Neutral Citation [2015] IEHC 408

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 1547 J.R.]

BETWEEN

O. I.

O. P. I. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND O. I.)

APPLICANTS

-AND-

THE REFUGEE APPEALS TRIBUNAL

THE MINISTER FOR JUSTICE AND LAW REFORM

ATTORNEY GENERAL

IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the the 17th day of June, 2015

1. This is a "telescoped" application for leave to seek judicial review seeking an order of *certiorari* to quash a decision of the Minister making deportation orders in respect of the first and second named applicants. Challenges to other decisions affecting the applicants have not been pursued. Two broad grounds of challenge were advanced based on the European Convention on Human Rights and based on the U.N. Convention on the Rights of the Child, a ratified but non-implemented international instrument. The latter ground was adjourned pending a decision of the High Court in a case where an analogous point was raised.

Background:
2. The applicants are a Nigerian mother and her young daughter. The first named applicant ("the mother") arrived in Ireland on 15th December, 2008, and claimed asylum the next day. She gave birth to the second named applicant in Limerick on 6th February, 2009. Two weeks later she sought asylum on behalf of her infant daughter. Both applications for asylum were given priority by the Refugee Applications Commissioner in accordance with s. 12(1) of the Refugee Act 1996. The mother stated that she fears persecution by the militant group M.E.N.D. (Movement for the Emancipation of the Niger Delta), as her former boyfriend was involved in the group and they believed that he had given information to the authorities which led to the deaths of fifteen of their members. She claims that M.E.N.D. killed her boyfriend and states that they then pursued her as they believed she knew the group's secrets. She claimed that she did not seek police protection as they are working together with M.E.N.D..

3. Further, she did not seek to move elsewhere within Nigeria as the M.E.N.D. members are everywhere. As the second named applicant was only one month old at the date of her s. 11 interview, the first named applicant outlined her fears as being wholly based on her own. In this regard, she claimed she feared that the militants would use her daughter as a human sacrifice as they knew she was pregnant before she left Nigeria.

4. Both applications for asylum were rejected by the Commissioner primarily on the basis of a lack of credibility. The applicants duly appealed to the Refugee Appeals Tribunal. The Tribunal upheld the recommendation of the Commissioner on the basis of the lack of credibility in a decision dated 15th June, 2009. The applicants received a "three options letter" on 31st July, 2009, and thereafter made an application for leave to remain in the State and for subsidiary protection to the Minister with the aid of the Refugee Legal Service on 11th August, 2009.

5. The applicants' applications for subsidiary protection were refused on the 29th October, 2010, and the applicants were informed by letter of 17th November, 2010. By letter of 26th November, 2010, the applicants were informed that they were also unsuccessful in their application for leave to remain pursuant to s. 3 of the Immigration Act 1999 and that the Minister had made deportation orders against them dated 24th November, 2010. The applicants now seek to quash the decision to make the deportation orders contained in the "Examination of file under Section 3 of the Immigration Act 1999, as amended".

Examination of File:
6. The first ground of challenge to the deportation orders relates to the manner in which their Article 8 E.C.H.R. rights were assessed by the Minister. The finding is set out in the "Examination of File" as follows:-

> **"Consideration under Article 8 of the European Convention on Human Rights (ECHR)**
> If the Minister signs a Deportation Order in respect of O. I., this decision would engage her right to respect for private and family life under Article 8(1) of the ECHR.
>
> **Private Life**
> The House of Lords decision in *R (Razgar) v. Home Secretary* [2004] 2 A.C. 368, sets out five questions which are likely to have to be addressed when considering Article 8 rights in the context of a proposal to remove an individual. Those questions are as follows:-
>
> (1) Will the proposed removal be of an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference 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?

(5) If so, is such interference proportionate to the legitimate public ends sought to be achieved?

In considering the first question, it is accepted that if the Minister decides to deport O. I., that this has the potential to be an interference with her right to respect for private life within the meaning of Article 8(1) of the ECHR. This relates to her educational and other social ties that she has formed in the State as well as matters relating to her personal development since his arrival in the State. (sic)

In addressing the second question, and having weighed and considered the facts of this case as set above, it is not however accepted that any such potential interference will have consequences of such gravity as potentially to engage the operation of Article 8.

As a result, a decision to deport O. I. and her daughter does not constitute a breach of the right to respect for private life under Article 8 of the ECHR."

Applicants' Submissions:

7. It is submitted by Mr. Mark de Blacam S.C., on behalf of the applicants, that the author of the Examination of File has erred in law because she stopped her inquiry by answering the second of Lord Justice Bingham's questions in *Razgar* in the negative. It is contended that owing to the applicants' degree of integration into Irish society the Minister's official should have found that their deportation would cause interference of sufficient gravity as to engage the operation of Article 8. Having so found she should have proceeded to apply the remaining steps of the test. Counsel relies on the decisions of this court in *A.M.S. v. Minister for Justice, Equality and Law Reform* [2014] I.E.H.C. 57 and in *C.I. v. Minister for Justice & Equality* [2014] I.E.H.C. 447 in this regard.

8. The decision in *A.M.S.* related to an application for family reunification and the assessment of family life rights pursuant to Article 8. It is noted by counsel that this court remarked that the phrase "consequences of such gravity" does not mean that there must be "grave consequences" arising from a decision before Convention rights are engaged. Further the court found at para. 67 that:-

> "…the author commences the assessment by indicating that a negative decision by the Minister would engage the applicant's rights. He then proceeds to ask whether any interference with family rights might have consequences of gravity.
>
> 68. Such an approach to an Article 8 assessment is not in accordance with law. The analysis should start by asking whether a negative decision on family reunification would interfere with article 8 rights and then ask whether that interference would have consequences of such gravity as to potentially engage Article 8 rights, bearing in mind the proper meaning of 'consequences of such gravity'. Following that analysis, the decision maker may decide that the interference is justified notwithstanding the engagement of rights..."

9. It is submitted that, similarly, the official in this case commenced the assessment by indicating that a negative decision by the Minister would engage the applicants' rights and then examined whether any interference would have consequences of gravity. The applicants contend that the Minister was not entitled to take this approach as was found in *A.M.S.*

10. Counsel also refers to the decision of this court in *C.I. v. Minister for Justice & Equality* (supra) where the legality of the Minister's approach to the *Razgar* questions was also considered in the context of deportation decisions. In particular, the applicants refer to the dicta of the court which found:-

> "29. It simply not enough for a decision maker to say, without anything else, that deportation will not have consequence of such gravity as to engage the operation of Article 8. It is difficult to discern why the removal of the children from their school would not constitute a grave consequence sufficient to engage Article 8. The consequences of the removal of the children from an environment which they know is a matter which should be addressed by the decision maker - but only for the purpose of identifying whether rights under Article 8 are engaged. The obvious consequence of removal from the State is that the life of the deportee in Ireland will be terminated. How could this not be an interference with private life of the most extreme type?"

11. The applicants further note the following comments of the court:-

> "39. I have previously approved of the proper meaning of the phrase "consequences of such gravity" in *Razgar* Question 2 in my decision in *AMS v. The Minister for Justice and Equality* [2014] IEHC 57. Effectively, the question asks whether the interference can be described as merely technical or inconsequential. If the interference is of this order, the rights to respect for private and family life under Article 8(1) will not be engaged by the proposed removal of the persons from the State. Where it is accepted that a proposed deportee has a private life, it seems to me that the answers to Questions 1 and 2 can never be anything but affirmative. The removal of the applicant from Ireland will comprehensively end the private life experienced by the applicant in Ireland. This could never be anything other than an interference with that private life. In most cases this will be an interference which is greater than inconsequential and something other than merely technical. In other words deportation will always engage the right to respect for private life once it is established that private life as understood in Convention terms was experienced in the state."

12. Counsel for the applicants submits that the effect of these decisions is that the Minister is not entitled to deny the existence of a private life here and so obviate the need to consider *Razgar* questions three to five, in a case where a proposed deportee has, by reason of the passage of time, *inter alia*, established a private life in the State. It is conceded that this submission does not mean that the Minister may not deport an applicant, but rather that she must consider whether deportation is lawful, necessary and proportionate before so doing. In this regard it is submitted that the Minister must consider whether in the circumstances of the case, the public interest does indeed outweigh the private right.

Respondents' Submissions:
13. Counsel for the respondents, Ms. Siobhan Stack S.C., notes that the applicants have dispensed with the vast majority of the reliefs and grounds originally sought. It is noted that the remaining grounds allege that "the deportation decisions are unreasonable and / or disproportionate" and that the Minister breached s. 3(6) of the Immigration Act 1999 and failed to consider the best interests of the child in making a deportation order.

14. In the first instance, it is submitted that the ground claiming that "the deportation decisions are unreasonable and / or disproportionate" is void for uncertainty and fails to identify even the basic legal provision which is relied upon. Counsel refers to the decision of Cooke J. in *Lofinmakin v. Minister for Justice* [2011] I.E.H.C. 38 in this regard, where he states:-

> "8. The Court would take this opportunity to emphasise that judicial review under O. 84 of the Rules of the Superior Courts is not a form of a forensic hoopla in which a player has at once tossed large numbers of grounds in the air like rings in the hope that one at least will land on the prize marked "certiorari". In the judgment of the Court a Statement of Grounds under O 84, is inadmissible to the extent that it fails to specify with precision the exact illegality or other flaw in an impugned act or measure which is claimed to require that it be quashed by such an order."

15. As such, it is submitted that the ground is inadmissible for failure to specify with precision the exact illegality or flaw in the deportation orders which is relied upon to make out the claim that the making of orders was unreasonable and / or disproportionate.

16. Without prejudice to this submission, it is contended that the rationality of the Minister's decision can only be considered in light of the information which was put before the decision maker. In this regard, counsel notes that the decision maker considered all of the specific personal and background facts relevant to the applicants. Further, it is submitted that given the infancy of the second named applicant at the date of the impugned decision (one year and eight months), the contention by the applicants that their "level of integration" into Irish society was such that the interference with their private life would have had consequences of such gravity so as to engage Article 8 rights is simply unsustainable.

17. In any event, counsel contends that their preliminary objection remains that the applicants' arguments in respect of Article 8 are not pleaded and are not relevant to these proceedings.

18. It is submitted that the Minister is required to examine Article 8 rights in the context of the statutory requirements of s. 3 of the Immigration Act 1999. In this regard the consideration is deemed warranted by the Minister as deportation had the "potential" to be an "interference" with the applicants' right to respect for their private life. However, it is noted that the Minister then concluded that "Having weighed and considered the facts of the case as set out above, it is not however accepted that any such potential interference will have consequences of such gravity as potentially to engage the operation of Article 8." It is submitted that the Minister makes it clear that in reaching this conclusion he is relying on matters previously set out in the decision such as the s. 3(6) considerations.

19. The respondents submit that European Court of Human Rights (E.Ct.H.R.) case law requires an applicant to demonstrate that a measure taken by the State, which is alleged to be an interference with their right to respect for private life, surmounts a particular threshold and shows sufficiently adverse effects on them. Counsel refers the court to the decisions in *Bensaid v. United Kingdom* (Application no. 44599/98, 6th February 2001), *Nnyanzi v. United Kingdom* (Application no. 21878/06, 8th April 2008) and *N. v. United Kingdom* (Application no. 26565/05, 27th May 2008) in this regard.

20. Counsel refers the court to the dicta of the E.Ct.H.R. in *Nnyanzi:*-

> "76. The Court does not consider it necessary to determine whether the applicant's accountancy studies, involvement with her church and friendship of unspecified duration with a man during her stay of almost ten years in the United Kingdom constitute private life within the meaning of Article 8 § 1 of the Convention. Even assuming this to be the case, it finds that her proposed removal to Uganda is "in accordance with the law" and is motivated by a legitimate aim, namely the maintenance and enforcement of immigration control. As to the necessity of the interference, the Court finds that any private life that the applicant has established during her stay in the United Kingdom when balanced against the legitimate public interest in effective immigration control would not render her removal a disproportionate interference. In this regard, the Court notes that, unlike the applicant in the case of *Üner* (cited above), the present applicant is not a settled migrant and has never been granted a right to remain in the respondent State. Her stay in the United Kingdom, pending the determination of her several asylum and human rights claims, has at all times been precarious and her removal, on rejection of those claims, is not rendered disproportionate by any alleged delay on the part of the authorities in assessing them.
>
> 77. Nor does the Court find there to be sufficient evidence that the applicant's removal with her asthma condition, which she asserts is exacerbated by stress, would have such adverse effects on her physical and moral integrity as to breach her rights under Article 8 of the Convention.
>
> 78. Accordingly, the applicant's removal to Uganda would not give rise to a violation of Article 8 of the Convention."

21. Counsel also refers the court to the findings of Feeney J. in *Agbonlahor v. Minister for Justice* [2007] I.E.H.C. 166 in a similar context:-

> "[13] 3.2 Article 8 does not protect private or family life as such. In fact it guarantees a "respect for these rights". In view of the diversity of circumstances and practices in the contracting states, the notion of "respect" (and its requirements) are not clear cut; they vary considerably from case to case. (See *Abdulaziz and Others v. United Kingdom* [1985] 7 E.H.R.R 471 at para. 67). The main issue which has concerned the European Court of Human Rights in relation to the concept and scope of "respect" is whether such obligation is purely a negative one or whether it also has a positive component. The court has stressed on many occasions that the object of article 8 is essentially that of protecting the individual against arbitrary interference by public authorities and that such is a primarily negative undertaking but that nevertheless it has on occasions indicated that there may in addition be positive obligations upon states that are inherent in effective respect for Article 8 rights. There have been occasional challenges to deportations on the ground of interference with article 8 rights. Those challenges have almost always been based on interference with "family life" rather than "private life". In *Abdulaziz and others v. United Kingdom* the court held, at p. 497, that whilst there might be positive obligations to respect the family. a State 'had a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resource of the community and of individuals…'.

> [14] 3.3 In considering immigration law under article 8 the European Court of Human Rights has focused on an analysis of the individual facts in each particular case to ascertain whether the individuals asserting breach of rights are in truth asserting a choice of the State in which they would like to reside, as opposed to an interference by the State with their rights under article 8..."

(I agree with the remarks of Feeney J. but cannot see how they assist the respondents.)

22. The respondents submit that the Minister was correct in reaching the decision that the removal of the applicants would not have consequences of such gravity so as to engage the operation of Article 8. It is submitted that the European case law cited above indicates that any private life developed in the State by non-settled migrants would not be sufficient to come within the ambit of Article 8 and that the E.Ct.H.R. has consistently come to the view that the removal of persons in positions such as the applicants will not result in a breach of Article 8. In this regard, it is contended that the applicants' reliance on the decisions in *A.M.S.* and *C.I. (supra)* is misconceived.

Findings:

The Pleading Point
23. I find that the pleading in respect of irrationality and disproportionality are not sufficiently imprecise to warrant dismissal. I read the dicta of Cooke J. in *Lofinmakin v. Minister for Justice* (supra) as a caution against pleading "the kitchen sink" in the hope that some point will succeed. Though Cooke J. also expressed the view that a bare plea of irrationality was imprecise, he did not refuse leave based on poor pleading but instead dealt with the substance of the (imprecise) pleas. I should also add that the views of the learned judge as to the quality of the pleadings, as far as I can tell, did not emanate from an application made by the respondents and thus it is unlikely that the parties ever addressed the pleading deficits described by the judge. To this extent, the remarks in respect of the pleadings are *obiter*.

24. I note that the respondents claim no prejudice based on the alleged pleading deficiency. In so far as greater detail was required from the applicants as to what precisely their complaint was, this was provided in written submissions delivered by the applicants in advance of the hearing. The respondents replied with detailed written submissions and then made an oral submission.

25. It is also of some consequence that the respondent raised a complaint about lack of precision in pleading for the first time in written submissions delivered shortly before the hearing. This case commenced in December, 2010 and was heard in December, 2014. In *K. B. v. Minister for Justice and Law Reform* [2013] I.E.H.C. 169, I decided that it would be wrong to accede to a delay point raised by the respondents for the first time at trial which could have been made as soon as the proceedings issued. I repeat that view here in respect of a pleading point. My view is that the respondent in asylum cases should not delay a pleading point which is believed to be of such strength as to warrant the dismissal of an applicants' case or of part of a case. This is particularly so when the State has an interest in ensuring that asylum litigation is brought to finality expeditiously and when the state is actively aware of the state of this list and how long it takes to achieve a hearing date.. The state is aware that litigants in this list often face severe personal circumstances while awaiting the outcome of proceedings. If litigation can be dealt with on the basis of procedural irregularity, my view is that such points should be pursued expeditiously. Given the extreme delays in this list, jf left to the trial date, such points loose their sheen. For these reasons I am unwilling to accede to the respondent's pleading point.

Article 8 of the E.C.H.R.
26. In the decisions I delivered in *A.M.S* and *C. I. (supra)* I rejected the notion that deportation did not interfere with private life (if such were established) in a manner which engaged the protections afforded by Article 8 E.C.H.R.. The protections set out in Article 8(2) of the E.C.H.R. require the decision maker to carry out a proportionality assessment, *inter alia*, on the effect of a proposed measure on family and/or private life provided the facts demonstrate the existence of family and/or private life in the state and provided the negative effect claimed surmounts the low threshold indicated by case law.

27. Counsel for the respondent refers me to certain decisions of the E.Ct.H.R. and in particular to it's decision in *Nnyanz*i in support of the proposition that this line of jurisprudence has closed down the argument that deportations might breach Article 8 E.C.H.R. rights. I disagree with this assessment of the E.Ct.H.R. case law.

28. In my view the Strasbourg Court in *Nnyanzi* was prepared to assume that deportation would interfere with the deportee's private life and placed emphasis on the questions which a Contracting State must ask and answer in compliance with the requirements of Article 8(2) of the E.C.H.R.. The Court decided that removal of the deportee was not disproportionate, ("the Court [E.C.tH.R.] finds that any private life that the applicant has established during her stay in the United Kingdom when balanced against the legitimate public interest in effective immigration control would not render her removal a disproportionate interference.", as set out in para. 20 above). Contrary to the submission of the respondents, the court conducted a proportionality assessment of the effect of deportation on a non-settled migrant. In other words the exercise avoided by the Irish officials was, in the cases to which I have been referred, carried out by the E.Ct.H.R..

29. It is not the applicants' complaint in these proceedings that the respondents have irrationally concluded that deportation would not be disproportionate. The complaint is that the respondents have comprehensively avoided asking the questions required to be answered by Article 8(2) E.C.H.R. because it was decided that none of the rights required to be respected under Article 8 are engaged by the proposed deportation.

30. My view is that the applicants are correct when they say that the manner in which the *Razgar* questions are answered is irrational. The respondents decided that although the applicants did have private lives in the State, their removal would not have grave consequences relative to those private lives. This led the respondent to say that Article 8 rights were therefore not engaged and consequently there was no need to carry out any proportionality assessment or to ask the other questions required by Article 8(2). I cannot accept that this is a lawful approach. A lawful approach based on the acceptance of the existence of private life requires the decision maker to ask whether deportation would interfere with the applicant's private lives and then to ask whether the interference is serious enough to engage Article 8 rights to respect private life. If so, then the other considerations in Article 8(2) must be assessed.

31. I reject the respondent's argument that the .ECt.H.R. case law decides that non-settled migrants do not have private life rights required to be respected by Article 8 of the E.C.H.R.. My view is that the E.Ct.H.R. has never stated that non-settled migrants do not enjoy private lives worthy of Article 8 respect. Contrarily, the Strasbourg Court has conducted a proportionality analysis resulting in decisions which decided that the removals of non-settled migrants are not disproportionate measures. In other words the proportionality of deporting non-settled migrants was actively considered by the Human Rights Court which would have been unnecessary if it had been decided that non-settled migrants enjoyed no private life requiring respect under Article 8 of the

Convention.

32. Finally, though counsel tried to persuade me that the second named infant applicant enjoyed no private life in the State due to her infancy, this was not the basis upon which her claim was assessed by the decision maker and thus it cannot be advanced now by the respondent.

The applicants must succeed on these grounds and orders of *certiorari* will issue.

The UN Convention on the Rights of the Child
33. With the consent of the parties it was decided to adjourn the module of the case which addressed the nature and extent of the Minister's obligations to consider the interests of the child, pending publication of McDermott J.'s decision in *Dos Santos v. Minister for Justice* [2014] I.E.H.C. 559.. That decision was delivered on 19th November, 2014 and a hearing dated 21st April, 2014 was secured. On the resumed hearing the applicant pursued it's case based on the following pleading: (Ground 6 in the Statement Required to Ground Application for Judicial Review):-

> "The failure to reasonably consider the representations made was in breach of s. 3(6) of the Immigration Act and the Respondent further erred in law in failing to consider the welfare of the children, and including what is in their best interests, when arriving at the deportation decision. The said Respondent lacked any entitlement to ignore or otherwise discount the submissions made in respect of the applicability of the provisions of the UN Convention on the Rights of the child."

34. I understood this pleading to embrace two separate but related grounds of complaint. The first was that the rule contained in Article 3(1) of the U.N. Convention on the Rights of the Child applied to a decision making process which considered whether a child should be deported. The second was that the submissions made on the applicability of the Convention were ignored. (Article 3(1) provides that in decisions concerning children, their best interests shall be a primary consideration)

35. It was argued that by operation of the principles of customary and conventional international law the ratification of the U.N. Convention on the Rights of the Child by Ireland had the effect of requiring the Minister to treat the best interests of the child as a primary consideration in deciding whether to deport that child, notwithstanding non-implementation of the Convention in Ireland. (By reference to decisions of the Supreme Court and in particular to the judgment of Henchy J in *Ó Domhnaill v. Merrick* [1984] I.R. 151, this court, on the application for leave to seek judicial review in *Dos Santos & ors v. Minister for Justice & ors* [2013] I.E.H.C. 237 had accepted (to the standard of arguability) that rules in international conventions ratified by the State had application in Ireland regardless of non-implementation provided such rules were not contrary to the express intention of the Oireachtas. In other words there existed a rebuttable presumption that Acts of the Oireachtas made after ratification by the Executive of an international instrument were not intended to contradict the content of the international instruments and should, in so far as possible, be construed in consonance with them.)

36. The effect of ratification without implementation of international instruments was reviewed by the Supreme Court in *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 I.R. 97 where Fennelly J. said at p. 129:-

> "… The constitution establishes an unmistakeable distinction between domestic and international law. The Government has the exclusive prerogative of entering into agreement with other States. It may accept obligations under such agreements which are binding in international law. The Oireachtas, on the other hand, has the exclusive function of making laws for the State. These two exclusive competences are not incompatible. Where the Government wishes the terms of international agreement to have effect in domestic law, it may ask the Oireachtas to pass the necessary legislation. If this does not happen, Article 29.6 applies. I am prepared to assume that the State may, by entering into an international agreement, create a legitimate expectation that its agencies will respect its terms. However, it could not accept such an obligation so as to effect either the provision of a statute or the judgment of a court without coming into conflict with Constitution. (sic)"

37. Reading *Ó Domhnaill v. Merrick and Kavanagh v. The Governor of Mountjoy Prison* together, it is clear that under our dualist approach to international legal obligations, the ratification of an international instrument may sometimes have real legal effects. It is wrong to suggest that ratification of such an instrument without Oireachtas action is always legally sterile. Fennelly J. in *Kavanagh* confirmed that ratification of a non-implemented international instrument may create a legitimate expectation that the terms of the instrument will be respected by the State. Where respecting the terms of the unimplemented instrument would conflict with the domestic law of the state, ratification will be sterile for any person who invokes it in domestic administrative or judicial process. Ratification creates a rebuttable presumption that legislation enacted after ratification is in consonance ("does not contradict") with the terms of the instrument.

In the decision on the substantive application for judicial review in *Dos Santos* McDermott J. ruled, at paragraph 55 that:-

> " Article 3(1) [of the UN Convention on the Rights of the Child] does not have direct effect in Irish law. It does not confer any directly enforceable rights on non-national children…"

I fully agree with McDermott J. that no provision of the U.N. Convention on the Rights of the Child is directly effective in Irish law

38. However, in the case at bar, no argument was made that the provisions of the Convention found expression in Irish law by operation of the principle of direct effect. That is a concept borrowed from E.U. law which has particular meaning based on the doctrine of supremacy of E.U. law and which has no application in these proceedings. The applicant has argued that the Minister's statutory powers to make deportation orders (under s. 3 of the Immigration Act, 1999) must be read in light of the Convention on the Rights of the Child, even though the convention has not been implemented. This argument was rejected by McDermott J. in *Dos Santos* when he said at para. 59:-

> "The court is not satisfied that s. 3(6)(a) which obliges the Minister to consider the age of each applicant in making a deportation order must be interpreted in accordance with Article 3(1) of the United Nations Convention on the Rights of the Child. The Oireachtas has not given effect to the Convention in domestic law by passing the necessary legislation and consequently has not conferred any directly enforceable rights on non-national children. The court does not accept that the applicants had any legitimate expectation that the best interests of each child would be given primacy over any other right or interest by reason only of Article 3(1) of the Convention. However, the court is satisfied that within the provisions of s. 3(6), and the matters which the respondent was required to consider, all relevant factors pertaining to the best interests of the children were considered before the orders were made."

Again I find myself in agreement with McDermott J. that this court is not required by any principle of law to interpret s. 3 of the 1999 Act so as to ensure that it embodies a rule derived from an international instrument to the effect that the best interests of the child shall be a primary consideration in making a deportation order. Article 29 of the Constitution forbids such a result and no rule of public international law requires it.

39. I note that McDermott J. did not accept that the minor applicants in *Dos Santos* had a legitimate expectation (derived from ratification by the State of the Convention) that their best interests would have primacy over other rights or interests in a deportation decision making process. This is surely a correct conclusion. Not even the Convention, if implemented, would require such result.

40. I accept that in the submission to the Minister (dated 24 August, 2009) on why deportation orders should not be made the applicants' solicitors said "We would in particular like to bring to the Minster's attention Ireland's obligations under the 1989 UN Convention on the Rights of the Child and in particular its article 3.1 …". Though it is not expressly stated it is reasonable to infer that the letter meant to convey that the rule in Article 3.1 of the Convention had application in a decision on whether a child should be deported. The Minster's decision does not refer to this submission. No view is expressed as to whether the Convention has application when the deportation of a child is under consideration. The failure to deal with the submission is expressly pleaded.

41. The case argued on behalf of the applicants is that when interpreting the powers of the Minister to make a deportation order under the Immigration Act, 1999, I should interpret the Minister's powers in a manner which is in consonance with provisions of Article 3(1) of the U.N. Convention on the Rights of the Child unless doing so would contradict the Irish legislation. In so far as I am thereby asked to "write in" the text of Article 3 of the Convention into the legislation, I am precluded by Article 29 of the Constitution from doing any such thing.

42. I am also asked to find that public international law requires that I read the Immigration Act in consonance with the Convention provided that doing so would not contradict the Immigration Act.

43. The respondent has argued that the Immigration Act requires the Minister to consider the interests of the child before making a deportation order. This may be correct, though I have doubts about the proposition, but I do reject the respondent's corollary argument that in considering the child's interests this equates to a consideration of the child's best interests. In my view these are not matching concepts. Even if they were, what is missing is any rule in the Act as to the primacy of that consideration.

44. I conclude that no provision of the Immigration Act requires the Minister to consider the best interests of the child as a primary consideration in making a deportation order. The act does not direct or permit a decision maker to place any consideration in a hierarchy whereby greater weight would be given to that factor over any other factor. There is an enormous difference between a rule which says "the best interest of the child shall be a primary consideration in a decision concerning that child" and a rule which says "the decision maker shall have regard to the age of a person about whom a decision as to deportation is to be taken" Thus, it is impossible to read the rules in the Act in consonance with the rule in Article 3 of the Convention. They are at a far remove one from the other. In so far as there exists a presumption (derived from public international law) that the Immigration Act was not intended to contradict the Convention, the presumption is rebutted by the terms of the Act which makes no mention of any particular interest being of primary importance in a deportation decision making process. This is the central difference between the terms of the Convention and terms of the Act and they cannot be reconciled. They stand in contradiction of each other and therefore the rule in the Convention fails to find expression within the State by operation of the pricniples of public international law.

45. Customary rules of public international law have application in the State. As described by Fenelly J., such rules may sometimes create a legitimate expectation that the State will respect the terms of a Convention ratified but not implemented. It is clear that reliance was placed on the terms of Article 3 of the Convention in the submission made to the Minister. It's terms were expressly invoked and were said to have application to consideration of whether to deport the child. In other words, it was said that because Ireland had ratified the instrument, the child had a legitimate expectation that its terms would be respected and applied when deciding whether to make a deportation order.

46. It must be recalled that Fennelly J. did not say that on ratification of an international instrument a pure, actionable legitimate expectation was thereby created. He qualified his statement by adding the important caveat "However, it [the State] could not accept such an obligation so as to effect either the provision of a statute or the judgment of a court without coming into conflict with Constitution" (see para. 36 above). As I am of the view that the terms of the Convention and of the Immigration Act are in conflict, in this instance no legitimate expectation exists that the Minister will respect the rule in Article 3(1) of the Convention when deciding on the deportation of a child.

47. I accept that the Minster did not address the argument of the applicant in relation to the Convention. However, as the only lawful reply which could have been given would be to reject the idea that the Convention had any application I cannot see that that any harm was done by the failure to answer the point. Judicial review being a discretionary remedy, I decline to grant relief on this aspect of the claim, notwithstanding the failure of the respondent to deal with the submission made as to the applicability of the Convention. To grant relief would result in the matter being sent back and court is entitled to assume that the respondent will apply the law in the manner expressed in this decision. No benefit could be achieved by such result and this court should not, in judicial review proceedings, rule in vain.

48. I dismiss this ground of challenge.