



THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 192

**The President
Finlay Geoghegan J.
Peart J.**

Appeal No: 2015/55

Between

C.I.

T.I. (A minor suing by his mother and next friend C.I.)

T.T.I. (A minor suing by her mother and next friend C.I.)

T.T.I. (A minor suing by her mother and next friend C.I.)

Applicants/Respondents

and

The Minister for Justice, Equality and Law Reform, Attorney General and Ireland

Respondents/Appellants

The Human Rights Commission

Notice Party

Judgment of the Court delivered by Ms. Justice Finlay Geoghegan on the 30th day of July 2015

1. The Appellants appeal against the judgment of the High Court (MacEochaidh J.) of the 31st July, 2014 and order of the 6th November, 2014, pursuant thereto granting orders of *certiorari* quashing the Minister's decision to make a deportation order in respect of the fourth named applicant and affirming deportation orders in respect of the first, second and third named applicants for the reasons as set out in the judgment.

2. By order of the 16th December, 2014, the High Court granted leave pursuant to s. 5(3) of the Illegal Immigrants (Trafficking) Act, 2000, certifying that the decision made on the 31st July, 2014, involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal be taken. Whilst the order of the High Court identifies the point of law, the appeal to this Court is against the entire of the decision and the point so identified informs the issues to be considered on the appeal.

Background Facts

3. The applicants are citizens of Nigeria. The first named applicant is the mother of the second, third and fourth named applicants. She first made an application for asylum on the 17th February, 2005, (having arrived in the State) and included in her claim the second and third named applicants who were born in 2002 and 2004 respectively. Her application for asylum was rejected both by the Commissioner and the Tribunal and on the 28th September, 2005, the Minister refused them declarations of refugee status. Deportation orders were subsequently made against them on the 4th May, 2006 and notified by letter dated the 19th May, 2006.

4. There were earlier High Court proceedings challenging the decision to make deportation orders which were abandoned. The first, second and third named applicants then requested revocation of the deportation orders on a number of occasions between May 2006 and March 2009. Those requests were unsuccessful and the deportation orders were affirmed on the 2nd September, 2009.

5. In the meantime the fourth named applicant was born in the State on the 25th January, 2006. Application was made unsuccessfully on her behalf for a declaration of refugee status. An application for leave to remain in the State was then made pursuant to s. 3 of the Immigration Act 1999. That was unsuccessful and the Minister made a deportation order in respect of the fourth named applicant on the 2nd September, 2009. Motions seeking leave to issue judicial review proceedings to challenge the two decisions of the 2nd September, 2014, were issued on the 26th September, 2009 and a 'telescoped' application was heard by the High Court in conjunction with another similar application in respect of which there is no appeal.

6. The focus of the High Court judgment which is under appeal was the consideration given in the examination of the file leading to the Minister's decision in relation to right to respect for private life pursuant to Article 8(1) of the European Convention on Human Rights (ECHR).

7. In respect of the mother and two elder children, this was in the following terms at para. 7:-

"Consideration under Article 8 of the European Convention of Human Rights (ECHR)

If the Minister affirms the deportation orders made in respect of [CI] and her children, [TI] and [TTI], this decision may engage their rights to respect for private and family life under Article 8(1) of the ECHR.

Private life

It is accepted that a decision by the Minister to affirm the deportation orders made in respect of [CI] and her children [TI] and [TTI] may constitute an interference with their right to respect for their private life within the meaning of Article 8(1) of the ECHR. This relates to their work, educational and other social ties that they have formed in the State as well as any matters relating to their personal development since their arrival in the State. [CI] submitted that she has worked as a volunteer for the Irish Wheelchair Association and for the Volunteer Centre and has also done work experience in St. Joseph's Hospital in Ardee. She also submitted that she has completed education and safety courses with a view to making a valuable contribution to Ireland. Furthermore, [CI] submitted that she is a member of a church in the State and

has integrated well into Irish society. It is submitted that [TI] and [TTI] are both attending school in the State and are making good progress.

However, it is not accepted that such interference will have consequences of such gravity as potentially to engage the operation of Article 8. As a result, the decision to affirm the deportation orders made in respect of [CI] and her children [TI] and [TTI] does not constitute a breach of the right of 'respect' for their private life under Article 8 of the ECHR."

The separate consideration of the fourth named applicant stated:-

"If the Minister signs a Deportation Order in respect of [TTI], this decision may engage her rights to respect for private and family life under Article 8(1) of the ECHR.

Private life

It is accepted that a decision by the Minister to deport Ms. T I may constitute an interference with her right to respect for her 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 any matters relating to her personal development since her arrival in the State. It is noted that the applicant is attending play school in the State on a regular part-time basis since the 25th August, 2008.

However, it is not accepted that such interference will have consequences of such gravity as potentially to engage the operation of Article 8. As a result, the decision to deport Ms. I does not constitute a breach of the right of 'respect' for Ms. I's private life under Article 8 of the ECHR."

High Court Judgment

8. In the High Court the principal issue was whether or not the Minister erred in law (through the author of the 'examination of file') in failing to accept that the applicants' Article 8 rights in relation to private life were engaged on the facts set out.

9. It was not in dispute that the approach taken by the author of the examination of file was following that recommended by Lord Bingham of Cornhill in his majority opinion in *Regina v. Secretary of State for the Home Department ex parte Razgar* [2004] UKHL 27. In that opinion Lord Bingham at para. 17 identified five questions likely to have to be answered by an adjudicator where Article 8 is relied upon to contest a proposed decision to deport. These are:-

"(1) Will the proposed removal be 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 end sought to be achieved?"

10. The issue in the High Court was whether or not on the facts identified, the author of the examination of file had erred in determining that the potential interference by deportation would not have "consequences of such gravity as potentially to engage the operation of Article 8". The parties made opposing submissions as recorded in the judgment of the trial judge, many of which were repeated for this Court.

11. The trial judge was critical of the approach of the author of the examination of file and concluded that there was an error of law. It is necessary to set out in full his analysis and reasoning:-

"25. As can be seen, its opening paragraph accepts that the deportation orders 'may engage [the applicant's] rights to respect for private and family life under Article 8(1) of the ECHR'. It is a peculiar feature of the decision that its author commences the Article 8(1) analysis at Question 2 of the *Razgar* questions, rather than at Question 1. I am aware that the series of questions or hierarchy of questions, recommended by Lord Bingham is only that - a recommendation. But it is apparent to me that the decision maker is attempting to follow the *Razgar* questions and the language in the decision is taken directly from the judgment of the House of Lords in *Razgar*. Where a *Razgar*-type analysis starts at Question 2 and accepts that rights are or might be engaged, one then anticipates that the decision maker will then ask if the interference is in accordance with law, and then whether a measure is necessary in a democratic society and, if so, whether it complies with the principles of proportionality. That is not what happens in this first decision under analysis. The decision maker, having indicated engagement of Article 8 rights then goes back one step to the first of the *Razgar* questions, which, it is to be recalled, asks whether the proposed removal will be an interference by a public authority with the exercise of the applicant's right to respect for his private or family life? In the hands of the author of this decision, that question seems to be answered by conceding that the deportation order, if confirmed, 'may constitute an interference' with rights under Article (8)(1) of the Convention.

26. Pausing there for a moment, it seems inappropriate for a decision maker, in handling Question 1, to equivocate in the answer. Either the proposed removal will interfere or will not interfere with private and family rights. If one has any sort of private life - and the concept is broadly understood in Convention terms - then it is impossible to imagine how removal from the State will not interfere with that private life. I can imagine circumstances where one has been in the State for such a short period that it might be said that no private life worthy of protection exists in Ireland. Similarly, if one had no family in Ireland, then removal from the State could not interfere with family rights. However, if one had family in Ireland and removal had the effect of separating the family, it would be impossible for there not to be an interference. Similarly where it is accepted that a person has a private life in the State, removal from the State will always interfere with that. Decision makers should not shy away from these rather simple questions. It may be that decision makers are fearful that if they answer positively the first of the *Razgar* questions that the remaining questions somehow fall like a house of cards.

This, of course, is not so.

27. The second of the *Razgar* questions, it is recalled, asks '[if there is an interference] will such interference have consequences of such gravity as to potentially engage the operation of Article 8?' The author of the decision under analysis, having identified the aspects of private life with which there might be an interference, answers *Razgar* 2 as follows: "it is not accepted that such interference will have consequences of such gravity as to potentially engage the operation of Article 8".

28. No reason is given as to why interference will not have consequences of such gravity as to engage the operation of Article 8. Indeed the consequences of the removal are not identified. Lord Bingham, in *Razgar*, explained the basis of the second of his questions by reference to the case law on the Convention which requires that conduct must attain a minimum level of severity to engage the operation of the Convention and cites the decision of the Court in Strasbourg in *Costello Roberts v. the United Kingdom* [1993] 19 EHRR 112. Though the decision maker identifies the area of private life with which there will be interference, no attempt whatsoever is made to identify the consequences of the interference. The obvious consequence is that the identified private life will cease.

29. It is 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?

30. The mere engagement of a right under Article 8 does not mean the State's proposed action will breach that right, nor does it mean that the State's proposed action will not be protected by the rule of necessity established in Article 8(2) of the Convention or by the principles of proportionality which may protect a decision, however negative the consequences might be for its addressee."

12. Having considered the approach to the potential interference with the right to respect of family life (in relation to which he upheld the Minister's decision), the trial judge concluded at para. 33 "I condemn that part of [the Minister's] decision with respect to their private life rights under Article 8 of the Convention". The trial judge further indicated that he reached the same conclusion for the same reasons in respect of the decision relating to the fourth named applicant.

13. The trial judge in considering similar issues in the second case before him (but not before us) expanded upon what he perceived to be the proper meaning of 'consequences of such gravity' when considering the gravity of the consequences of potential interference in *Razgar* question 2. He added at para. 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."

14. The trial judge also considered the proper approach to questions 3, 4 and 5 as identified by Lord Bingham in *Razgar* and concluded at para. 44 that Lord Bingham was indicating "that, save in the most unusual of cases, an adjudicator or a decision maker will ultimately spend much of the analysis on the issue of proportionality". He then stated:-

"45. Decision makers are not required to find that a deportation measure offends proportionality because it comprehensively interferes with established private life in Ireland. Given that it is lawful for the State to regulate the presence of non-nationals on its territory and that immigration control does not per se offend rights protected by the Convention, something other than the natural consequence of deportation involving, as it does, the cessation or termination of private life in the deporting state, will be required if the proportionality analysis is to yield a positive result for an applicant."

Appeal

15. The primary contention made on behalf of the Minister is that the trial judge was in error in deciding that in relation to a person, who has never been lawfully living in the State but has established a private life in the sense of establishing social ties with other persons in the State deportation will always constitute an engagement of Article 8 by reason of what is stated to be the obvious consequence that the immigrants private life in the State in the sense of personal ties created in the State will cease. The primary submission on behalf of the Minister is that the case law of the European Court of Human Rights (ECtHR) establishes that the Minister is entitled to operate a lawful system of immigration control and that other than in exceptional circumstances a proposed deportation of persons who have never been lawfully living in the State does not engage the obligations of the State in relation to respect for the right to private life pursuant to Article 8 of the Convention.

16. On behalf of the applicants it is submitted that the trial judge was correct. They submit that a proposal to deport an immigrant who has been living in the State, albeit unlawfully, for a number of years and has established a private life in the State consisting of relationships and ties in an educational, work or social context, has the consequence of ending that private life and hence is of sufficient gravity to engage Article 8. The applicants do not dispute that the Minister may be entitled to decide in accordance with Article 8(2) of the Convention to make an order for deportation, but submit that any such lawful decision must be taken in accordance with the requirements of Article 8(2) and in particular by applying the established proportionality principles.

17. As appears the net issue is whether or not the trial judge was correct in determining that on the facts before the Minister he was in error in deciding that Article 8 was not engaged in relation to the alleged right to respect for the private life of the applicants in the making of a deportation order by reason of the absence of consequences of sufficient gravity for the applicants.

Dos Santos Appeal

18. This appeal was heard at the same time as an appeal from a judgment of the High Court (McDermott J.) in *Odenis Rodrigues Dos Santos and Ors. v. Minister for Justice and Ors.* [2014] IEHC 559 delivered on the 19th November, 2014 ("*Dos Santos*") and orders made pursuant thereto dismissing applications for orders of *certiorari* of decisions made by the Minister to deport the mother and five children who were members of a Brazilian family. None of those applicants had permission to live in Ireland. None had claimed asylum. A deportation order was also made in relation to the father but pursuant to a separate examination of file.

19. The *Dos Santos* appeal raises a number of additional issues and a separate judgment is being delivered. It is relevant to this judgment to note that the Minister in his decisions in relation to the Santos family also adopted an examination of file in relation to Article 8 family and private life rights which contained an approach similar to that in the decisions the subject of this appeal. In *Dos Santos*, the author of the examination on file referred expressly to the five questions in *Razgar*. She took a similar approach stating (albeit using different words) that the proposed deportation "has the potential to be an interference with their right to respect for private life within the meaning of Article 8(1) of the ECHR". The author then went on to consider the facts presented and indicated that it was not accepted that any such "potential interference would have consequences of such gravity as potentially to engage the operation of Article 8". The trial judge in the *Dos Santos* proceedings drew attention to the fact that there was no evidence of any specific adverse consequences advanced by the applicants concerning the potential effect of deportation on any of the children. He concluded that in substance, the examination of file determined that "the applicant had failed to establish that the consequences of deportation for the children reached the level of seriousness sufficient to amount to a breach of Article 8". The trial judge considered the evidence which had been submitted to the Minister and at para. 67 concluded:-

"67. The court is satisfied that the conclusion reached that the alleged interference with the right to private life under Article 8 did not have consequences of such gravity to potentially engage its operation and that, consequently, the decision to deport the applicants did not constitute a breach of the right to respect for private life under Article 8, was, on the facts and circumstances considered in the examinations of file, reasonable."

The High Court judgment delivered in *Dos Santos*, whilst delivered later, does not refer to the judgment in this appeal. It appears that the hearing in *Dos Santos* took place prior to the delivery of the judgment herein. The trial judges undoubtedly took different views of what is required when considering the gravity of the consequences of a proposed deportation for persons who have never been lawfully living in Ireland in the sense of being permitted to live in Ireland other than while an asylum claim was being processed.

Legal Framework

20. The legal framework appropriate to consideration of the issues in the appeal is of importance. Article 8 of ECHR is not part of the domestic law of the State. However, the Minister and her officials are obliged to perform their functions in a manner compatible with the State's obligations under the Convention pursuant to s. 3(1) of the European Convention on Human Rights Act 2003. Further, s.4 of the Act of 2003, requires this Court in interpreting and applying the Convention to take due account of the principles laid down in the judgments of the European Court of Human Rights (ECtHR). Hence those judgments are of importance in deciding the extent of the State's (and Minister's) obligations under the Convention.

21. 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, the protection of health or morals, or for the protection of the rights and freedoms of others."

22. In this appeal, the focus is on the obligations of the Minister pursuant to s.3 of the 2003 Act. In relation to Article 8 of the Convention, the judgments of the ECtHR make clear that where Article 8 is relied upon to oppose a proposed decision of a State to expel or deport a person, two separate issues may arise for consideration:

1. Does the proposed expulsion 'engage' Article 8 rights or as sometimes put are the facts such that the proposal falls within the scope of Article 8; and

2. If so, is the proposed expulsion permitted or prohibited by Article 8 having regard to Article 8(2).

The ECtHR in its judgment in *Bensaid v. United Kingdom* (2001) 33 EHRR 10 follows this approach. On the facts therein, the ECtHR decided that Article 8 was not engaged. It is also true to observe that in other decisions, such as *Nnyanzi v. United Kingdom* (2008) 47 EHRR 18 the ECtHR moved directly to the second issue and Article 8(2) on simply an assumption that Article 8 was engaged without first deciding whether or not it was engaged. This approach gives rise to some of the difficulties in these appeals.

23. The more detailed questions (1) and (2) identified by Lord Bingham in *Razgar* followed in the examinations of file leading to the decisions taken herein are directed to resolution of the first issue identified above i.e. the engagement of Article 8 and the remaining three questions relate to compatibility of the proposed decision with Article 8(2).

24. The case law of the ECtHR insofar as it concerns the right to respect for private life in Article 8, and the entitlement of States to control their borders and deport illegal immigrants, presents, if I may say so, two difficulties in deciding whether or not the approach of the trial judge herein is correct or whether the approach of McDermott J. in *Santos* is to be preferred or whether there is a further approach which should be considered. The first difficulty relates to the definition of 'private life' or 'the right to respect for private life'. As the ECtHR has said on many occasions 'private life' for the purposes of Article 8 "is a broad term not susceptible to exhaustive definition". It has been determined to cover "the physical and psychological integrity of a person" (*Pretty v. United Kingdom* (2002) 35 EHRR 1). In *Bensaid* at para. 47 the ECtHR stated:-

"47. 'Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life."

25. As appears many of the rights identified above (and often similarly repeated) are firstly elements of the personal identity of an

individual or of the physical and psychological or moral integrity of the person. Matters within a personal sphere of the individual. The second aspect of the rights identified is the right of the individual to establish and develop relationships with other human beings. Within this formulation, is a concept of a right to private life beyond the identity of the individual within his/her personal sphere and appears to be directed to the right of the individual to engage in relationships and personal development. Both aspects are, however, focused on the individual and the right of the individual albeit including a right to develop relationships with others.

26. However, it does not appear that such definition is exhaustive. In a number of cases relating to settled migrants (in the sense of immigrants who have been lawfully present in the host State), the ECtHR appears to have gone further in its approach to what constitutes private life (and the right to private life) for the purpose of Article 8. In *Balogun v. United Kingdom* (2013) 56 EHRR 3, the ECtHR, in the context of settled migrants, stated:-

"43. The Court recalls that, as Article 8 protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants such as the applicant and the community in which they are living constitutes part of the concept of 'private life' within the meaning of Article 8. Indeed it will be a rare case where a settled migrant will be unable to demonstrate that his or her deportation would interfere with his or her private life as guaranteed by Article 8 (see *Miah v. the United Kingdom* (dec.), no. 53080/07, 27 April 2010 at [17]). Not all settled migrants will have equally strong family or social ties in the Contracting State where they reside but the comparative strength or weakness of those ties is, in the majority of cases, more appropriately considered in assessing the proportionality of the applicant's deportation under Article 8(2)."

27. Whilst it must be recognised that the ECtHR has distinguished in its judgments between settled migrants and those who had never lawfully lived in the host State, nevertheless in relation to what comes within the right to private life, it appears that the ECtHR considers it goes beyond the right of a person to develop relationships and may include the right to the totality of the actual social ties established between the migrant and the community in which they are living.

28. If the applicants were settled migrants then it would appear that in accordance with the principles stated by the ECtHR in *Balogun* cited above, the interference which must be considered in assessing the gravity of the proposed deportation (*Razgar* Question (2)) is the interference with the immigrant's right to an actual established private life being the social and educational ties of the applicants with the community in which they are living. It appears to follow from *Balogun* that Art 8 encompasses a right to the actual private life established.

29. The ECtHR, however, has not directly addressed the question as to whether or not, in relation to a person who has never been a lawful migrant, but whilst living unlawfully (or without a legal right to be present) establishes social ties with members of a community, such social ties constitute part of the concept of a private life protected by Article 8. There is no positive assessment by the ECtHR similar to that in *Balogun* in relation to social ties established by unlawful migrants or persons claiming asylum.

30. Whilst the ECtHR has on many occasions repeated that the Convention does not guarantee the right of an alien to enter or to reside in a particular country, nor oblige a State to respect the choice of residence of aliens, nevertheless it does not appear to have ruled out the possibility that an unlawful migrant may, during a stay develop social ties which could be considered as constituting private life to which they have a right within the meaning of Article 8(1) of the Convention. In *Nnyanzi v. United Kingdom* (2008) 47 EHRR 18, it had the opportunity to do so and did not. The applicant had been in the United Kingdom pursuing an asylum claim for almost ten years. She had never been a lawful migrant. She was the daughter of a government Minister in Uganda. She contended *inter alia*, that her expulsion to Uganda violated her right to respect for her private life pursuant to Article 8. That contention was based upon an established private life in the United Kingdom which involved close ties with her church, her part qualification as an accountant and the relationship with a male friend which she hoped would develop. She also relied upon delays by the State in the asylum process. Finally she contended that her expulsion would be traumatic and exacerbate an asthmatic condition. The ECtHR assessment of that part of her claim was succinct in paragraphs 72-78: -

1. Relevant principles

"72. The Convention does not guarantee the right of an alien to enter or to reside in a particular country. However, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed in Article 8(1) of the Convention (see *Moustaquim v. Belgium*, judgment of 18 February 1991, Series A, No. 193, p. 18, 36). The Court has also recognised that, regardless of the existence or otherwise of "family life", and depending on the circumstances of a particular case, such removal may also give rise to an infringement of an applicant's right to respect for his private life (see *Üner v. the Netherlands* [GC], no. 46410/99, ECHR 2006-, 59).

73. The Court also reiterates its finding in *Bensaid v. the United Kingdom* (no. 44599/98, judgment of 6 February 2001 at 46) that 'not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8'.

74. However, the Court's case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity (see *Costello-Roberts v. United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, pp. 60-61, 36).

75. Any interference with Article 8 rights will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 8. It is therefore necessary to determine whether the interference was 'in accordance with the law', motivated by one or more of the legitimate aims set out in that paragraph, and 'necessary in a democratic society'.

2. Application of the above principles to the present case

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."

31. The above analysis is of assistance in deciding this appeal. Firstly, at paragraph 72 it supports the approach taken by the Minister in considering deportation 'may' give rise to an infringement or as put on behalf of the Minister 'may engage' their right to respect for private life under Article 8(1). Secondly, paras. 73 and 74 make clear the necessity of addressing the 'gravity' or 'sufficiently adverse effects' question ie. *Razgar* (2).

32. Thirdly and perhaps most importantly, in a case where the private life primarily relied upon was established social ties and connections in the host State the ECtHR identified, at least at the level of principle, that what has to be considered is the gravity of adverse impacts on the "physical and moral integrity" of the individual (para74). Hence, whilst the inevitable consequence of expulsion may be the severing of the social ties which may be considered to form part of the private life it appears that what requires to be examined by the decision maker is not just the obvious impact on the private life in the sense of the social ties but rather the gravity of the impact of severing the social ties on the proposed deportee or on his/her physical and moral integrity.

33. The Minister in adopting the examination of file adopted a position whereby the proposed deportation potentially constituted an interference with the right to private life within the meaning of Article 8. I do not agree with the trial judge that the examination of file demonstrates that it was accepted that the applicants did have a private life in Ireland protected by Article 8. The current case law of the ECtHR as reflected by the principles stated in *Nyanzi* appears to support an approach of first identifying a potential interference in the right to respect for private life within the meaning of Article 8 and then considering as a second question whether the proposed deportation would have consequences of such gravity for the individual as to engage the operation of Article 8(1). In so far as the first question above differs slightly from the first question suggested in *Razgar*, s.4 of the Act of 2003 requires that the principles of the judgments of the ECtHR be followed. There does not appear to be any difference in approach between the ECtHR and Lord Bingham in *Razgar* in relation to the second question which is central to this appeal.

34. The trial judge, in my judgment, primarily fell into error in deciding that the relevant consequence of deportation to be examined (for the purpose of determining whether the interference by deportation would have consequences of such gravity as to engage the operation of Article 8) was the bringing to an end of the private life in the sense of existing social and educational ties in Ireland. It appears to me, rather, what the case law of the ECtHR requires is for the adjudicator (and on review the court) to consider the gravity of the consequences of deportation (including severing social and educational ties or relationships) for the individual and in particular how it affects his or her moral or physical integrity. It is the individual's right to respect for his or her private life which is guaranteed by Article 8. The prohibition against interference by a public authority is with the exercise of this right. Where the relevant aspect of the right to private life is the right of the individual to establish and develop relationships with other human beings and insofar as it concerns education, the right to personal development, then it appears to me that what an adjudicator must consider is the gravity of the consequences for the individual of deportation including the inevitable rupture of relationships and social ties formed whilst in the State.

35. This, it appears to me, follows from the approach taken by the ECtHR in *Bensaid* following the earlier decision in *Costello-Roberts* (referred to by Lord Bingham in *Razgar*). I recognise that those judgments related to facts where the asserted right was to mental and physical integrity. However, as I have pointed out, it was repeated as a relevant principle in *Nyanzi* which related principally to established social ties. Mr. Bensaid was a schizophrenic suffering from a psychotic illness. He was in receipt of treatment in the UK and his condition was being successfully managed. The United Kingdom sought to return him to Algeria, Mr. Bensaid objected and sought to rely upon evidence of a high risk of relapse if returned as only lesser treatment was stated to be available in Algeria. He was unsuccessful on appeal in the United Kingdom and then appealed to Strasbourg in reliance *inter alia*, on Articles 3 and 8 of the Convention. The ECtHR rejected his claim based upon Article 3 and his Article 8 claim, in which it was contended that his removal from the UK would have a severely damaging effect on his private life in the sense of his moral and physical integrity. It was contended that without the UK treatment which permitted him to have some level of social functioning he would be unable to interact in the community and establish or develop relationships with others. In the first part of its assessment relating to the potential engagement of Article 8, the ECtHR stated:

"46. Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8. However, the Court's case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity (see *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, pp. 60-61, 36).

47. 'Private life' is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8. . . . Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. . . . The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.

48. Turning to the present case, the Court recalls that it has found above that the risk of damage to the applicant's health from return to his country of origin was based on largely hypothetical factors and that it was not substantiated that he would suffer inhuman and degrading treatment. Nor in the circumstances has it been established that his moral integrity would be substantially affected to a degree falling within the scope of Article 8 of the Convention."

36. In that judgment the ECtHR did continue at para. 48 to consider the position under Article 8(2) "even assuming that the dislocation caused to the applicant by removal from the United Kingdom . . . was to be considered by itself as affecting his private life in the context of the relationships and support framework . . ." and indicated that the deportation complied with the requirements of Article 8(2). However for the issues under consideration in this appeal, it is the first part of the ECtHR's assessment which is of

importance. It makes clear that in this aspect of a private life there must be sufficiently adverse effects on the physical or moral integrity of the person to engage Article 8.

37. It appears that Lord Bingham in suggesting question (2) and speaking of minimum level of severity also had in mind the assessment of adverse impacts on the individual and in particular his physical and moral integrity. In his opinion in *Razgar*, he added the following further explanation of what he had in mind in relation to question (2):-

"Question (2) reflects the consistent case law of the Strasbourg court, holding that conduct must attain a minimum level of severity to engage the operation of the Convention: see, for example, *Costello-Roberts v. United Kingdom* (1995) 19 EHRR 112. If the reviewing court is satisfied that the answer to this question clearly would or should be negative, there can again be no ground for challenging the certificate."

38. A consideration of the judgment of the ECtHR in *Costello-Roberts* and what was stated at para. 36 emphasises that what the Court has in mind is the necessity for the conduct complained of to have adverse effects for the individual. In that judgment at para. 36 set out below, it concluded that the treatment being complained of was not within "the scope of the prohibition contained in Article 8" ie. Article 8 was not engaged because it did not entail adverse effects for "his [the applicant's] physical or moral integrity". At para. 36 of that judgment the ECtHR stated:-

"36. The Court agrees with the Government that the notion of 'private life' is a broad one, which, as it held in its recent judgment in the case of *Niemietz v. Germany* (16 December 1992, Series A no. 251-B, p. 11, para. 29), is not susceptible to exhaustive definition. Measures taken in the field of education may, in certain circumstances, affect the right to respect for private life . . . but not every act or measure which may be said to affect adversely the physical or moral integrity of a person necessarily gives rise to such an interference.

. . .

The Court does not exclude the possibility that there might be circumstances in which Article 8 (art. 8) could be regarded as affording in relation to disciplinary measures a protection which goes beyond that given by Article 3 (art. 3). Having regard, however, to the purpose and aim of the Convention taken as a whole, and bearing in mind that the sending of a child to school necessarily involves some degree of interference with his or her private life, the Court considers that the treatment complained of by the applicant did not entail adverse effects for **his physical or moral integrity** [emphasis added] sufficient to bring it within the scope of the prohibition contained in Article 8 (art. 8). While not wishing to be taken to approve in any way the retention of corporal punishment as part of the disciplinary regime of a school, the Court therefore concludes that in the circumstances of this case there has also been no violation of that Article (art. 8)."

39. The above also requires me to disagree with a further relevant conclusion reached by the trial judge. As set out above the trial judge, following his own decision in *A.M.S. v. Minister for Justice and Equality* [2012] IEHC 72, in turn following the judgment of Sedley L.J. in the Court of Appeal in England in *V.W. (Uganda) v. Secretary of State for the Home Department* [2009] EWCA Civ 5, decided that the phrase 'consequences of such gravity' in *Razgar* question (2) is whether or not "the interference can be described as merely technical or inconsequential". I cannot agree with the trial judge that the ECtHR in the principles set out in *Nyanzi* following its previous judgments in *Bensaid* and *Costello-Roberts* as requiring "sufficiently adverse effects on physical and moral integrity" of the immigrant is to be considered as only having in mind something which is simply more than a technical or inconsequential interference. It appears to me it would be inconsistent with the principles set out in the context of the facts in *Bensaid* and indeed *Costello-Roberts* to take such an approach. What will or will not constitute "sufficiently adverse effects" or have "consequences of such gravity" as to engage Article 8, will depend upon the individual facts and circumstances. It also appears that it may depend upon the circumstances in which the alleged interference occurs. I say this because in *Costello-Roberts* the ECtHR appears to have taken into account the fact that sending a child to a school necessarily involves some degree of interference with his or her private life (see para. 36). In a similar way it appears to me that if an individual decides to travel to a new State and claim asylum the permissible and inevitable application to him of immigration laws, if he fails, will necessarily involve some degree of interference with any private life established in the host State in which he is permitted to remain pending a decision on his asylum claim.

40. This analysis also informs my conclusion that in considering the gravity of the consequences of deportation on the right to respect for private life of an individual who has never been permitted to reside in the host State (other than pending a decision on an asylum claim), it is permissible to take into account that it is a private life consisting of relationships including educational and social ties formed at a time when the right of the individual to remain in the State is precarious.

41. It is important to add the following. The Minister submitted that the Court should determine on this appeal that persons such as the applicants herein, who were never lawfully present in the State (other than being permitted to enter and/or remain to pursue an asylum claim) are not capable of establishing within Ireland a private life in the sense of educational or other social or community ties potentially capable of protection pursuant to Article 8. It does not seem to me that we should do so. Firstly, as I hope demonstrated, the ECtHR has not directly addressed this question and the decision in *NNYANZI* appears, at minimum, to deliberately leave it open. Secondly, the Minister in adopting the examination of file adopted a position, correctly in my view, having regard to s.3 of the Act of 2003 that the proposed deportation potentially constituted an interference with the right to private life within the meaning of Article 8. This approach is consistent with the current case law of the ECtHR. Nevertheless, it also appears correct to observe that in accordance with the judgments of the ECtHR, and in particular *Nyanzi* and *Bensaid*, that it would require wholly exceptional circumstances to engage the operation of Article 8 in relation to a proposal to deport persons who have never had permission to reside in the State (other than being permitted to remain pending determination of an asylum application). This appears to follow from the fact that any consideration of the gravity of the consequences of expulsion must be in the context of the long standing principles stated by the ECtHR, that Article 8 does not entail a general obligation for a State to respect the immigrant's choice of the country of their residence. This approach is emphasised by the facts of *Bensaid* and the conclusion reached by the ECtHR on its facts that Article 8 was not even engaged by his proposed removal. It appears to me that in relation to interference with a right to respect for private life it follows that in order to engage Article 8 the gravity of the consequences for an illegal immigrant or for his physical or moral integrity must be above the normal consequences of the impact on an individual and his physical and moral integrity of enforcement of immigration law, including deportation.

Conclusion

42. In my judgment the trial judge was in error in condemning that part of the Minister's decision which related to the State's respect for the applicants' private life pursuant to Article 8 of ECHR for the reasons set out.

43. The approach taken in the examination of file was consistent with the current case law of the ECtHR.

44. The mother and first two children arrived in Ireland and immediately claimed asylum. They were not then unlawfully present in Ireland by reason of s. 9 of the Refugee Act 1996 for so long as their asylum claim was pending. Nevertheless they did not have a right to live in Ireland, unless successful in their asylum application and their continued presence in Ireland was always precarious. In relation to the fourth named applicant, whilst born in Ireland, she is not an Irish citizen and does not have a right to live in or be brought up in Ireland. She is a young child (approximately 6 years at time of Minister's decision). She is a member of the family unit and her welfare is dependant on her mother with whom she lives. Her continued presence in Ireland is also in that sense precarious. All of the social, educational and other ties established in the State were at a time when the mother knew their continued existence in Ireland was precarious and objectively the continued existence of the children in Ireland was also precarious. There was no evidence put before the Minister by the facts presented and referred to in the examination of file to indicate that the bringing to an end of the particular private life they had created in Ireland would have any significant impact on the right of the applicants, mother or children, to personal development including to education or their right to establish and develop relationships with other human beings on their return to Nigeria. There was no evidence of any grave impact on the physical or moral integrity of the mother or children by reason of the cessation of the relevant activities and social relationships in Ireland.

45. Hence the conclusion reached, on the facts before the Minister, that the interference in the right to private life by deportation of all applicants will not have consequences of such gravity as potentially to engage the operation of Article 8 was reasonable.

46. The above approach was also consistent with the view taken by Feeney J. in *Agbonlahor v. Minister for Justice* [2007] 4 I.R. 309, in 2007 IEHC 166. That judgment concerned a challenge by way of judicial review to a deportation order made in respect of her mother and two children to Nigeria. One of the children had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) while in Ireland. Information was placed before the Minister in relation to the absence in Nigeria of educational and medical facilities to ensure the full development of the child. Feeney J. had been referred to the questions suggested by Lord Bingham in *Razgar* and addressed the second question and concluded that the case before him was not one where the proposed removal would be an interference having consequences of such gravity for the child as to potentially engage the operation of Article 8.

47. Accordingly, I would allow the appeal, vacate the orders of *certiorari* granted by the High Court and hear the parties as to any further orders in respect of the applicants' claims before the High Court as I note that there were other issues not the subject of the judgment of the 31st July, 2014.

Addendum

Since reaching the above conclusions and preparing a draft judgment my attention was drawn to the judgments delivered by the Supreme Court (MacMenamin J. Laffoy J. and Charleton J.) on 16th July 2015 in *P.O & anor -v- Minister for Justice and Equality & ors* [2015] IESC 64. The judgments of MacMenamin J. and Charleton J consider an assessment by the Minister of a right to private life pursuant to Article 8 ECHR. Since it appears to me that the views I had independently formed are not inconsistent with those of the Supreme Court in the recently delivered judgments it did not seem necessary to reconvene the parties.