This is the principal judgment in a series of judgments given by Ms Justice Finlay Geoghegan on the 14th November 2006. The judgments given were [2006] IEHC 342/343/344/345/346/347 and 348.

Neutral Citation Number: [2006] IEHC 341

THE HIGH COURT
JUDICIAL REVIEW

2006 No. 102 J.R.

DEBORAH OLARANTIMI BODE
(A MINOR SUING BY HER FATHER AND NEXT FRIEND, FOLAJIMI BODE)
FOLAJIMI BODE
CAROLINE OLA-BODE

APPLICANTS

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

AND
HUMAN RIGHTS COMMISSION
AND ATTORNEY GENERAL

NOTICE PARTIES

Judgment of Ms. Justice Finlay Geoghegan delivered the 14th day of November, 2006.

1. The above entitled proceedings were heard with four other similar but not identical applications for judicial review. These were:

2005 No. 1271 J.R. *Chuka Paul Oguekwe & Ors. v. The Minister for Justice, Equality and Law Reform & Ors.*

2005 No. 1234 J.R. *Samir Moriss Gerges Fares & Anor. v. The Minister for Justice, Equality and Law Reform*

2005 No. 151 J.R. *George Dimbo & Ors. v. The Minister for Justice, Equality and Law Reform*

2006 No. 222 J.R. *Armstrong Edet and Anor. v. The Minister for Justice, Equality and Law Reform*

2. Immediately after the above were heard, three other similar applications for judicial review were also heard. These are:

2006 No. 43 J.R. *Folashade Olubunmi Adio & Ors. v. The Minister for Justice, Equality and Law Reform*

2006 No. 504 J.R. *Mercy Oviawe & Ors. v. The Minister for Justice, Equality and Law Reform & Ors.*

2005 No. 1348 J.R. *Gheorghe Dorin Duman v. The Minister for Justice, Equality and Law Reform & Ors.*

3. Each of the proceedings is a separate judicial review proceedings. In each of the proceedings the applicants include an Irish citizen child and a non-national parent or parents who made an application which was refused or not considered under administrative arrangements established by the respondent in 2005 which became known as the IBC/05 Scheme. In certain of the proceedings the other non-national parent of the Irish citizen child was granted leave to remain in the State under the IBC/05 Scheme and is also an applicant.

4. In each of the proceedings the applicants have sought an order of *certiorari* quashing the relevant decision of the respondent either refusing or refusing to consider an application made under the IBC/05 Scheme.

5. Notwithstanding that there were two groups of hearings, it was agreed in the course of the hearing that in assessing the challenges made the court could take into account in each of the sets of proceedings evidence which had been given in other sets of proceedings. Similarly, whilst a number of the applicants were represented by different counsel and solicitors, in the economy of time those counsel sought to rely upon submissions made by each other and not to repeat unnecessarily submissions already made to the court. It was therefore agreed that subject to the submissions being applicable to a ground in respect of which leave was granted in the relevant proceedings that the court should consider collectively the submissions made by counsel for the differing applicants. The respondent was represented in all the proceedings by the same counsel and solicitor. The same affidavit of Ms. Hynes, a Principle Officer in the Department of Justice, Equality and Law Reform was filed in all the proceedings and identical written submissions of the respondent relied upon. Notwithstanding, each application must ultimately be determined by reference to the facts relevant to the applicants in those proceedings and the reliefs sought and grounds in respect of which leave was granted.

6. The principal relief sought in these proceedings is an order of *certiorari* of the refusal of the second named applicant, Mr. Bode's application under IBC/05. The reason for his refusal is sufficiently similar to the reason for the refusals in respect of Mr. Oguekwe, Mr. Fares and Mr. and Mrs. Dimbo to warrant considering in this judgment the relevant facts pertaining those refusals. Each of the applicants seeks ancillary and consequential relief and also certain seek relief in relation to other decisions taken by the respondent in respect of them. Those will be considered in the separate judgments.

7. I am also giving today separate judgments in each of the applications for judicial review referred to above. The principles set out in this judgment apply in part at least to certain of the issues which have to be decided in the other judgments. As appears from those judgments they are not repeated. Accordingly, I have taken into account in reaching my conclusions as set out in this judgment, submissions made also on behalf of those other applicants on the common issues in relation to decisions taken on applications under IBC/05.

8. In certain of the proceedings, the Human Rights Commission and the Attorney General were joined as notice parties. In others notices were served under the Superior Court Rules. I was informed at the outset that they would not be separately represented. Counsel for the respondents also appeared on their behalf.

Relevant background facts of Bode, Oguekwe, Fares and Dimbo applicants

9. Deborah Bode was born in the State on 13th September, 2004 and is an Irish citizen. She has resided in the State continuously since the date of her birth. Her mother is Caroline Ola-Bode the third named applicant. She has been resident in the State since June, 2004. She is a national of Nigeria. On 10th October, 2005 she was granted permission to remain in the State on her IBC/05 application.

10. Folajimi Bode, is the father of Deborah Bode. He is a national of Nigeria. He is stated to have arrived in the State on 23rd July,

2002. On 5th March, 2005 he made an application on IBC/05. On 21st November, 2005 he was refused permission to remain in the State on his IBC/05 application. Mr. Bode was then and is the subject of a deportation order issued on 2nd March, 2005. The respondents indicated in the course of the proceedings that the respondent proposed revoking that deportation order, however, no evidence of revocation was given prior to the end of the hearing.

11. Prince Roniel Oguekwe was born in Ireland on 9th June, 2003. He is an Irish citizen. His parents are the first and second named applicants who are Nigerian nationals and who are married to each other. Mrs. Oguekwe arrived in Ireland in April, 2003 and Mr. Oguekwe in February, 2005. Both applied for residency under the IBC/05 Scheme. On 10th March, 2005 Mr. Oguekwe was refused permission to remain in the State under the Scheme. On 3rd May, 2005 Mrs. Oguekwe was granted residency under the Scheme.

12. Flobater Samir Moriss Gerges Fares was born in Ireland on 14th September, 2003 and is a citizen of Ireland. Mr. Fares is the father of Flobater, is married to his mother, both of whom are Egyptian nationals. They spent approximately four to six weeks in the State on a visitors visa at the time of their son's birth. They returned to the State in March, 2005 on a visitors visa. Mr. Fares made an application under the IBC/05 Scheme which was refused on 19th August, 2005.

13. George Dimbo was born in the State on 6th May, 1996 and is a citizen of Ireland. His mother, Mrs. Dimbo, at that time was in Ireland lawfully on a student visa. She was a student in UCC. His parents, Mr. and Mrs. Dimbo, are nationals of Nigeria and are married to each other. On 29th September, 1997 Mrs. Dimbo was granted leave to remain in the State on the basis of her citizen child. She and George Dimbo appear to have remained in the State until January, 1998 when they returned to Nigeria. There is a factual dispute as to subsequent movements of Mr. and Mrs. Dimbo and George Dimbo in and out of the State. It appears common case that they were in the State between end 2002 or early 2003 and a date in 2004 and that most recently they have been in the State since February, 2005. Mr. and Mrs. Dimbo applied under the IBC/05 Scheme on 15th March, 2005 and were refused on 16th August, 2005.

14. There are additional facts pertaining to the immigration history of the adult applicants including in the cases other than the Fares family, applications for declarations of refugee status; refusals; proposals to deport; applications for leave to remain and individual decisions to issue deportation orders which are relevant to other issues in each of the proceedings but not necessarily relevant to the primary common issue as to the lawfulness of the refusal under the IBC/05 Scheme upon the basis of a failure to show that the refused parent had been continuously resident in the State since the birth of the Irish citizen child.

15. In summary, it is common case that Mr. Oguekwe, Mr. Fares and Mr. and Mrs. Dimbo were not continuously resident in the State from the birth of their citizen child. Mr. Bode asserts he was so resident but did not submit documentary proof of continuous residence which satisfied the respondent. Further, it is common case that all of the above were in the State upon the date upon which they submitted an application under IBC/05.

Background to IBC 05 Scheme

16. An affidavit of Ms. Maura Hynes, a Principal Officer with the Department of Justice, Equality and Law Reform, sworn on 19th May, 2006 setting out much of the background was filed in all the proceedings. The facts leading to the introduction of the Scheme may be summarised as follows.

17. In the 1990s the State began to experience mass applications for asylum. The large number of applications created administrative difficulties. Initially there was a non-statutory asylum scheme. In 1996 it was put on a statutory basis by the enactment of the Refugee Act, 1996 and the Refugee Applications Commissioner and the Refugee Appeals Tribunal were established. These provisions did not come into full force until 2000.

18. At that time a child born in Ireland was an Irish citizen from birth regardless of the status of his/her parents in the State. This was provided for by s. 6(1) of the Irish Nationality and Citizenship Act, 1956. Article 2 of the Constitution as amended by the referendum pursuant to the 19th Amendment of the Constitution Act, 1998, also so provided subsequent to 3rd June, 1998.

19. It became apparent that a significant number of non-nationals in the State (both those who entered the State in order to claim asylum and others) gave birth to children in the State and then claimed a right to remain in the State based on the parentage of the Irish citizen child. An administrative procedure was established for such applications and it is stated that the respondent adopted a policy of generally granting permission to remain in the State to non-national parents of Irish citizen children. Between 1996 and February, 2003 Ms. Hynes states that the respondent granted leave to remain on the basis of the parentage of an Irish citizen child to approximately 10,500 non-nationals. The possibility of obtaining residency based on parentage of an Irish citizen child is considered to have encouraged many to come to Ireland.

20. The nature of the respondent's power to deport the non-national parents of Irish citizen children was the subject of Supreme Court decisions in the cases of *A.O. and D.L. v. the Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1. Judgment was given in those cases on 23rd January, 2003. Following that decision, the respondent's policy towards granting permission to reside in the State on the basis of an Irish citizen child was reviewed.

21. It is stated that the respondent decided that the separate administrative procedures for the consideration of residency applications based solely on parentage of an Irish born child should cease with effect from 19th February, 2003. There were then 11,493 such applications outstanding. The outstanding applications were not determined and in July/August, 2003 the respondent announced that they would not be determined in a separate procedure but that individual consideration would be given to the position of citizen children in the context of a proposal to deport a parent under s. 3 of the Immigration Act, 2005. Proposals to deport parents of Irish citizen children then recommenced on a widespread basis.

22. It appears that an expectation that the number of non-national births in Ireland would drop significantly following the decision in *A.O. and D.L. v. the Minister for Justice, Equality and Law Reform* and change of policy was not realised. However, it is stated that in 2004 two out of three non-national births were to persons other than asylum seekers. In response to this situation it is stated that the Government introduced the proposal to amend the Constitution which was approved by referendum in 2004. Legislative effect was given to the amendment by the Irish Nationality and Citizenship Act, 2004 which commenced on 1st January, 2005. Since 1st January, 2005 it is no longer possible for persons to bestow Irish citizenship on their children simply by arranging for their birth in Ireland.

23. Ms. Hynes explains that even prior to 1st January, 2005 it became apparent that there were reducing numbers of pregnant women travelling to Ireland to claim asylum (presumably with a view to giving birth in Ireland). She also states that it was hoped that following the change in the citizenship laws that there would be less temptation for persons to make groundless asylum applications in the hope of obtaining a right to remain in the State derived from the citizenship of their child. She states that it was this hope that made it possible for the respondent to consider the situation of outstanding claims of parents of Irish citizen children in a somewhat different light. Of them she states at para. 15:

"It was believed that their position was something of an anomaly and that they could be considered to be a closed category of persons whose situations could be treated with more generosity than might be warranted on a strict case by case analysis of the situation of each."

24. Ms. Hynes explains the decision to establish the IBC/05 Scheme at para. 17 of her affidavit in the following terms:

"… it was then decided that, rather than engaging in a case by case analysis, as a gesture of generosity and solidarity to the persons concerned, a general policy would be adopted of granting those persons permission to remain in the State provided that they fulfilled certain criteria which were designed to reflect the factors that had given rise to the decision to adopt a generous attitude towards these persons and to protect the public interests in the safety and security of the residents of the State."

Factual assessment of IBC/05 Scheme

25. It is necessary to consider in some detail the administrative arrangements of the respondent at issue in these proceedings as there is a factual dispute between the parties which is central to the challenges made by the applicants to the validity of the decisions of the respondent herein.

26. In summary, the applicants contend that the revised arrangements announced by the respondent, and which became known as and are referred to in these proceedings as the IBC/05 Scheme were administrative arrangements according to which each of the parent applicants herein was invited or entitled as the parent of an Irish citizen child to apply for leave to remain in the State and which provided for the processing or consideration and determination of such applications.

27. On behalf of the respondent it was submitted that the revised arrangements or IBC/05 Scheme was not addressed to all parents of Irish born children born before 1st January, 2005. Rather it was a Scheme directed only towards those parents who fell within the class of person the respondent, as a matter of policy had determined should be granted residency or leave to remain under the Scheme. This factual submission, counsel for the respondent acknowledged was central to many of his legal submissions on behalf of the respondent.

28. There is no one document setting out all the terms of the revised arrangements or IBC/05 Scheme. Ms. Hynes in her affidavit refers to and exhibits three documents of relevance:

1. An announcement by the respondent on 14th December, 2004 which it is stated was published in the newspapers;

2. a notice setting out the Scheme's detail which was published in the national media and on the Department's website on 15th January, 2005; and

3. the application form IBC/05.

29. The notice if 15th January, 2005 is probably the most important of these documents as it was the formal announcement of the commencement of the Scheme. However, as reliance is also placed upon the respondent's announcement of 14th December, 2004 it is proposed to set it out in full: the text of that announcement as exhibited is in the following form:

Minister announces revised arrangements for processing claims for permission to remain from parents of Irish born children

Mr. Michael McDowell TD, Minister for Justice, Equality and Law Reform, has announced that the Government have today approved his proposals to introduce revised arrangements for the processing of claims for permission to remain in the State from the non-national parents of Irish born children with effect from early January 2005.

Announcing the new arrangements, the Minister said "The Irish Nationality and Citizenship Bill 2004 which will be commenced with effect from 1 January 2005, will enable me to deal with these claims in a decent, pragmatic and common sense way, as I had promised. Each case will be examined thoroughly and I intend to grant residence only to those people who can show that they have been resident in Ireland taking care of their Irish citizen children, have not been involved in criminal activity, and that they are willing to commit themselves to becoming economically viable. They will be given the opportunity to work and to contribute fully to Irish society."

The onus will be on applicants to show why they should be granted residence. Applicants will be required to provide adequate proof of their identity, their period of residence in Ireland, and their relationship with the Irish citizen child. Details of the application procedure will be published early in January, 2005 and application forms will be made available at that time. Applications must be returned by the end of March. In the meantime, people should prepare themselves by obtaining the necessary evidence of identity, including passports from their countries of origin and birth certificates. People who had previously applied for permission to remain on the basis of their Irish citizen child will be required to submit a new application on the new form.

The Minister added, "The non-national parents of Irish born children born before the enactment and commencement of the new legislation are a group in a unique position because of the citizenship legislation which has been in place to date. With our new legislation, it will no longer be possible for non-national parents to bestow Irish citizenship on their child solely on the basis of his or her birth on the island of Ireland. From now on, only children of non-national parents who have a genuine prior link to Ireland, evidenced by being resident here legally for three out of the previous four years, will be entitled to Irish citizenship."

14 December, 2004

30. The announcement made on 15th January, 2005 was in the following terms:

Department of Justice, Equality and Law Reform

An Roinn Dli agus Cirt, Comhionannais agus Athchóirithe Dli

NOTICE TO NON-NATIONAL PARENTS OF IRISH BORN CHILDREN

REVISED ARRANGEMENTS FOR THE CONSIDERATION

OF APPLICATION FOR PERMISSION TO REMAIN

MADE BY THE NON-NATIONAL PARENTS OF IRISH

BORN CHILDREN BORN BEFORE 1 JANUARY, 2005

The contents of this Notice do not affect those parents who have already been granted permission to remain in the State.

1. This notice sets out details of the new arrangements which are being introduced with effect from today. Applications from non-national parents of Irish born children born before 1 January, 2005 for permission to remain in the State can be made on form IBC/05. This form is now available on our website at www.justice.ie Hard copies of the form will be available with effect from 21st January 2005 at the Department of Justice, Equality and Law Reform, 13-14 Burgh Quay, Dublin 2, Garda District Headquarters stations outside Dublin and at all Reception and Integration Agency accommodation centres countrywide. Forms will also be distributed to various non-governmental organisations working with immigrants and asylum seeks. Blank forms can be photocopied and applications submitted on photocopied forms.

2. Please note that if you have previously applied for permission to remain based on parentage of an Irish born child and your application was not processed to a conclusion, you must re-apply by completing an application form under this new Scheme. If both parents are applying, they must do so on separate forms. Completed applications must be submitted before the end of March 2005. Applications will be processed as quickly as possible.

3. Your completed application form should be accompanied by the following:

Original passport/National Identity card (not GNIB card) of the adult applicant

Original birth certificate for the Irish born child

2 passport size photographs of the adult applicant (each one signed on back)

Evidence of continuous residence in the State since the birth of the child (utility bills, lease/rental agreements, etc)

Letter from your Community Welfare Officer stating the period that you have been in receipt of welfare payments in the State

If you have been employed in the State, details of that employment, such as tax certificate, letter from employers, etc

Important: All documents must be original documents and copies of documents will not be accepted.

If you are unable to provide any of the above documents, please include a note explaining why this is the case. If you have already sent any of the above documents to the Department please give details.

4. Each applicant will be required to make a statutory declaration as to their future conduct which must be made in front of and signed by a Notary Public, a Commissioner for Oaths or a Peace Commissioner.

5. Each case will be examined on its merits and successful applicants will be granted permission to remain for an initial period of two years. Applicants will be required to acknowledge that the granting of permission to remain does not give any entitlement to any other person, related or not, to enter the State. This Scheme does not make any provision for persons granted permission to be joined by family members from outside the State.

6. Applications will be processed in the order in which they are received. In order to facilitate processing, queries will not be answered over the telephone. All queries should be put in writing and sent to the following address:

Irish Born Child Unit

Department of Justice, Equality and Law Reform

P.O. Box 10003

Dublin 2

15th January 2005

31. The respondent also relied upon the application form IBC/05. This form is headed "Application for permission to remain on the basis of parentage of an Irish born child born before January, 2005 (Form IBC/05)".

32. Instructions are then given as to the completion of the form including that a separate form must be completed for each adult applicant. At the commencement, each applicant had to insert their name following which was printed:

> "I….wish to apply to the Minister for Justice, Equality and Law Reform for permission to remain in the State on the basis of my parentage of an Irish born child. The information supplied by me in connection with this application is true to the best of my knowledge."

33. The application form does not purport to set out the criteria according to which applications would be decided but does contain certain questions of relevance to the issues the court has to consider. Firstly, at section 3(E) an applicant is asked "Have you left the State for any reason since the birth of your first Irish born child?". They are then required to tick a box saying "yes or no" and then asked, "If yes, please give details below (use additional sheets if necessary)". The details sought are under headings, date of

departure; date of return; place visited and purpose of visit.

34. In section 4 it is stated under a heading of "Supporting documentation" that the completed application form must be accompanied by the following original details and they are asked to tick confirming the documents included. The relevant box is "evidence of continuous residence in the State since the birth of the Irish born child (utility bills, lease/rental agreements etc.)." It is then stated "If you are unable to provide any of the above documents, please include a note explaining why this is the case. If you have already supplied any of the above documents to the Department please give details on the additional sheets provided."

35. The last documents of relevance to the factual question as to whom the revised arrangements or IBC/Scheme was addressed are the letters issued on behalf of the respondent to each of Mr. Bode, Mr. Oguekwe, Mr. Fares and Mr. and Mrs. Dimbo. The letter to Mr. Bode of 21st November, 2005 was as follows:

> "Dear Folajimi Bode,
>
> > I am directed by the Minister for Justice, Equality and Law Reform to refer to your application for permission to remain in the State under the revised arrangements announced by the Minister on 15 January 2005 for the processing of applications from the non-national parents of Irish born children born before 1 January 2005.
> >
> > It is a requirement under the revised arrangements that the applicant has been resident in the State with their Irish born child on a continuous basis since the child's birth. Evidence of such residence is required. In this case I note that you have not provided sufficient evidence of residency in the State since the birth of your child.
> >
> > On the basis of the foregoing, I am not satisfied that you met the criteria for the granting of permission to remain under the revised arrangements and, accordingly, your application in hereby refused.
>
> Yours sincerely,"

36. Whilst the wording of the letters to Mr. Oguekwe, Mr. Fares and Mr. and Mrs. Dimbo were different, they each referred to the application referred to the requirement under the revised arrangement of continuous residency in the State with the Irish born child, stated that the applicant did not meet the criteria for granting of permission to remain in the State under the revised arrangement and refused the application.

37. By way of contrast with the above in the case of Ms. Edet who made an application whilst resident in Nigeria, she was informed that her application for permission to remain in the State could not be considered under the revised arrangement. Ms. Adio, who applied late, was likewise informed.

38. Considering each of the above documents I have concluded in accordance with their plain meaning the revised arrangements (which became known as the IBC/05 Scheme) established by the respondent on 15th January, 2005 were, as the title of the notice of that date states, "Revised arrangements for the consideration of application(s) for permission to remain (in the State)". Further, the persons to whom they were addressed were non-national parents of Irish born children born before 1st January, 2005. Such parents were invited or permitted to apply for permission to remain in the State based upon the parentage of their Irish born child. The respondent by the announcement committed himself to consider and determine applications for permission to remain in the State from parents of Irish born children born before the 1st January, 2005 made on form IBC/05.

39. There is nothing in any of the documents which expressly, or by implication states that the revised arrangements do not apply to a person who was not continuously resident in the State with his or her Irish born child since the date of birth in the sense of precluding such persons from making an application on IBC/05.

40. The revised arrangements announced were essentially a revised procedure for the making and processing or considering applications to remain in the State from parents of Irish born children born before 1st January, 2005.

41. Insofar as reliance is placed on the IBC/05 Form and the questions asked in relation to continuous residency at para. 3(e) the details sought do not imply automatic exclusion from consideration if a person had left the State since the date of the birth of their child, rather that the length of absence and reason for absence may be relevant.

42. Finally, it is clear from the form of letters sent to Mr. Bode and the other parents who were refused by reason of a failure to meet the requirement of continuous residence that their application was processed and considered under the revised arrangement and a determination made that their application should be refused.

43. In the formal notice of 15th January, 2005 the only indication given of the criteria which would apply in determining applications made is at para. 5:

> "Each case will be examined on its merits …"

44. In the announcement of 14th December, 2004 the respondent had stated:

> "… each case will be examined thoroughly and I intend to grant residence only to those people who can show that they have been resident in Ireland taking care of their Irish citizen children, have not been involved in criminal activity and that they are willing to commit themselves to becoming economically viable."

45. In this judgment, I propose continuing to refer to the revised arrangements introduced by the respondent in January, 2005 as the IBC/05 Scheme for the sake of simplicity. However, in doing so, I do not intend to confer any special status on the revised arrangements.

Implementation of IBC/05

46. Ms. Hynes in her affidavit states that a total of 17,917 applications were received and processed under the IBC/05 Scheme. On the basis of the cases completed by 31st January, 2006, 16,693 applicants were given leave to remain and it is stated "refusal decisions were given in 1,119 cases". Of these it is stated 566 were refused as continuous residence was not proven. Fourteen other reasons for refusal are identified in the affidavit at para. 32 and the relevant numbers given.

47. It is common case that in considering and determining the applications made on IBC/05 no consideration was given by or on behalf of the respondent to the position or rights of the Irish born child.

48. There is a dispute on the affidavits as to whether the respondent applied to all applications the criteria or requirement of continuous residence. Ms. Hynes asserts that this was uniformly applied. In these proceedings Mr. Brendan Toale, solicitor for the applicants, swore an affidavit in which he identifies a named individual (with his departmental reference number) in respect of whom he states the requirement of continuous residence was not applied. There is no denial of this specific averment.

49. Notwithstanding, what is not in dispute is that such a requirement was applied to each of the refused parents in this and the related proceedings and it was by reason of failure to meet this requirement that their applications under IBC/05 was refused.

50. The only potential relevance of the fact that the respondent may not have applied this requirement in another case is that it accords with a view which I have formed, independently of this fact, that as a matter of law, the respondent retained and retains at all times a discretion to determine applications made on IBC/05 in accordance with the legal principles set out in this judgment.

Grounds of challenge to validity of decisions to refuse residency

51. The applicants relied upon multiple grounds and submissions to challenge the validity of the individual decisions taken by or on behalf of the respondent to refuse residency to the second named applicant herein and other refused parents in the related proceedings by reason of a failure to meet the requirement of continuous residence in the State since the citizen child's birth. The primary submission was that the decisions were invalid or unlawful in that they were taken in breach of personal or fundamental rights of the citizen children guaranteed and protected by the Constitution and European Convention on Human Rights as implemented in the State. Submissions were also made in certain applications in reliance on alleged breach of rights of the non-national parents. It is proposed in this judgment to consider the following grounds.

> 1. The taking of a decision to refuse a parent residency for failure to meet a requirement of continuous residency without considering the rights, including welfare, of the citizen child is in breach of the citizen child's rights under Article 40.3 and 41 of the Constitution.
>
> 2. The taking of a decision to refuse a parent residency for failure to meet a requirement of continuous residency without considering the rights of the child to respect for his/her private and family life is in breach of the State's obligations under article 8 of the European Convention on Human Rights and consequently in breach of the respondent's obligations under s. 3 of the European Convention on Human Rights Act 2003.
>
> 3. The requirement of continuous residency as a criteria for the granting of permission to remain in the State is in breach of the citizen child's rights under article 14, when considered in conjunction with article 8 of the European Convention on Human Rights and consequently in breach of the respondent's obligation under s. 3 of the Act of 2003.

Grounds of Opposition

52. In response to the above challenges the principle contentions on behalf of the respondents may be summarised as follows:

> 1. IBC/05 was introduced in the exercise of the inherent power of the Executive to formulate and execute immigration policy.
>
> 2. The determination of the criteria according to which residency would be granted is a matter of immigration policy and as such is not subject to review by the courts.
>
> 3. If the refusal for failure to meet the requirement of continuous residency is subject to review by the court then the respondent was not under any obligation to consider the rights of the Irish citizen child prior to refusing an application on IBC/05 as:
>
> > (i) The refusal did not alter the status in the State of the refused parent; and
> >
> > (ii) The refusal did not involve the deportation or breaking up of a family unit; and
> >
> > (iii) The Scheme operated to grant a privilege to which the parents had no entitlement to those who met the criteria under the Scheme; and
> >
> > (iv) Prior to any deportation the citizen child's rights and the rights of the family would be considered under the procedure set out in s. 3 of the Immigration Act 1999.
>
> 4. For similar reasons there was no interference with the citizen child's right to respect for his/her private and family life in breach of article 8 of the Convention.
>
> 5. The requirement of continuous residency is not in breach of article 14, taken in conjunction with article 8 of the Convention. The difference between those able to meet the requirement of continuous residency and those not does not relate to a ground which article 14 of the Convention applies.

Legal and Administrative Framework of IBC/05 Scheme

53. The constitutional, legal and administrative framework of the IBC/05 is important to a consideration of the issues in dispute between the parties and therefore requires to be set out. It was considered in some detail by the Supreme Court in *A.O. and D.L. v. Minister for Justice & Ors.* [2003] 1 I.R. 1. From the judgments in that case and the earlier decisions referred to the position appears to be as follows.

54. The State, as a sovereign state has an inherent power to control aliens both in relation to their entry to the State and whilst

resident in the State. It is in the interests of the common good of a state that it should have control of the entry of aliens, their departure and their activities and duration and stay within the state. This inherent power of the State is longstanding and predates the present Constitution. The current constitutional source of the power, in common with all executive powers, is now to be found in Article 6.1 of the Constitution. Hardiman J. in *A.O. and D.L. v. Minister for Justice* at p. 135, having reviewed the longstanding inherent nature of this power, stated:

> "The constitutional source of this power, and of all executive powers in relation to foreign affairs or otherwise, is now to be found in Article 6.1 of the Constitution: it is part of the executive power which is there referred to. By the following sub-article, it is exercisable exclusively by the relevant organ of State established by the Constitution, in this case the executive Government, responsible to Dáil Éireann and thus to the people of Ireland. Article 29.4 deals specifically with the executive power in connection with international relations. But the detailed exercise of the power in relation to aliens is now heavily regulated by law."

55. As observed by Hardiman J. the detailed exercise of the inherent power is now regulated and prescribed by law. Such law includes:

> (1) The Constitution,
>
> (2) legislative provisions, and
>
> (3) international obligations.

56. At the time of the introduction of the IBC/05 Scheme there was no statute or regulation or other administrative scheme or procedure which enabled a non-national parent of an Irish citizen child (independently of a Notice of Intention to Deport under s. 3 of the Immigration Act, 1999) to apply for residency or leave to remain in the State or which expressly stated the matters to be considered or criteria according to which the respondent should determine any such application.

57. It is common case that the inherent power of the respondent in relation to aliens referred to above includes the power, in his discretion to receive, consider and determine an application for residency or leave to remain in the State from a non-national whether then in or outside the State, independently of any statutory scheme such as the procedure envisaged by s. 3 of the Act of 1999. That section does not expressly refer to applications for residency or leave to remain.

58. The respondent in establishing IBC/05 and in receiving, processing or considering and determining applications made on IBC/05 is exercising such inherent executive power now derived from Article 6 of the Constitution.

59. The affidavit of Ms. Hynes at para. 36 cites another example of the exercise by the respondent of this inherent discretionary power. These were the decisions taken on humanitarian grounds by the respondent in relation to non-nationals whose Irish citizen child had died prior to the introduction of the IBC/05 Scheme. Whilst it appears such parents may have made applications on IBC/05, the permissions to remain in the State are said not to have been granted under the IBC/05 Scheme. It also appears from para. 38 of the same affidavit that the respondent independently of the IBC/05 Scheme also considered and determined applications for residency from non-national parents of Irish citizen children who were repatriated as Kosovar programme refugees.

60. The only legislative provision relied upon by the applicants as constraining the respondent in the exercise of his executive power in considering and determining applications under IBC/05 is s. 3 of the European Human Rights Act, 2003.

> "3.—(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

61. It is undisputed, having regard to the definitions in s. 1 of the Act of 2003, that the respondent is an "organ of the State" and in considering and determining applications under IBC/05 is performing a "function" within the meaning of s. 3(1) of the Act of 2003. Accordingly, he is under a statutory obligation pursuant to s. 3 of the Act of 2003 to consider and determine applications under IBC/05 in a manner compatible with the State's obligations under the European Convention on Human Rights.

62. The applicants contend that the respondent is constrained by the Constitution to consider certain personal rights of the citizen child. It is not disputed, as a matter of principle, that the respondent, when exercising inherent executive power in considering and determining applications on IBC/05, may also be constrained by obligations flowing from the Constitution including rights guaranteed to citizens under Article 40. However, there was significant dispute as to the extent to which the respondent was so constrained, in particular in relation to the constitutional rights asserted on behalf of the citizen children in the factual and legal context of the revised arrangements for applications on IBC/05.

63. It was also contended and not disputed that in considering and determining the applications from the parent applicants that the respondent was bound to act in accordance with the principles of constitutional justice and fair procedures.

Review of the criteria applied in IBC/05 by the courts

64. The first legal issue to be considered in the light of the submissions made on behalf of the parties is the extent to which the criteria applied in the determination of applications under IBC/05 is subject to review by the courts. On behalf of the respondents it was submitted that the criteria applied in determining whether an application should be granted or refused reflects or forms part of the then current policy of the executive which is not subject to review by the courts.

65. The exclusive role of the Executive and Oireachtas in determining policy in immigration matters was not disputed on behalf of the applicants. However, what is alleged is that in determining the applications of Mr. Bode and other refused parents under IBC/05 by the application of a criteria or requirement of continuous residency the respondent acted in breach of certain rights of the Irish citizen children guaranteed by Articles 40.3 and 41 of the Constitution and also that the respondent acted in breach of his obligations under s. 3 of the European Convention on Human Rights Act, 2003 in that the manner of consideration and determination of the application was inconsistent with the State's obligations under articles 8 and 14 (in conjunction with article 8) of the European Convention on Human Rights.

66. Insofar as the applicants allege that the respondent in either the establishment or implementation of the IBC/05 Scheme acted in breach of the constitutional rights of the citizen children or contrary to his obligations under s. 3 of the Act of 2003, then such dispute is to be determined by the Courts and in such proceedings the challenged decision or implementation is subject to review by the courts.

67. What is and remains policy is a matter exclusively for the Executive or Oireachtas and is not subject to review by the courts. However, where either the Oireachtas transforms what was policy into legislation or the Executive by an administrative or other act takes a decision, which impacts on an individual albeit in accordance with a policy then if it is alleged that such legislation or decision is contrary to constitutional or legally protected rights of the individual it is a matter for the courts to hear and determine that dispute. In *A.O. and D.L. v. Minister for Justice* [2003] 1 I.R. 1, Keane C.J. at p. 26, having reviewed changing immigration and emigration patterns, stated:

> "The resolution of these complex political, social and economic issues which, it need hardly be said, are not in any sense unique to Ireland, is entirely a matter for the Oireachtas and the Executive. The function of the courts is to ensure that the constitutional and legal rights of all the persons affected by the legislation in question are protected and vindicated."

68. In the same case, Murray J. (as he then was) at p. 86 stated:

> "No doubt it can be said that the immigration policy adopted by our State, bearing in mind our history, should be as generous as possible, but the evaluation of its generosity is not a matter for the courts. On the other hand few, if any, countries can afford to adopt an open door policy. There must be some regulation and control of numbers. The courts are concerned as to whether the control and regulation of immigration, and in particular the application of those controls in individual cases are in accordance with the law and the Constitution."

69. In *T.D. v. Minister for Education* [2001] 4 I.R. 259, Keane C.J. in considering the separation of powers, albeit in a different context, stated at 284:

> "If it was established in any proceedings that the government had acted in a manner which was in contravention of the Constitution, then the exclusive role afforded to them in the exercise of executive power of the State would not prevent the courts from intervening with a view to securing compliance by the government with the requirements of the Constitution."

70. In the same case at p. 331 Murray J. (as he then was) stated:

> "There is a fundamental distinction between the courts determining whether policies or measures of the executive or the Oireachtas are compatible with their obligations under law or the Constitution and the courts taking command of such matters so as to, in substance, actually exercise a core constitutional function of one of those organs of the State. …
>
> Thus it is not in issue that the superior courts, in determining cases brought before them, may make orders affecting, restricting or setting aside actions of the executive which are not in accordance with law or the Constitution or make declaratory orders as to its obligations."

71. Accordingly, this Court must determine whether or not, as alleged by the applicants, the refusal by the respondent of the parent's application on IBC/05 without any consideration of the rights, including welfare, of the Irish citizen children is in breach of the rights of the Irish citizen children guaranteed by the Constitution.

72. Similarly the court must determine the allegation that the taking of the same decisions without considering private and family rights of the Irish citizen children is inconsistent with the State's obligations under article 8 (and in certain cases article 14 taken in conjunction with article 8) of the European Convention on Human Rights and hence in breach of the respondent's obligations under s. 3 of the Act of 2003.

Rights of citizen child protected by Article 40.3.1

73. The relevant rights of the citizen child asserted to be "personal rights" within the meaning of Article 40.3.1 of the Constitution were:

> (1) The right to live in Ireland .
>
> (2) The right to be reared and educated with due regard to welfare including a right to have his/her welfare considered in the sense of what is in his/her best interests in decisions affecting him/her.
>
> (3) For those children whose parents were married to each other, the rights which as an individual the child derives from being a member of a family within the meaning of Article 41. This does not apply to Deborah Bode.

74. The submissions in relation to the child's right to live in Ireland as a citizen in Ireland were based upon the judgments of the Supreme Court in A.O. and D.L. v. The Minister for Justice. It was contended that whilst those judgments considered the rights which flowed from the child being a citizen in the context of a proposed decision to deport, that similar principles applied in the making of a decision on an application under IBC/05.

75. The submission that a citizen child has a right to be reared and educated with due regard to his/her welfare and a right to have his/her welfare (in the sense of what is in the child's best interest) considered in decisions affecting the child is based upon the judgments of the Supreme Court in *G. v. An Bord Uchtála* [1980] I.R. 32, the judgment of Finlay P. in that case; the subsequent decision of the Supreme Court in *D.G. v. Eastern Health Board* [1997] 3 I.R. 511 and other decisions which have followed these. In *G. v. An Bord Uchtála* O'Higgins C.J. at p. 56 stated:

> "Having been born, the child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being. These rights of the child (and others which I have not enumerated) must equally be protected and vindicated by the State."

76. Similar rights were referred to by Walsh J. at pp. 67 to 69.

77. In the same case, Finlay P. (as he then was) (whose decision was upheld) at p. 44 had put it as follows:

> "In my view, her daughter likewise has a constitutional right to bodily integrity and has an unenumerated right to an opportunity to be reared with due regard to a religious moral, intellectual, physical and social welfare. The State, having regard to the provisions of Article 40, s. 3 and sub-section (1) of the Constitution must by its laws defend and vindicate these rights as far as practicable."

78. Counsel for the respondent did not dispute that each of the above were personal rights of the Irish citizen child within the meaning of Article 40.3.1. Rather it was submitted that Article 40.3.1 did not impose any obligation on the respondent to consider such rights of the Irish citizen child prior to refusing an application from its parent under the IBC/05 Scheme as:

> (i) The refusal did not alter the status in the State of the refused parent; and
>
> (ii) The refusal did not involve the deportation of a parent or breaking up of a family unit; and
>
> (iii) The Scheme operated to grant a privilege to which they had no entitlement to parents who met the criteria under the Scheme; and
>
> (iv) Prior to any decision to deport a parent the citizen child's rights and the rights of the family would be considered under the procedure set out in s. 3 of the Immigration Act 1999.

Conclusion on alleged breach of child's rights

79. The citizen child is central to IBC/05. In accordance with the printed IBC/05 form the application was for permission to remain in the State "on the basis of my parentage of an Irish born child". The fact that the IBC/05 Scheme was addressed only to parents of citizen children distinguishes it fundamentally from a scheme addressed to non-nationals with no such citizen family link and gives rise to very different considerations and obligations for the respondent.

80. An analogous important and self-evident distinction was identified in the context of deportation in *A.O. and D.L. v. The Minister for Justice* [2003] 1 I.R. 1 by Murray J. (as he then was) where he stated at p. 83:

> "I return to the important and self-evident distinction between an entirely non-national family and one in which one or more of the children are citizens. A proposed deportation of the latter gives rise to different considerations because of the Irish citizenship of one or more children of the non-national parents. The children have a general right of residence in the State and *prima facie* a right to the company and parentage of their parents within the family unit and while within the State. But that right is qualified and the infant citizen does not have a right to the company and parentage of their parents in all circumstances to such an extent that the parents themselves acquire a right to reside in the State in all circumstances. Any rights of the parents are qualified because they themselves have no right to remain within the State and any right of the infants to their company and parentage is subject to the exigencies of the common good."

81. Whilst the above analysis by Murray J. was not expressly stated to be pursuant to Article 40.3.1 it appears to me to support the submissions of the applicants based on that Article. The above extract must also be considered in the context that there does not appear to have been any submission made in *A.O. and D.L. v. The Minister for Justice* based upon the personal rights of a child to be educated and reared with due regard for his welfare.

82. Article 40.3.1 provides:

> "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

83. It is well established that the fact that a right of a citizen is a personal right within the meaning of Article 40.3 does not mean that it is an absolute right. It is a qualified right. The right of the citizen is to have the personal right respected and "as far as practicable defended and vindicated by the State".

84. No submission was made on behalf of the respondent that any interest of the common good required the respondent to take a decision to refuse an application on IBC/05 without considering the personal rights of the citizen child. Further, it was expressly indicated by counsel on behalf of the respondent that no submission was being made that any interest in the common good required a decision to refuse an application on IBC/05 by reason of a failure to establish continuous residency.

85. The State guarantee of the personal rights of a child are continuing guarantees under Article 40.3.1. The qualified right of the citizen child is to have those personal rights defended and vindicated apply at all times. Accordingly, I have concluded that when the respondent established in January, 2005 the IBC/05 Scheme and when he received applications from the parents of the citizen children and proceeded to consider and determine those applications, at all times he was bound to act in a manner consistent with the State guarantee to defend and vindicate as far as practicable the personal rights of the citizen child including the right to live in the State and to be reared and educated with due regard for his welfare.

86. At the time the applications were made under IBC/05 by the parents of the citizen children in the Bode, Oguekwe, Fares and Dimbo families the citizen children and their parents were living in the State. Their parents were in what Ms. Hynes in her affidavit has described as "an anomalous position". In the course of submission they were described as being "in Limbo". The position appears to have been that whilst each of the parents was in the State, they had no right or entitlement as an individual to be in the State, and most particularly they were not permitted to work. This had obvious consequences for their ability to provide for their citizen child and also adverse consequences for the rights of the citizen child to be reared and educated with due regard for their welfare.

87. The grant of residency or permission to remain in the State for a period of two years for successful applicants under IBC/05 is a benefit for each of the parent applicants but also is of immediate benefit to the lives of the citizen children. This permission enables the parents commence work in the State and create a settled family life and make secure plans for the upbringing and education of their child in the State. It removes from the family the uncertainty and threat of either the execution of a pre-existing deportation order (as in the case of Mr. Bode and Mr. and Mrs. Dimbo at the dates of their respective refusals under IBC/05) or the threat of deportation pursuant to a notice of intention to deport (as in the case of Mr. Oguekwe) or threat of deportation by reason of illegal status (as in the case of Mr. Fares).

88. In such circumstances a positive decision on a parent's IBC/05 application is *prima facie* a decision which defends and vindicates the personal rights of the citizen child to live in the State and to be reared and educated with due regard for his/her welfare.

89. Following the announcement and introduction in January, 2005 of the IBC/05 the citizen child at that moment in time had a right to have his personal rights defended and vindicated as far as practicable in accordance with Article 40.3 of the Constitution. That entitlement obliged the respondent when considering and determining the parent's application to consider the relevant personal rights

of the citizen child prior to refusing the application of his or her parents and to take a decision in a manner which is consistent with the guarantee to defend and vindicate those rights as far as practicable.

90. It does not appear to me, as a matter of principle that the fact that the respondent may (at least in some cases) at a future date if he proposes to deport the parents of the citizen child be then proposing to consider the rights of the citizen child, can relieve him of his obligation to do so in the context of considering and determining an application under IBC/05. It is clear from the subsequent decisions under s. 3 of the Act of 1999 in relation to Mr. Oguekwe and Mr. and Mrs. Dimbo which are the subject matter of the separate judgments delivered also today that the approach of the respondent in any such individual decisions as to whether permission would be granted was quite different from the approach to applications on IBC/05 which, as stated by Ms. Hynes, was "a general policy would be adopted of granting those persons permission to remain in the State providing they fulfilled certain criteria …".

92. Accordingly, I have concluded that it was in breach of the rights of the citizen child under Article 40.3 for the respondent having commited himself by the announcement made in January, 2005 to consider applications for permission to remain in the State based upon the parentage of a citizen child to then refuse such an application without any consideration of the rights of the citizen child.

93. The judgment of Murray J. in *A.O. and D.L. v. The Minister for Justice* [2003] 1 I.R. 1 is again helpful in identifying the manner in which the respondent may take a decision which is consistent with the rights of the citizen child under Article 40.3.

94. In his conclusion in that judgment Murray J. summarises both the rights of the citizen child and the obligation and entitlement of the respondent to take decisions in the context of a deportation order at p. 91as follows:

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

95. Applying the above to the rights identified herein and the IBC/05 application the position appears to be as follows. The citizen child of the non-national parent has, *prima facie*, a right to remain in the State. While in the State (at least) the citizen child has a right to be educated and reared with due regard to his/her welfare and in a decision affecting this, to have considered what is in his/her best interests. These are qualified rights in the sense that the respondent having had due regard to these rights and taking account of all relevant factual circumstances may decide for good and sufficient reason, in the interests of the common good, that the parent be refused permission to remain in the State even if this is a decision which is not in the best interests of the child. In deciding whether there is such good and sufficient reason in the interests of the common good to refuse the application of the parent on IBC/05 for permission to remain in the State the respondent should ensure that his decision, in the particular circumstances of the citizen child and parent is not disproportionate to the ends sought to be achieved.

European Convention on Human Rights

96. The applicants contend that the respondent in deciding to refuse the parents' application under IBC/05 by reason of the alleged failure to establish continuous residency in Ireland since the date of birth of the Irish citizen child without having regard to and considering the private and family rights of the child and their own family rights has acted in a manner which is not compatible with the State's obligations under article 8 of the Convention and hence contrary to s. 3(1) of the Act of 2003.

97. On behalf of the respondent it is accepted that in making decisions under IBC/05 the respondent is bound to act in a manner compatible with the State's obligations under the Convention. However, it is contended that the rights of the parent applicants and the citizen children under article 8 of the Convention were not "engaged" in making a determination on an application under the IBC/05 Scheme. It is asserted that such rights only become engaged where there exists a proposal to deport a family member with possible consequential effects on the unity of the family.

98. Article 8 of the Convention provides:

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

99. In considering this dispute it is necessary to distinguish between the alleged interference in the right to respect for family life and the alleged interference with the citizen child's right to respect for the private life of the citizen child.

100. The question as to whether or not the applicants enjoy a family life is a question of fact. In each of the applications referred to above I am satisfied that at the date upon which the parent made an application under IBC/05 the citizen child had a family life with those parents in the State within the meaning of article 8.1 of the Convention. Having regard to the fact that in each family there is a citizen with a right to live in the State, in accordance with ECHR case law these families enjoy a family life in the State which merits the respect of the authorities. See for example *Boultif v. Switzerland* [2001] 33 EHRR 1179.

101. The onus is on the applicants to establish that the decision taken to refuse residency under IBC/05 constituted an interference with the right to respect for family life. There is no physical interference in the family ties as a result of the decision taken. There is no interference in the ability of the individual members of the family to maintain relationships with each other as a result of the decision. There is interference with the ability of the parents to provide for the welfare and rearing of the child. The refusal means that whilst the parent remains in the State he or she is not permitted to work and provide for the child. However, the applicants did not refer me to any decision relating to article 8 of the Convention in which, in the absence of any interference in the ability of the family members to maintain or develop their family relationships an interference in the right to respect for family life was found. Accordingly, I have concluded that the applicants have not discharged the onus of establishing in such circumstances that the decision taken constitutes an interference with the individual member's right to respect for their family life within the meaning of article 8 of the Convention.

102. It is separately submitted that each citizen child has a private life in the State which is entitled to respect from the respondent.

103. It is common case that the European Court of Human Rights has not exhaustively defined what constitutes "private life". In *Niemietz v. Germany* (1992) 16 E.H.R.R. 97 the European Court of Human Rights state at para. 29:

> "…it would be too restrictive to limit the notion [of private life] to an 'inner circle' in which the individual may live his own personal life as he chooses to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings."

104. In *Niemietz* the concept of "private life" was recognised as wide in ambit, such that it covered a person's professional and business activities.

105. The court was also referred to the decision of the ECHR. of 16th June, 2005, in *Sisojeva v. Latvia*. That case concerned a refusal by the Latvian authorities to regularise the status in Latvia of a married couple and their daughter. The father and daughter had Russian nationality and the mother no nationality. The father and mother had arrived in Latvia in 1969 and 1968 respectively. The daughter was born in 1978. The court in considering the application of article 8 to the circumstances of the applicants stated at par 102:

> "102. In the instant case, the Court notes that the first two applicants arrived in Latvia in 1969 and 1968 respectively, that is, at the age of 20 in the case of Svetlana and 22 in the case of Arkady. Since then, they have lived continuously in Latvia. Their daughter, the third applicant, was born in Latvia in 1978 and has always lived there. Accordingly, it is not disputed that during their time in Latvia the applicants have developed the personal, social and economic ties that make up the private life of every human being. Therefore, the Court cannot but find that the measure imposed on the applicants constituted an interference with their "private life" within the meaning of Article 8 1 of the Convention."

106. In accordance with the above, I have concluded that each of the citizen children who has lived in the State since the date of their birth must be considered to have a private life in the State in the sense of personal and social relationships which result from living in the State. Further, as they are citizens with a constitutionally protected right to live in the State, it is a private life which demands respect from the respondent.

107. The first named applicant has lived in the State since the date of her birth and so has a private life in the State which demands respect from the respondent.

108. The next issue is whether the applicants have established that the taking of a decision to refuse an application under IBC/05 constitutes an interference with the respect for such right. The applicants submit that the case law of the ECHR establishes that article 8 can give rise to positive obligation on the State to ensure effective respect for private or family life. In Sisojeva and Others v. Latvia at paragraph 104 the Court stated:

> "104. The Court further notes that no formal deportation order has been issued in respect of the applicants. It reiterates, however, that Article 8, like any other provision of the Convention or the Protocols thereto, must be interpreted in such a way that it guarantees not rights that are theoretical or illusory but rights that are practical and effective (see, *mutatis mutandis*, *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, pp. 15-16, 33, and *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, p. 34, § 87). Furthermore, while the chief object of Article 8, which deals with the right to respect for one's private and family life, is to protect the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life (see, for example, *Gül v. Switzerland*, judgment of 19 February 1996, Reports 1996-I, pp. 174-175, § 38; Ignaccolo-*Zenide v. Romania*, no. 31679/96, 94, ECHR 2000-I; and *Mehemi v. France* (no. 2), no. 53470/99, § 45, ECHR 2003-IV). In other words, it is not enough for the host State to refrain from deporting the person concerned; it must also, by means of positive measures if necessary, afford him or her the opportunity to exercise the rights in question without interference."

109. It is important to note as stated above article 8 guarantees rights that are "practical and effective". The citizen children in these applications are all of an age that their effective exercise of their right to a private life in the State is dependant on their parents' presence in the State and their parents' ability to provide for them by *inter alia* working and creating a stable environment in which the children may develop. This, it is submitted, means that article 8 imposes a positive obligation on the respondent to grant permission to remain in the State on the IBC/05 application.

110. In *Kutzner v. Germany* (2002) 35 EHRR 653 the ECHR having referred to the positive obligations under article 8 in similar terms to the above, stated at para 62:

> "The boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, among other authorities, *W., B. and R. v. the United Kingdom*, cited above, respectively, p. 27, § 60, p. 72, 61, and p. 17, 65; and *Gnahoré*, cited above, 52).

111. This appears to mean that at minimum, the respondent is required to determine whether the citizen child's right to respect for his private life under article 8 requires that the parent be given permission to remain in the State and making that decision must seek to strike a fair balance between the rights of the individual child and the community.

112. The striking of a fair balance between the interests of the individual and the community in turn necessitates a consideration of the relevant rights of the individual i.e. the citizen child. Such rights are the constitutionally protected personal rights set out in the preceding section of this judgment which form part of the citizen child's private life in the State.

113. Applying the above principles to the position of each citizen child in this and the related applications that the taking by the respondent of a decision to refuse the parent's application without considering the right to private life in the sense of the constitutionally protected personal rights of the citizen child was an interference with the citizen child's rights to respect for his/her private life within the meaning of article 8.1 of the Convention.

114. A decision which constitutes an interference with the right to respect for private life is not necessarily in breach of article 8 of

the Convention. It may be permissible if justified under article 8.2. However, counsel for the respondent expressly indicated to the court that no submission was being made on behalf of the respondent that the taking of decisions to refuse an application on IBC/05 by reason of a failure to establish continuous residency since the date of the birth of the citizen child was justified in accordance with the provisions of article 8.2 of the Convention.

115. Accordingly, it appears to me that in taking the decision to refuse the parent's application IBC/05 the respondent must be considered to have acted in a manner which is not compatible with the State's obligations under article 8 of the Convention and hence contrary to s. 3(1) of the Act of 2003.

116. Having regard to the above conclusion it is unnecessary for me to consider the additional submission made on behalf of certain of the applicants in reliance upon article 14 of the Convention taken in conjunction with article 8.

117. Conclusion on validity of decision to refuse the second named applicant's application on IBC/05

118. For the reasons set out above I have reached the following conclusions.

> 1. The decision taken by the respondent on the application on IBC/05 of the second named applicant as communicated in the letter of 21st November, 2005 is unlawful as it was taken in breach of the first named applicant's rights under Article 40.3 of the Constitution.
>
> 2. The decision of the respondent on the application under IBC/05 of the second named applicant communicated in the letter of 21st November, 2005 is unlawful as it is in breach of the respondent's obligations under s. 3(1) of the European Convention on Human Rights Act, 2003.

Other Grounds
119. It is unnecessary for me to consider the other grounds relied upon including the challenge to the so-called rule of law determined in *O'Keefe v An Bord Pleanala* [1993] 1 I.R. 39

Relief
120. Having regard to the above conclusions it appears to me that the applicants are entitled to an order of certiorari quashing the decision of the respondent dated 21st November, 2005, refusing the application of the second named applicant under IBC/05 and an order remitting the application for consideration and determination by the respondent in accordance with law.

Subsidiary Claims of Mr. Bode
121. In these proceedings Mr. Bode also claims an order of *certiorari* of the decision of the respondent dated the 21st November, 2006, to refuse to grant permission to reside in the State under IBC/05 on a separate ground of a breach of fair procedures.

122. The substantive reason for Mr. Bode's refusal under IBC/05 was set out in the letter to him of the 21st November, 2005, in the following terms:

> "It is a requirement under the revised arrangement that the applicant has been resident in the State with their Irish born child on a continuous basis since the child's birth. Evidence of such residence is required. In this case I note you have not provided sufficient evidence of residency in the State since the birth of your child."

123. The complaint made is that Mr. Bode was not accorded fair procedures in that he was not given any notice that the respondent considered the evidence supplied with this application form not to be sufficient evidence of residency in the State since the birth of his child or any opportunity of providing further or additional evidence.

Applicable Law
124. It was not disputed that Mr. Bode has an entitlement to have his application under IBC/05 processed and determined in accordance with the principles of constitutional justice and fair procedures. The only issue in dispute is whether on the facts herein the respondent was obliged to give Mr. Bode an opportunity of providing further or additional evidence prior to taking the decision.

Conclusion on Fair Procedures
125. The following appeared to be the material facts. As already concluded there was no express notice to the applicants in the notices published that unless satisfactory evidence of continuous residence in the State was provided their application would be refused.

126. The application form at section 4 under a heading of "Supporting Documentation" states:

> "The completed application form must be accompanied by the following original documents (please tick confirming documents included): the relevant heading is 'Evidence of continuous Residence in the State since the birth of the Irish born child. (utility bills, lease/rental agreements, etc.)'"

127. Under this list there is then a note:

> "If you are unable to provide any of the above documents, please include a note explaining why this is the case. If you have already supplied any of the above documents to the Department please give details on the additional sheets provided."

128. From the copy of Mr. Bode's application form it would appear that he did not tick any of the boxes listed but opposite the relevant one he seems to have added a note, part of which was obliterated in the copy handed in but appears to read "see additional .. in form .."

129. With the copy of the form exhibited there are only two relevant documents the document, from the Health Services Executive, the first part of which appears to have been completed by Mr. Bode and shows different addresses in Ireland from August, 2002, until March, 2005 and the second part completed by the H.S.C. which confirms weekly welfare claims from the 25th July, 2002, to the 14th August, 2002 and from the 22nd February, 2005, to date. The second document is from the Dún Gibbons Inn and is dated the 8th March, 2005 and confirms that Mr. Bode is then a resident at the Dún Gibbons Inn, Co. Galway and states that he arrived to join his

family on the 21st February, 2005 and that his family had been living in the Inn since the 17th June, 2004. The final document of relevance attached to the application form is the birth certificate of the citizen child. She was born on the 13th September, 2004. Mr. Bode is named as her father and his address is given in Nigeria.

130. However, in the application form in response to the specific question "have you left the State for any reason since the birth of your first Irish born child?" He has ticked the box "No".

131. The documents supplied by Mr. Bode on their face are not evidence of continuous residency in the State since the birth of his daughter on the 13th September, 2004. It can also be said that there are inconsistencies between his assertion that he has been so resident and the address given on the birth certificate. He has explained the address in the affidavit grounding this application as being by reason of the fact that his partner had been in Ireland for a short period of time and he was unsure of his status and did not wish to cause him any difficulties with the authorities in Ireland.

132. Mr. Bode has maintained in the affidavits sworn in these proceedings that he resided in the State since he arrived here in July, 2002. He was not cross-examined on his affidavit.

133. Ms. Hynes at paragraph 33 of her affidavit explains the procedure followed in considering the applications under IBC/05. She states:

> "Each application was considered individually taking into account the information supplied by the applicant on the form and their supporting documentation. Where applicants omitted to supply certain documents or pieces of information they were so informed by letter and given a certain length of time in which to reply."

134. She then exhibited a standard form template letter used in those situations.

135. The procedure as explained by Ms. Hynes accords in my view with an applicant's entitlement to fair procedures. However, on the facts pertaining to Mr. Bode there is no evidence offered on behalf of the respondents that he received the type of letter exhibited by Ms. Hynes. He has averred that he did not receive any such letter. On his application form he had stated that he had not left the State since the birth of his daughter. The documents put in evidence to the court as the supplied supporting documentation evidencing residence in the State from September, 2004 do not do so.

136. I have concluded that fair procedures did require that he received the type of letter seeking specifically documentation evidencing residency in the State from September, 2004 and giving him an opportunity of producing it within a specified period of time. This is the procedure which the Department recognised as being appropriate. There is no explanation as to why the omission occurred in this case. It is perhaps understandable in the context of so many applications but the omission in my view entitles the applicant to an order of *certiorari* on this ground as sought.

Order of Mandamus

137. Amongst the other reliefs sought by Mr. Bode is an order of mandamus requiring the respondent to determine his application for permission to reside in the State in an undated letter sent in December, 2005.

138. Mr. Bode's personal immigration history is relevant to this aspect of the claim. It appears that Mr. Bode arrived in the State on the 25th July, 2002. He applied for asylum and on the 20th February, 2003, was notified that the Refugee Applications Commissioner was recommending that he be refused refugee status. He did not appeal this recommendation. On the 14th March, 2003, he was notified that the respondent proposed making a deportation order under s. 3 of the Act of 1999. By letter of the 29th May, 2003, his solicitors made representations under s. 3 of the Act of 1999 seeking leave to remain. On the 23rd November, 2004, the Department of Justice, Equality and Law Reform informed Mr. Bode's solicitors that they would be examining his case under s. 5 of the Act of 1996 and s. 3 of the Act of 1999 and if Mr. Bode had information which he wished to be included for consideration it was to be forwarded within 14 days. They also sought confirmation of Mr. Bode's up-to-date address.

139. Ms. MacGeehin Toale and Nagle responded to that letter by a letter dated the 21st December, 2004, both informing the Department of Mr. Bode's current address, apologising for the delay by reason of Mr. Bode's change of address and informing the Department that Mr. Bode became the father of an Irish citizen child on 13th September, 2004 and giving her name. They also referred to the recent announcement regarding the new possibility of applications for residency by parents of Irish born children and asked that no decision be made until Mr. Bode had an opportunity of making such an application.

140. In the intervening the examination of file was conducted by a Clerical Officer on the 13th December, 2004 and on the same day by an Executive Officer who recommended that the respondent sign a deportation order.

141. However, the respondent did not consider the matter until the 7th February, 2005, when a deportation order was made. The deportation order appears to have been signed without consideration of the fact that Mr. Bode was the father of an Irish born child as had been notified to the Department in December, 2005.

142. The deportation order was sent to Mr. Bode with an arrangements letter pursuant to s. 3(9)(a)(i) of the Act of 1999 dated the 2nd March, 2005, requiring him to be at the Garda National Immigration Bureau in Burgh Quay on Thursday the 10th March, 2005.

143. By letter of the 23rd March, Mr. Bode's solicitors informed the Department that he had made an application under IBC/05 and requested confirmation that no steps would be taken to execute the deportation order pending a decision on his application under IBC/05.

144. By letter of the 11th April, 2005, such confirmation was given. In the light of the above when Mr. Bode's application under IBC/05 was refused by letter of the 21st November, 2005, there was extant against him a deportation order (which he had not challenged). Further the period during which it was confirmed it would not be executed had now expired.

145. Mr. Bode then made an application to the respondent in an undated letter which was acknowledged by the respondent's private secretary by letter of the 8th December, 2005. In his letter Mr. Bode identifies himself, applies for permission to reside in Ireland and then states:

> "For your information I confirm that I am the father of Irish citizen child Deborah Olarantimi Bode. My child's mother, Caroline Ola-Bode, has been granted permission to reside in the State as parent of an Irish citizen child. I make this application without prejudice to my previous applications for permission to remain on humanitarian grounds and/or as

parent as an Irish citizen child pursuant to IBC/05 Scheme."

146. Mr. Bode's solicitors repeated this request but apart from again a formal acknowledgement indicating that their letter was receiving attention did not receive any substantive response to the application for residency prior to the commencement of these proceedings.

147. The assessment of Mr. Bode's claim for an order of *mandamus* is further complicated by the acknowledgement made on his behalf by the Higher Executive Officer in the affidavit sworn in which she acknowledges that by reason of the information supplied on the 21st September, 2004, to the effect that Mr. Bode was the parent of an Irish citizen child born on the 13th September, 2004, that:

> "It will therefore be necessary to revoke the said deportation order and reconsider such representations as the second named applicant may make in respect of an application for leave to remain in the State pursuant to s. 3 of the Immigration Act 1999."
>
> However, as previously stated no evidence has been adduced that the deportation order has been revoked."

148. Leave was granted on the 30th January, 2006. On that date the respondent had not indicated whether or not he would consider the application for residency. Ms. Hynes in the replying affidavit makes clear at paragraph 42 that the respondent is not prepared to consider a free standing application for residency. She does indicate his willingness to consider an application to remain in the State in the context of a decision as to whether or not to make a deportation order under s. 3 of the Act of 1999.

149. In the case of Mr. Bode any consideration under s. 3 of the Act of 1999 had been completed by the 7th February, 2005. Until such time as the respondent revokes the deportation order and makes a new proposal to deport Mr. Bode there is no such opportunity to Mr. Bode.

150. Mr. Bode when considered individually does not in my view have any right to insist that the respondent consider an application from him for residency. As an individual he has no right either to reside in Ireland or to require the respondent to consider an application from him to so reside. However, he is the parent of an Irish citizen. That Irish citizen has constitutionally protected rights which have been considered in great detail in this judgment.

151. In early December, 2005, Deborah Bode was in the position that she was a citizen of Ireland with a right to live in Ireland and with the other personal rights protected by Article 40.3. Her mother had been granted leave to remain and therefore could lawfully decide that Deborah should be reared in Ireland at least for the next two years.

152. There is no legislative provision which enables the parent of an Irish born child apply for residency or leave to remain in Ireland except where the proposal to deport is made under s. 3 of the Act of 1999. It is undisputed that the respondent as part of the executive power of the State has an inherent right and power to exercise a discretion to consider and determine and grant if he considers it appropriate residency to the parent of an Irish born child. As previously determined, such discretion must be exercised in accordance with the Constitution which includes having regard to the State guarantee of the personal rights of the citizen child under Article 40.3.1.

153. Such principles appear to me to require that, at minimum, where the respondent receives an application for residency or leave to remain in the State from the non-national parent of an Irish citizen child, he must by a fair and proper enquiry into the circumstances of the citizen child and his or her family consider determine whether or not the respect for and defence and vindication of the child's personal rights guaranteed by Article 40.3 require that he should then consider the application for residency. It does not appear to me having regard to the guarantee of the personal rights of the Irish citizen child in Article 40.3 including the right to live in Ireland and the welfare rights set out in *G. v. An Bord Uchtála* [1980] I.R. 32 that it is open to the respondent either, to fail to deal in a substantive way with the application, or to refuse, without consideration of the relevant facts and rights of the citizen child to consider the application.

Relief

154. By reason of the order of certiorari of the decision refusing the second named applicant's IBC/05 application there is now before the respondent an outstanding application under IBC/05 to be determined. It therefore appears unnecessary to make an order of mandamus against the respondent in respect of the subsequent free standing application for residency. The position is further complicated by the expressed intention to revoke the deportation order.