential conflict between the respect for family life and the enforcement of immigration controls: (1) A State has a right under international law to control the entry of non-nationals into its territory, subject always to treaty obligations. (2) Article 8 does not impose on a State any general obligation to respect the choice of residence of a married couple. (3) Removal or exclusion of one family member from a State where other members of the family are lawfully resident will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family. (4) Article 8 is likely to be violated by the expulsion of a member of a family that has long been established in a State if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled. (5) Knowledge on the part of one spouse at the time of the marriage that rights of residence of the other was precarious militates against a finding that excluding the latter spouse violates Article 8. (6) Whether interference with family rights is justified in the interests of controlling immigration will depend on (i) the facts of the particular case and (ii) the circumstances prevailing in the State whose action is impugned.

to remove him from the United Kingdom.⁷² The Asylum and Immigration Tribunal should have considered, they said, whether, and to what extent, a delay in resolving his asylum claim, and the manner of its handling, were relevant when considering the overall proportionality of ordering the removal of the asylum seeker.⁷³ In *Beoku-Betts*, the Law Lords again emphasised the rights of the family as a whole and the need to consider the impact of removal of an unsuccessful asylum seeker. Baroness Hale stated that the ‘... right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed.’⁷⁴

DEPORTATION, MIGRANT FAMILIES AND ARTICLE 8 IN THE IRISH COURTS

13.18 Following the Supreme Court decision in *L and O*, the Department of Justice, Equality and Law Reform ceased the consideration of applications for residency from parents of Irish born children. The *jus soli* principle was limited following a controversial referendum on citizenship in June 2004 and the enactment of the Nationality and Citizenship (Amendment) Act 2004.⁷⁵ The position of migrant families with citizen children born prior to the commencement of the 2004 Act was finally addressed in January 2005, when the Government announced the introduction of a new set of procedures to assess residency applications, the IBC/05 scheme.⁷⁶ The human rights obligations and implications were fully teased out in a series of test cases brought before the courts, which challenged the administration of the IBC/05 Scheme.⁷⁷

⁷² *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41.

⁷³ *Ibid.*, paras 13–16.

⁷⁴ *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39.

⁷⁵ See generally Mullally ‘Citizenship and Family Life in Ireland: Asking the Question “Who Belongs?”’ 25(4) *Legal Studies* (2005) 578–601.

⁷⁶ Department of Justice, Equality and Law Reform ‘Minister announces details of revised arrangements for residency’ 14 January, 2005, available at: <http://www.justice.ie>. The Department received and processed 17,917 applications under the IBC/05 scheme. On the basis of the cases determined by 31 January 2006, 16,693 applicants were given leave to remain and 1,119 were refused. Of the latter, 566 were refused on the ground that ‘continuous residence’ was not proven.

⁷⁷ There were eight test cases in total and the judgments were appealed to the Supreme Court by the State: (i) *Bode v Minister for Justice, Equality and Law Reform* [2006] IEHC 341 (14 November 2006) (High Court), [2007] IESC 62 (20 December 2007) (Supreme Court); (ii) *Oguekwe v Minister for Justice, Equality and Law Reform* [2006] IEHC 345, [2008] IESC 25; (iii) *Dimbo v Minister for Justice, Equality and Law Reform* [2006] IEHC 344, [2008] IESC 26; (iv) *Fares v Minister for Justice, Equality and Law Reform* [2006] IEHC 343, [2007] IESC 65; (v) *Oviawe v Minister for Justice, Equality and Law Reform* [2006] IEHC 342, [2007] IESC 66; (vi) *Duman v Minister for Justice, Equality and Law Reform* [2007] IESC 64; (vii) *Adio v Minister for Justice, Equality and Law Reform* [2006] IEHC 346, [2007] IESC 63; and (viii) *Appeal No 005/200, Edet v Minister for Justice, Equality and Law Reform*.

13.19 The lead judgment handed down by Finlay Geoghegan J in 2006 was in *Bode v Minister for Justice, Equality and Law Reform*. In the course of the proceedings before the High Court, the Minister had informed the court that he gave no consideration to the rights of the child in making a decision to grant or refuse residency under the IBC/05 scheme.⁷⁸ Finlay Geoghegan J concluded that this failure was a breach of the child's personal rights protected under Article 40.3 of the Constitution. The learned judge also found that the Minister had acted in breach of Article 8 of the ECHR. The breach lay in the failure to protect the citizen child's private life in the State. The State had failed to meet its positive obligations to the citizen child arising under Article 8. The child's right to private life was defined as including the constitutionally protected personal rights.⁷⁹ The State's failure to consider these rights in refusing the parents' residency application constituted an interference with private life, within the meaning of Article 8(1) of the ECHR. No justification for this interference as permitted by Article 8(2) was provided by the State.

13.20 In two of the eight 'test cases', the parents of Irish citizen children were subject to deportation orders after having been refused residency under the IBC/05 scheme (the cases of *Oguewke* and *Dimbo*). In her judgment in *Oguewke*,⁸⁰ Finlay Geoghegan J set out the factors to be considered in determining whether or not a deportation order in such a case could be considered to be reasonable and proportional. The decision-making process, she said, must be consistent with the state guarantee to respect and 'as far as practicable ... to defend and vindicate' the relevant personal rights of the citizen child. In analysing the issues that the Minister should consider when issuing a deportation order, consideration must be fact specific to the individual child in relation to the age, current educational progress, development and opportunities within the state, in the context of the family circumstances in the State. In addition, the Minister should consider the educational and other relevant conditions and development opportunities available for the citizen child in the country to which the parents are being deported. Finlay Geoghegan J concluded that, unless such factual matters were considered, the Minister could not form a view as to whether the decision to deport was proportional or reasonable, as required by Article 8 of the Convention. The factors to be considered drew on the principles laid down by the Supreme Court in *L and O* and by the High Court in *Bode*. They reflected also the jurisprudence of the ECtHR, in particular, the tests laid down for consideration of the individual rights claims, case by case.

13.21 The focus of the decisions in the High Court on the IBC/05 Scheme was centred on the citizen child. Finlay Geoghegan J viewed the citizen child as a holder of rights.⁸¹ Where consideration is being given to removing third

⁷⁸ [2006] IEHC 34. Full text of the judgment is available from www.courts.ie. The judgment is currently only available electronically and there are no page numbers or paragraph numbers to which direct reference can be made.

⁷⁹ Article 40.1 of *Bunreacht na hEireann*.

⁸⁰ *Oguewke v Minister for Justice, Equality and Law Reform* [2006] IEHC 345.

⁸¹ Compare this with the views of the former Chief Justice in *L and O* wherein Keane CJ viewed

country national parents of Irish citizens, the Constitutional and Convention rights of the citizen child should be respected. On appeal however, the Supreme Court rejected the need for the Minister to enquire as to whether the rights of the citizen child under the IBC/05 Scheme were adequately protected.⁸² The purpose of the IBC/05 Scheme, the court said, was not to examine the rights or otherwise of the citizen child. Denham J, delivering the judgment of the Supreme Court, stated that the High Court judgment was 'misconceived' in considering human rights arguments.⁸³ Ireland in adopting and implementing immigration policies was executing a fundamental function of a state. The grant of residency within Ireland on the basis of the IBC 05 Scheme was a mere 'gift' by virtue of the exercise of executive power.⁸⁴ The IBC 05 Scheme was an exercise of executive power by the Minister for Justice, Equality and Law Reform. Issues relating to the Convention rights of the applicants were deemed irrelevant.⁸⁵ Denham J went on to note that within deportation procedures, the Constitutional and Convention rights of the citizen child would be examined.⁸⁶ The rights of the child were therefore relegated to consideration solely within the deportation process. The effect of the judgment was to provide a veil of legitimacy to the operation of ministerial schemes on the basis that the Minister had the inherent power to establish schemes that do not necessitate the consideration of Convention rights. The reasoning of the Supreme Court is open to question, not least under the terms of the ECHR Act itself. Unlike the office of the President, or the Houses of the Oireachtas, Government ministers exercising executive functions are not expressly excluded from the definition of organ of the State in the ECHR Act 2003. A strict reading of the ECHR Act 2003 would suggest that there *is* an obligation of the Minister to consider Convention rights in the execution and administration of the IBC 05 Scheme.⁸⁷ It remains to be seen whether the reasoning of the Supreme Court will withstand the scrutiny of the Strasbourg court.

13.22 In *Oguekwe*, Finlay Geoghegan J in the High Court stated that where deportation of the third country national parents of an Irish born child is considered, the Minister must assess the individual circumstances of the child, including issues in relation to the education and welfare of the child if he/she is returned with his/her parents upon deportation orders being issued against them.⁸⁸ The Supreme Court agreed with the outcome of the High Court's

minors rights being in abeyance until they reached an age wherein they could practically instigate and insist on the respect of their rights, [2003] 1 IR 1 at 19.

⁸² *Bode and Others v Minister for Justice, Equality & Law Reform & Others* [2007] IESC 62.

⁸³ [2007] IESC 62, para 24.

⁸⁴ *Ibid*, para 22.

⁸⁵ *Ibid*, para 24.

⁸⁶ *Ibid*, para 25.

⁸⁷ Under s 2 of the ECHR Act 2003, an 'organ of State' specifically excludes the President, either House of the Oireachtas and committees of one or both houses and courts. Government ministers are not excluded. It was accepted in *Bode* that the Minister exercised an executive function in establishing and administering the IBC 05 Scheme. The Executive is obliged under s 4 of the 2003 Act to perform its functions in a manner compatible with Ireland's obligations under the ECHR.

⁸⁸ *Oguekwe v Minister for Justice, Equality and Law Reform* [2006] IEHC 345.

decision in *Oguekwe*, but disagreed with the reasoning of Finlay Geoghegan J. Denham J, delivering the judgment of the Supreme Court, after reviewing the case-law of the Strasbourg Court, noted that only in exceptional circumstances will Article 8 protections interfere with the State's functions within the field of immigration.⁸⁹ Drawing on the dictum of Lord Phillips in *Mahmood*, she noted that even when citizen children's rights claims are at stake, the State's interest in immigration control must be brought into the balancing process. Denham J noted that the European Court of Human Rights regarded the connection between child and parent as an important factor to consider under Article 8.⁹⁰ Denham J stated that constitutional rights of the citizen child included the right to live in the State, the right to be reared and educated with due regard for his/her welfare and where parents form a family unit, the child is entitled to the protection of his/her rights under Article 41 of the Constitution.⁹¹ Where a deportation order is being issued against the third country national parents of an Irish child, the Minister should, she said, consider the personal rights of the child by due enquiry in a fair and proper manner. Further, the Minister must be satisfied that substantial reasons require deportation. Finally, the Minister must demonstrate that the deportation decision is reasonable and proportionate in light of the individual facts in the case.⁹²

13.23 In the High Court, Finlay Geoghegan J stated that an assessment of the welfare and best interests of the child should include factors in relation to his/her educational development and welfare, as well as the educational and development opportunities within the country to which his/her parents are being deported.⁹³ Denham J, speaking for the Supreme Court, however, stated that the Minister was not obliged to consider such details in relation to the rights of the Irish citizen child upon deportation.⁹⁴ Such detailed analysis will only be needed in the most exceptional of cases; however a 'substantial reason' must be given to justify the deportation of non Irish national parents of an Irish born child.⁹⁵ The deportation orders were found to be invalid as the Minister had failed to adequately consider the rights of the Irish born child in light of the proposed deportation of his/her parents.⁹⁶

⁸⁹ *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] IESC 25, para 20.3. Before the Supreme Court decision in *Oguekwe* Irvine J gave a judgment in the case of *E & AHE v Minister for Justice, Equality and Law Reform* [2008] IEHC 68. In *E* a non-national parent was issued with a deportation order. At the time the deportation order was issued, the child was conceived but not yet born. The Minister failed to take into account the rights of the child to the care and company of his father. Irvine J stated that the constitutional rights of the citizen child should be considered. Irvine J decided not to examine the arguments arising out of Article 8 of the Convention in relation to the right to family life.

⁹⁰ See *Berrehab v The Netherlands* (1989) 11 EHRR 322.

⁹¹ [2008] IESC 25, para 22.

⁹² *Ibid*, para 22.

⁹³ [2006] IEHC 345.

⁹⁴ *Ibid*, para 26.

⁹⁵ *Ibid*, para 31.

⁹⁶ See also the case of *Dimbo v Minister for Justice, Equality and Law Reform* [2008] IESC 26 where judgment was delivered directly after *Oguekwe*. Similar issues were involved and the Supreme Court allowed the Government's appeal in relation to the IBC 05 Scheme. As in

13.24 Within the High Court, the principles stated by Finlay Geoghegan J highlighted the importance of safeguarding the child's best interests and the right to family life in the context of immigration decisions. Irish constitutional law has traditionally placed special emphasis on the rights of the family and the duty of the state to defend the family against attack. However, with the onset of inward migration, the traditional constitutional protection of the family⁹⁷ has not been fully extended to migrant/transnational families.

13.25 In *I and E*⁹⁸ the applicants sought leave to apply for judicial review of the decisions of the Minister to deport the father of an Irish born citizen child. In both cases, the mothers of the children had leave to reside in the State. In both cases, it was argued that the Minister did not 'adequately direct his mind' to the contents of the rights of the family arising under Article 8 of the ECHR and, secondly, that in reaching his decision, the Minister failed to carry out the type of enquiry necessary in order to vindicate the rights of the applicants under Article 8. It was further argued that the ECHR Act 2003 changed the legal landscape and necessitated a review of the judgments in the *L* and *O* cases. Rejecting this argument, Dunne J noted that while the legal landscape may have changed, the law as set out in the *L* and *O* cases remained unchanged. The State's obligation to conduct an 'appropriate enquiry in a fair and proper manner as to the facts and factors affecting the family' was set out in *L* and *O* by Denham J.⁹⁹ This obligation remained unchanged by the ECHR Act, and was in fact, in compliance with the principles set down by the Law Lords in *Mahmood* and *Razgar*. The High Court distinguished *Oguekwe*, where it was noted that the Minister had only given a 'cursory analysis' of the rights of the child. In contrast, in these cases, the court noted the Minister had engaged in an extensive examination of the family and private life of the child, as required by Article 8 ECHR and Article 40.3 of the Constitution. Leave for judicial review was refused.

13.26 In the case of *S v Minister for Justice, Equality and Law Reform*, the applicant came to Ireland to live with his parents and siblings who had leave to remain in the State.¹⁰⁰ Following the rejection of his claim to asylum, deportation proceedings were commenced. In all, some six months had elapsed since the applicant had first entered the State. The applicant and his family claimed, *inter alia*, that the issuing of a deportation order, which would limit the possibility of re-entry into the State in the future, would be disproportionate to the aim pursued and, therefore, in breach of Article 8. The respondent argued that the applicant had no legal right to remain in the

Oguekwe the decision of the High Court was upheld in relation to the deportation orders, however on different grounds than the trial judge.

⁹⁷ See generally Hogan and Whyte *Kelly's: The Irish Constitution* (Butterworths, 4th edn, 2004), in particular pp 1825–1968. In relation to the constitutional fundamental rights protections of citizens and non-citizens, see pp 1260–1265.

⁹⁸ Judicial Review No 2007/1493 *I v Minister for Justice, Equality and Law Reform* (unreported) 30 November 2007, Dunne J and Judicial Review No 2007/1537 *E v Minister for Justice, Equality and Law Reform* (unreported) 30 November 2007, Dunne J.

⁹⁹ [2003] IR 1, at 62.

¹⁰⁰ *S v Minister for Justice, Equality and Law Reform* [2007] IEHC 398.

State,¹⁰¹ and urged the High Court to have regard to Lord Bingham's statement in *Razgar*, where it was stated that decisions '... taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis.'¹⁰²

13.27 The applicant's Article 8 claim failed. After reviewing the jurisprudence from the ECtHR and the House of Lords, Dunne J stated that the right to family life between a parent and his/her adult child may not necessarily come under Article 8 unless elements of dependency are also present. This is in addition to any familial relationship wherein emotional ties may already be present.¹⁰³ On the particular facts of the case, Dunne J found that sufficient emotional ties did not exist between the applicant and the other members of the family. There was no question of the applicant being dependent on his parents or other family members. Dunne J noted the short length of time that the applicant was in the State and the fact that the applicant had had options to leave the State without the Minister issuing a deportation order. The fact that the applicant may not now re-enter the State was not found to be a disproportionate interference with the enjoyment of family life, on the basis that the applicant, his parents and his siblings never in fact enjoyed family life deserving of Article 8 protection.

CONCLUSION

13.28 The rise in inward migration to Ireland over the last decade coincided with increased judicial engagement with the rights and freedoms protected by the ECHR. Article 8 claims to protection of private and family life have been at the heart of much of this engagement. In the jurisprudence of both the Irish

¹⁰¹ The Minister referred the High Court to the various cases relied on by the applicant, including *Yilmaz v Germany* (2004) 28 EHRR 23, *Bouchelkia v France* (1998) 25 EHRR 686, *El Boujaïdi v France* (2000) 30 EHRR 233 and *Berrehab v Netherlands* (1988) 11 EHRR 323. The Minister sought to differentiate these cases on the basis that persons claiming a breach of Article 8 had all been legally resident within the respective State and were seeking to challenge the termination of the permission to remain within the State.

¹⁰² *R (Razgar) v Home Secretary* [2004] 1 AC 368, p 390. This case was cited with approval in the earlier High Court decision of *Agbonlahor v Minister for Justice, Equality and Law Reform* [2007] IEHC 166. In *Agbonlahor* Feeney J rejected the claim by the applicants that removal from the State was prevented by Article 3 or Article 8 of the Convention as treatment for the main applicant's Attention Deficient Hyperactivity Disorder (ADHD) would not be provided for within Nigeria. Feeney J noted that risks or dangers faced by the family do not emanate from the actions of the public authorities in the receiving State and removal of the Agbonlahor family is pursuant to lawful immigration policy. Feeney J also stated that failure to provide a continued social benefit to a person who is to be removed from the State does not give rise to any issues under Article 3 or Article 8 of the Convention.

¹⁰³ In making this finding Dunne J made particular reference to the case of *Advic v United Kingdom* (1995) 20 EHRR CD 125. In *Advic* the applicant had 18 years of lawful residence in the UK. The applicant left the UK and attempted to re-establish himself there a number of years later. The applicant stated that the UK should consider the application as he had a number of adult children in the UK and the applicant's brother also lived there. The second chamber of the European Court of Human Rights found that there were insufficient links between the applicant and his relatives so as to raise any issue of Article 8 protection.

courts and the ECtHR, tensions have arisen between states' interests in immigration control and claims to protection of private and family life. The best interests of the child have been at the heart of these conflicting claims. At best, however, the child's best interests is one amongst a number of factors to be considered by the courts, not a trumping claim. The focus on the legal status and behaviour of parents has marginalised the rights-claims at stake for a child. The existing connections sustained by adults or parents are privileged over the potentiality for future connections of children with the importance of connection to a community or territory assessed 'in terms of the length and depth of past association, rather than the salience or value of future connection.'¹⁰⁴ Recent jurisprudence of the ECtHR has highlighted the necessity of giving due consideration to claims raising a child's best interests. As the outcome of the *Bode* litigation has shown, however, the Irish courts have, as yet, given only limited weight to such claims.¹⁰⁵

¹⁰⁴ Bhabha above, pp 6–7.

¹⁰⁵ The Twenty-Eight Amendment to the Constitution Bill 2007 sought to explicitly recognise the 'natural and imprescriptible' rights of the child. The Bill is generally concerned with child protection issues, particularly with issues in relation to protection from sexual abuse. Due to a lack of cross party political agreement, the Joint Committee on the Constitutional Amendment on Children was established in November 2007. The Joint Committee's remit of review is limited to the proposals within the Twenty-Eight Amendment to the Constitution Bill 2007.