THE HIGH COURT
JUDICIAL REVIEW

2003 556 JR

BETWEEN

S.C. AND R.C. AND C.C.
(A MINOR) SUING BY HER MOTHER AND NEXT FRIEND S.C.

APPLICANTS

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

AND

2003 557 JR

BETWEEN

T.C. (NEE MCC) AND A.C.

APPLICANTS

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment of Mr. Justice Quirke delivered on the 21st day of December 2004.
These two cases concern broadly similar decisions made by the Minister for Justice Equality and Law Reform on the 1st April, 2003, and they have, for convenience, been heard together.

By orders of the High Court (O'Neill J.) dated 28th July, 2003, the applicants in both cases were given leave to apply by way of judicial review for certain declaratory and other relief including in particular orders of *certiorari* quashing decisions of the respondent made on the 1st April, 2003, to refuse to revoke deportation orders which have been made and remain in force in respect of the applicants R.C. and A.C.

Factual Background– R.C.
1. R.C. who is an Albanian Kososovar national arrived in this jurisdiction on 22nd September, 1999. He applied for asylum within this State and was refused by the Office of the Refugee Applications Commissioner on 7th September, 2001. By that time he had met and commenced a relationship with S.C. who was and remains an Irish citizen.

2. In December, 2001, R.C. changed residence and went to live with S.C. in the latter's family home where he was accepted as a member of S.C.'s family and assumed a quasi parental role in respect of S.C.'s son from an earlier relationship.

3. On 20th February, 2002, the Refugee Appeals Tribunal upheld the refusal of asylum in respect of R.C. A "*fifteen day letter*" dated 19th March, 2002, was posted to R.C.'s last known place of address which notified him of the outcome of the appeal and of his statutory and other rights and options arising out of that decision.

4. The address to which the "*fifteen day letter*" was sent was an address in Walkinstown at which R.C. had lived prior to his establishing a home with S.C. It was a term of R.C.'s permission to reside within this State that he should notify any change of address to the Garda National Immigration Bureau. He failed to do so.

5. A deportation order was made in respect of R.C. on 20th June, 2002. A letter was sent to R.C. (and his solicitor James Sweeney) on 28th June, 2002, requiring the presence of R.C. at the Garda National Immigration Bureau on 5th July, 2002, in order to make arrangements for his deportation. The letter addressed to R.C. was sent to his former address in Walkinstown. It was returned to the respondent on 30th July, 2002, marked "*not called for*". R.C. in evidence indicated that he was not informed by his solicitor James Sweeney that a deportation order affecting him had been made and was unaware of its existence until February 2003.

6. S.C. and R.C. averred in evidence that they became engaged to be married early in 2002 intending to marry shortly thereafter. On the 30th March, 2002, R.C. purchased an engagement ring which he presented to S.C. The applicants claimed in evidence that the wedding was postponed because S.C. became pregnant.

7. On 1st February, 2003, C.C. (a minor) was born at the Rotunda Hospital in Dublin. It is not disputed that she is the child of both R.C. and S.C.

8. In early February, 2003, R.C. attended at the Garda National Immigration Bureau for the purpose of having his identity card amended. Whilst he was present in the bureau he was arrested on foot of the deportation order dated 20th June, 2002 and was removed to Cloverhill prison where he was detained in custody.

9. By letter dated 19th February, 2003, Mr. Eugene Smartt, a solicitor who had been retained (by S.C.), on behalf of R.C. wrote to the respondent advising that R.C. was the father of an Irish born child whose mother was engaged to be married to R.C. and that both mother and child resided within the jurisdiction and were Irish citizens.

10. The letter indicated to the respondent that R.C. wished to apply for permission to remain in the State as the parent of an Irish child and as a person who had acted in *loco parentis* in respect of another child within the State, (S.C.'s child from her former relationship).

11. The respondent was advised that R.C. wished to make submissions in accordance with s. 3 of the Immigration Act, 1999 and was asked to take no further action in respect of the deportation of R.C. pending the lodgement of an application. The markings on the copy indicate that the letter was faxed to the respondent on the 19th February, 2003.

12. On 20th February, 2003, R.C. was deported to Albania.

13. S.C. travelled to Albania in March, 2003 and was married to R.C. in accordance with Albanian law on 25th March, 2003. The validity of that marriage in Albania is not in dispute.

14. By letter dated 14th May, 2003, the applicants' solicitors wrote to the respondent formally applying for revocation of the deportation order which subsisted (and subsists) in respect of R.C. on the basis that R.C.'s circumstances had changed. It was explained that since the issue of the deportation order R.C. had married an Irish citizen and that there was a child of the marriage who had been 12 days old on the date of R.C.'s arrest prior to deportation.

15. A report and recommendation dated 22nd May, 2003, signed by Ms. Lisa O'Connor of the Immigration and Citizenship Division of the respondent was submitted to Mr. Joseph Mortell of the respondent's Immigration Operations Division.

On 27th May, 2003, it was decided on behalf of the respondent by Mr. Mortell that the application to revoke the deportation order in respect of R.C. should be refused. The decision is contained in a document of the same date which was adduced in evidence during the course of the proceedings. The document comprising the decision (and the report and recommendation which gave rise to the document) did not become available to the applicants (and to the court) until the proceedings had commenced and were at hearing.

Accordingly the applicants sought leave and were permitted to amend the grounds upon which they were relying in support of their application.

16. The report and recommendation dated 22nd May, 2003 and signed by Ms. Lisa O'Connor referred to the birth of C.C. on 1st February, 2003 and to the fact that R.C. was the father of an "IBC" (Irish born child) but made no other reference to C.C. The document dated 27th May, 2003, signed by Mr. Mortell and comprising the decision used to revoke the deportation order in respect of R.C. made no reference to C.C.

17. During the course of the trial of these proceedings it was fairly and properly acknowledged by Ms. Moorehead on behalf of the respondent that the rights and interests of C.C. were not factors which were taken into account in any respect by either Ms. Lisa O'Connor or by Mr. Joseph Mortell during their respective consideration of R.C.'s application for revocation of the deportation order.

18. R.C. re-entered the State on 18th July, 2003 and has been living in Ireland with S.C. their daughter and her son between that date and the date of the hearing of these proceedings.

Factual Background– A.C.
1. A.C. who is a Romanian national arrived in this jurisdiction on the 30th August, 1999. He applied for asylum within this State and was refused by the Office of the Refugee Applications Commissioner on 8th May, 2001. This decision was affirmed on appeal by the Refugee Appeals Tribunal on 22nd April, 2002. In or about Christmas of 1999 A.C. had met T.C. and had commenced a relationship with her.

2. With effect from March of 2000 A.C. and T.C. lived together with T.C.'s three children spending part of each week in A.C.'s residence in Beechmount Drive Dundalk, Co. Louth and a further part in A.C.'s residence at Monasterboyce Co. Louth. A.C. and T.C. averred in evidence that A.C. assumed a quasi parental role in respect of T.C.'s three children from earlier relationships.

3. T.C. indicated in evidence that she and A.C. had discussed marriage and that A.C. began to investigate the possibility of obtaining a divorce. A.C. was, at that time, married but separated.

4. A letter was sent to A.C. (and to his solicitors Messrs. McCourt and Company) on the 12th August, 2002, requiring his presence at Dundalk Garda Station on Friday 16th August, 2002, at 2.30 pm in order to make arrangements for his deportation.

The letter addressed to A.C. was returned to the respondent marked "*not called for*."

A.C. failed to attend at Dundalk Garda Station on 16th August, 2002, as required and was classed as having avoided deportation on 16th August, 2002.

A.C. was in T.C.'s home in September, 2002 when he was arrested on foot of the deportation order. He was deported on 16th September, 2002.

5. Later in September, 2002 T.C. visited Romania where she discovered that A.C. was in the process of securing a divorce. In January of 2003 T.C. visited Romania again and on 30th January, 2003, A.C. and T.C. were married in accordance with Romanian law. The validity of that marriage in Romania is not in dispute.

6. On 24th February, 2003, A.C. applied to the respondent for a visa permitting him to travel to this jurisdiction to join his spouse T.C. and to reside within the State. This application was refused on 26th March, 2003, on the grounds that there was a deportation order in force in respect of A.C.

7. Joseph Mortell who was a Higher Executive Officer in Immigration Operations in the respondent's department averred in evidence that A.C. made an application for asylum in Germany in respect of his (then) wife E.C. and two of their children in or about 1992. That application was refused and the applicants were returned to Romania.

8. In or around 1998 A.C. made an application for asylum in France. That application was refused and A.C. was returned to Romania again.

9. In the course of his application for asylum after his arrival in the State on 30th August, 1999, A.C. stated that he was then married to E.C. and that there were four children of the marriage.

10. E.C. arrived in the State on 12th April, 2002 and applied for asylum naming A.C. as her husband. After A.C.'s deportation T.C. consented to voluntary repatriation and was returned to Romania on 7th April, 2003.

In evidence Mr. Mortell averred *inter alia* that:-

> *"The decision to refuse the revocation of the deportation order …(was) … made after taking into account all available information. It was considered that the application for … revocation of the deportation order should be refused… as (A.C. and T.C.)…had not resided together as a family unit for an appreciable period of time since the date of their marriage and (A.C.) did not make any representations regarding his relationship with (T.C.)…prior to the deportation order being signed."*

11. By letter dated 17th February, 2003, solicitors on behalf of A.C. and T.C. wrote to the respondent formally applying for the revocation of the deportation order issued in respect of A.C.

12. A report and recommendation dated 27th March, 2003, signed by Ms. Lisa O'Connor of the Immigration and Citizenship Division of the respondent was submitted to Mr. Joseph Mortell of the respondent's Immigration Operations Division.

The final paragraph of that document contained a recommendation in the following terms:-

> *"From the information to hand, there are indications that the marriage in question may have been entered into solely to facilitate re-entry to the State. Furthermore the couple have not been residing together as part of a subsisting family unit since their marriage…as (T.C.) has returned to the State in order to care for her three children. I would therefore recommend refusal of this application for revocation of a deportation order in place against … (A.C.)."*

On 31st March, 2003, it was decided on behalf of the respondent by Mr. Mortell that the application to revoke the deportation order in respect of A.C. should be refused. The decision is recorded by Mr. Mortell in handwriting by the "agreed" beside the recommendation of the report from Ms. O'Connor.

T.C. has averred in evidence that she has travelled on three occasions to Bucharest to see A.C. during his deportation and that A.C. has travelled to Spain and to France seeking work since the time of his deportation.

T.C. in evidence has further averred that she is unable to be with A.C. by reason of the need to care for her children who are Irish citizens and who are resident within this jurisdiction.

Two of T.C.'s children have ongoing contact with their natural father who is entitled to access to his children within this jurisdiction.

Grounds Relied upon
Section 3 of the Immigration Act, 1999 (as amended) empowers the respondent to require non-nationals to leave the State within a specified period and to remain thereafter out of the State. The power is exercised by order (referred to as a deportation order).

Subsection (11) of s. 3 provides that:-

> *"The Minister may by order, amend or revoke an order made under this section including an order under this subsection."*

The applicants in these cases do not challenge the validity of the deportation orders made by the respondent which affects them. They do not challenge the statutory provision (s. 3 (11) of the Act of 1999) which empowers the respondent to revoke (or to decline to revoke) the deportation orders.

The applicants challenge and seek to impugn the manner in which, on the facts of these particular cases, the respondent has exercised the power conferred upon him to revoke (or to decline to revoke) the deportation orders which have been made and which remain in force in respect of R.C. and A.C.

Both applicants claim that the respondent has exercised the power conferred upon him by subs. (11) of s. 3 of the Act of 1999 in an unlawful manner. It is contended that the respondent has fettered his discretion to make the appropriate decision by applying a seemingly inflexible policy consideration to the applications.

Mr. McDonagh S.C. on behalf of the applicants points to the fact that both applications were refused on the grounds that the applicants were "*not residing in a family unit…*" and …"*not residing together as part of a subsisting family unit.*" between the date of the marriages and the dates of the applications to revoke the deportation orders.

He argues that the reasons advanced for these decisions give rise to a clear inference that they are regulated by a strict and inflexible policy applied to applications of this kind by the respondent. He says that, on the evidence it was not physically or practically possible for the applicants to reside together as family units throughout the periods in question having regard to the fact that both R.C. and A.C. had been deported to Albania and to Romania respectively whilst their spouses were required to remain within this jurisdiction caring for children.

He said that a policy which requires applicants to reside together for a "*appreciable period…*" of time after their marriage is a policy which may not lawfully be applied by the respondent to applications to revoke deportation orders if it necessarily requires that they live outside this jurisdiction before any consideration will be given to their applications.

He says that such a policy offends the constitutional imperative to support the applicant's marriage. Furthermore, he says, that the respondent or his *persona designata* is required to bring his own discretion to bear upon the applications made by the applicants and he refers to the case of the *State (McLoughlin) v. Minister for Social Welfare* [1958] I.R. 1 and in particular the following passage from the judgment of O'Dálaigh J. at p. 27:-

> *"What he did say was that he was bound to adhere to a direction, purported to have been given to him by the Minister for Finance, an observation which disclosed not a concern for the niceties of the probative value, but the belief that a public servant in his position has no option but to act on the direction of a Minister of State. Such a belief on his part was an abdication by him from his duty as an appeals officer. That duty is laid upon him by the Oireachtas and he is required to perform it as between the parties that appear before him freely and fairly as becomes anyone called upon to decide on matters of right of obligation."*

It is argued that by adopting an inflexible policy the respondent has fettered the discretion conferred upon him by the 1999 Act.

Counsel for the applicants says that the respondent was required to consider the applications with reference to the nature of the family life enjoyed by the applicants before their marriages and throughout the entire duration of their relationships. He says that instead of so doing the respondent adopted what appears to have been a rigid and wholly confined policy which was, in the circumstances unreasonable and unlawful.

It is further claimed on behalf of both applicants that their rights to reside in Ireland as a family unit are constitutionally protected pursuant to the provisions of Articles 40, 41 and 42 of the Constitution and Articles 8 and 14 of the European Convention on Human

Rights which has now been incorporated into Irish Law pursuant to the provisions of the European Convention on Human Rights Act, 2003.

Counsel for the applicants argues that the decisions to refuse to revoke the deportation orders in respect of R.C. and A.C. interferes disproportionately and without lawful justification with the right of all of the applicants to the company of one another and to enjoy the right guaranteed by the Constitution and the European Convention of Human Rights to enjoy family unity and the other features of family life.

In respect of R.C. it is claimed that the decision of the respondent was further flawed by the failure of the respondent to consider and take into account the rights and interests of C.C. who is an Irish citizen born and resident within the State and whose rights and interests were, of necessity, affected by any decision made or to be made by the respondent to revoke or refuse to revoke the deportation order which was and is in force in respect of her father.

On behalf of the respondent Ms. Moorehead argues that the respondent is expressly empowered by s. 3 (11) of the Act of 1999 (as amended) to make the decisions which have been made. She points out that valid and subsisting deportation orders remain in force in respect of each applicant and the validity of those orders has not been challenged.

She says that the right to deport aliens is vested in the State "*by virtue of its nature and not because it has been conferred on particular organs of the State by Statutes*" (see *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26 at p. 91.

She says that whilst family rights are protected under the Constitution they are not absolute in nature and must be balanced with other potentially conflicting rights and obligations.

She says that the State may enact laws for the common good which may impinge upon the rights of the family. She says that the decisions made by the respondent in these cases were made lawfully as part of the exercise by the respondent of a discretion conferred upon him by statute. She says the decision may not be interfered with unless it is shown that the respondent has failed to exercise his discretion in accordance with natural and constitutional justice.

The claim made on behalf of the applicants that the impugned decisions were made unlawfully pursuant to a rigorous and inflexible policy which fettered the respondents discretion is rejected on behalf of the respondent by counsel for the respondent who argues that certain policy considerations may quite lawfully be taken into account during the exercise by the respondent of his discretion pursuant to s. 3 (11) of the Act of 1999.

Importantly, it is conceded on behalf of the respondent that the rights and interest of C.C. were not considered or taken into account by or on behalf of the respondent before the decision was made on behalf of the respondent to refuse to revoke the deportation order in respect of R.C.

Decision
Each of the applicants is the subject of a valid lawful and subsisting deportation order which precludes him from entering into or residing within the State at the times material to these proceedings.

The applicants have each applied to the Minister to exercise the power conferred upon him by s. 3 (11) of the Immigration Act, 1999 (as amended) to revoke the deportation orders which affect them. In each case the respondent has declined to do so.

It is well settled that powers of the kind exercised by the respondent pursuant to the provisions of s. 3 (11) of the Act of 1999 (as amended) may not be interfered with by the courts unless they have been exercised unlawfully.

On behalf of the applicant it has been contended that the exercise by the respondent of his discretion under s. 3 (11) of the Act of 1999 has been unlawful for two reasons. They are:-

> (1) because he has fettered his discretion to make the appropriate decisions by applying a seemingly inflexible policy consideration to the applications and
>
> (2) because by refusing to revoke the relevant deportation orders. the respondent has interfered disproportionately and without lawful justification with the rights of the applicant (guaranteed by the Constitution and by the European Convention on Human Rights) to enjoy family unity and the other features of family life.

1. Fettering of Discretion
In *A.O. and Ors. v. Minister for Justice Equality and Law Reform* [2003] 1 I.R. 1 the Supreme Court Keane C.J. considering the factual and statutory context in which the respondent is required to decide whether a deportation order should be made observed that at p. 39 and 40:-

> *"As in all applications by way of judicial review, the test for determining whether the respondent was entitled to make the orders of deportation in either or both of the present cases is whether the decision was so manifestly contrary to reason and common sense that they must be set aside by the High Court…".*

He went on:

> *"One of the grounds relied on by the respondent in resisting the application was that public policy required that the common travel area between the State and the United Kingdom should not be put in jeopardy… In the course of his judgment, Geoghegan J. said at p. 386:-*
>
> > *'I accept that the common travel area arrangements as between Ireland and the United Kingdom have been and are perceived by the general public to be of great advantage to this State. I therefore accept the submissions made on behalf of the Minister that this public policy is not merely legitimate but also fundamental…A single or individual instance of back door illegal immigration into the United Kingdom through initial entry into Ireland may not threaten the continuance of the common travel area, but an accumulation of such 'back door entries' would obviously threaten the continuance of the privilege. For that reason each individual instance of such back door illegal entry or probable backdoor illegal entry is a serious threat to the longterm continuance of the common*

travel area and it is a legitimate act of public policy to take the necessary steps to prevent each individual instance of it.'

I would respectfully agree with that approach. While the respondent must consider each case involving deportation on its individual merits, he is undoubtedly entitled to take into account the policy considerations which would arise from allowing a particular applicant to remain where that would inevitably lead to similar decisions in other cases, again undermining the orderly administration of the immigration and asylum system."

I have no doubt that the principles identified by Keane C.J. in the foregoing passage apply with equal force to the facts of these proceedings.

The respondent, in considering the applications of R.C. and A.C. was required to consider each application on its individual merits but was entitled to take into account legitimate policy considerations relevant to the orderly administration of the immigration and asylum system within the State.

What is alleged on behalf of the applicants is that the respondent did not consider in detail the facts upon which R.C. and A.C. were relying in support of their respective applications and did not make a determination on the merits of each case

Counsel for the applicants argues that the decisions made on behalf of the respondent reflect consideration only of the question whether the applicants were "*…residing as a family unit*" or "*residing together as part of a subsisting family unit…*" or living together for "*…an appreciable period…*" between the dates of their respective marriages and the dates when they applied to the respondent to revoke the relevant deportation orders.

He says that the terms of the decisions made in each of the two cases lead to the inexorable inference that the decisions have been regulated and dictated by a rigid and inflexible policy applied by the respondent which amounted to a precondition to the exercise of the respondent's discretion.

He says that the policy required that the applications could not be successful and must inevitably be refused by the respondent if the applicants were unable to demonstrate by way of evidence that they had been residing in a family unit or as part of a subsisting family unit for an appreciable period between the date when they were married and the date when they applied to have the revocation orders affecting them revoked.

I have no hesitation in accepting the argument advanced by Counsel for the applicants that in considering the two applications concerned the respondent (or his *persona designate*) was obliged to act judicially and within the bounds of Constitutional justice. This included the requirement that each of the applications made had to be considered separately by the respondent on their individual merits.

The application of R.C. was first considered on behalf of the respondent by Ms. Lisa O'Connor who made a recommendation thereafter to Mr Mortell by letter dated 22nd May, 2003.

Ms. O'Connor concluded that:-

"The documentation submitted would appear to support the submission that this is a validly contracted marriage and as it would also appear that (R.C.) is the father of an I.B.C. there has been no period (short or long-term) whereby the couple in question have resided together as a family unit, since the marriage took place.

Throughout the asylum process, the applicant claimed to be a Kosovan national. However there are now reasonable doubts as to the veracity of these claims. As such the applicant's identity may also be questionable."

She went on to recommend refusal of the application for revocation of the deportation order.

In his decision dated 27th May, 2003, Mr. Mortell reviewed in some detail the time which R.C. had spent within the State and outside the State and concluded that "*clearly this marriage has only taken place to circumvent the valid deportation order…*". He went on to uphold the recommendation of Ms. O'Connor and to refuse the application for permission "…on the basis that he is not residing in a family unit with his Irish spouse."

The case of A.C. was first considered on behalf of the respondent by Ms. Lisa O'Connor who made a recommendation which was contained in a document dated 27th March, 2003.

In that document she set out in detail the history of A.C.'s claims for asylum in Germany in 1992 and France in 1998 together with the refusals of asylum in both instances and his return to Romania. Details concerning his wife E.C. and his four children in Romania together with the application of E.C. for residence in this country and her subsequent voluntary repatriation was also described in detail.

In her recommendation relating to A.C.'s application to revoke the deportation order affecting him Ms. O'Connor concluded that:-

"…there are indications that the marriage in question may have been entered into solely to facilitate re-entry to the State. Furthermore the couple have not been residing together as part of a subsisting family unit since their marriage as (T.C.) has returned to the State in order to care for her three children…".

She went on to recommend refusal of the application.

Mr. Mortell indicated his decision to accept her recommendation by affixing the handwritten word "*agreed*" at the bottom of Ms. O'Connor's document.

Counsel on behalf of the applicants points to the fact that the decisions in respect of each applicant were made within three days of one another and that both recommendations of Ms. O'Connor referred to the apparent fact that the applicants had *"…not been residing together*" either "*as part of a subsisting family unit…*" or "*as a family unit*" since their respective marriages. He says that Mr. Mortell accepted both recommendations on those grounds and refused both applications for revocation on those grounds.

He says that this leads to an inference that the respondent applied a particular policy consideration to both applications.

I do not accept Counsel's contention in that respect. There are significant and important factual differences between the history of both applications and indeed the history of both applicants. It is evident from perusal of the recommendations of Ms. O'Connor that the history of each applicant and the history of each application was considered separately and in some detail.

Although the principal reason given by Mr Mortell for the refusal to revoke the deportation order referable to R.C was that R.C was not then " *residing in a family unit with his Irish spouse..*" Mr. Mortell had earlier concluded that "*… clearly this marriage was only taking place to circumvent the valid deportation order…*".

In her recommendation in respect of R.C. Ms. O'Connor had indicated that "*…there are now reasonable doubts as to the veracity of these claims*"

In the case of A.C. both Ms. O'Connor and Mr. Mortell concluded that "*there are indications that the marriage in question may have been entered into solely to facilitate re-entry to the State…*".

Although no evidence has been adduced expressly confirming or denying the application by the respondent of particular policy considerations to applications made pursuant to s. 3(11) of the Act of 1999 I think that it is reasonable to infer from the evidence of Mr. Mortell and from the terms of the decisions which have been made in this case that, as a matter of practice, where such an application is made on the ground that the applicant is the spouse of an Irish citizen an enquiry will usually, (perhaps invariably), be made on behalf of the respondent as to whether the applicant has resided with his or her spouse as part of a family unit for an appreciable period of time between the date of the marriage and the date of the application for the revocation of the deportation order.

If such inquiries are made and if the results of the inquiry are taken into account by the respondent in the exercise of his discretion pursuant to s. 3(11) of the Act, of 1999 then, on a view, the practice could be broadly described as the application by the respondent of a particular policy consideration to applications made by applicants such as R.C. and A.C.

On another view it might well be described as a sensible enquiry in respect of an applicant who is seeking to revoke a deportation order on the grounds that he or she is married to an Irish citizen.

Whether it is viewed as a policy consideration or a simple enquiry I am satisfied that it is a matter which was relevant to the applications. Accordingly, it was properly a matter which could be taken into account by the respondent during his overall consideration of the applications.

It is unnecessary to point out that the exercise of the power conferred by s. 3(11) of the Act of 1999 may not be discharged by the respondent simply conducting an inquiry into the validity of the marriage and whether or not the relevant couple have resided together as part of a subsisting family unit for an appreciable period of time after the marriage.

As has already been indicated the respondent, in considering applications made pursuant to s3 (11) of the Act of 1999 is required to consider each application on its individual merits. He is also required to consider and take into account all material before him which is relevant to the application in question and not to take into account material which is not relevant to the application.

In both of the cases which are the subject of these proceedings, I am satisfied that the respondent's persona designata did, in fact, consider each application on its individual merits.

In each case he took into account and was influenced by the applicant's history prior to and after entry into the State. In each case he took into account and was influenced by the fact that the applicant was the subject of a deportation order. In each case he enquired into and took into account the duration of time which had elapsed between the date of the applicants marriage to an Irish citizen and the date when an application was made pursuant to s. 3 (11) of the Act of 1999.

Had the decisions been made solely on the basis of the results of that inquiry then the arguments advanced by Counsel for the applicants would have much greater force.

However, as I have indicated, I am satisfied on the evidence that Mr Mortell, having considered each application on all of its individual merits, reached conclusions and made the decisions on that basis.

It is not appropriate for this court to consider the merits of either application for the purposes of deciding whether or not the court would have reached the same conclusions and made the same decisions as have been made by the respondent.

On the evidence therefore the court is satisfied that the decisions made on behalf of the respondent were, (subject as hereafter provided), made after consideration of each case on its merits and not by the application of a particular inflexible policy consideration.

Family Rights
The applicants claim that by refusing to revoke the deportation orders the respondent has interfered disproportionately and without lawful justification with the rights of the applicant to enjoy family unity and the other features of family life.

In *A.O. and D.L. v. Minister for Justice* [2003] 1 I.R. 1 the Supreme Court (Denham J.) considering the Constitutional rights of an Irish born applicant to the company, care and parentage of her parents within the State observed (at p. 60):-

> *"The family is the fundamental unit group of the State but the State governs, not the family. The rights of the family are not absolute. The State by its laws, made for the common good, may so order society as to restrict family life in Ireland. The family is the primary unit group – but it is a unit of the State. The State may make appropriate laws which may impinge upon the family for the common good.*
>
> *The Constitution contemplates a balance of rights, of persons and of the organs of the State. Thus the State determines the foreign policy of the nation and this may include agreed European Union policy. Historically and constitutionally, foreign policy is a matter for the executive and the legislature. The courts protect and vindicate constitutional rights. However, such rights are not absolute. They are subject to the law and the Constitution to matters such as public order, the common good and proportionality."*

Counsel for the applicants relies upon the following extract from the decision of the High Court (Walsh J.) in *Fajujonu v. Minister for Justice* [1990] 2 I.R. 151 in support of his contention that the respondent's decisions to refuse to revoke a deportation order in these

cases comprised a disproportionate interference with the applicant's right to enjoy a family unity at p. 166 he stated:-

> *"In my view he (the Minister for Justice) would have to be satisfied, for stated reasons, that the interests of the common good of the people of Ireland and of the protection of the State and society are so pre-dominant and so overwhelming in the circumstances of the case, that an action which can have the effect of breaking up this family is not so disproportionate to the aim sought to be achieved as to be unsustainable."*

However in *A.O. and D.L. v. Minister for Justice* [2003] 1 I.R. 1 Murray J. (as he then was) referred expressly to the case of *Fajujonu v. Minister for Justice* [1990] 2 I.R. 151 in the following terms at p.84:-

> *"I think it is also worth repeating that both Finlay C.J. and Walsh J. took full account of the rights of the family within the State but went on to conclude that these were no bar to deportation as such and that the Minister may, for good and sufficient reasons associated with the common good, nonetheless deport the non-national parents with all the consequences that would have for the infant citizens. Walsh J. went so far as to say that this was so, even if it should result in the separation of members of the family, although this has not been established as a fact in this case."*

Of particular relevance to the facts of this case he went on immediately to emphasise that:

> *"The point being that, unlike a family of non-nationals who can be deported simply because they are non-nationals, having no personal right whatever to be within the State (where rights arising under the immigration asylum systems have been excluded) the Minister must take into account in a case such as the present one, the prima facie constitutional rights deriving from the citizenship of the infants and consider whether, notwithstanding those rights, there are, in the circumstances of the case, good and sufficient reasons associated with the common good for the deportation of their parents with the inevitable consequences for their child."*

Accepting, as I of course do without hesitation, that final paragraph as a clear statement of the law and of the respondents obligation when considering the potential deportation of non-nationals and adopting the principle identified as being applicable equally to applications made to the respondent pursuant to s. 3(11) of the Act of 1999 it follows that the decision of the respondent to refuse to revoke the deportation order in respect of R.C. was and remains invalid.

This is so because of the candid acknowledgment on behalf of the respondent that the *prima facie* constitutional rights of C.C. deriving from her citizenship were not taken into account by the respondent during the consideration of R.C.'s application. In considering R.C's application the respondent did not consider whether, notwithstanding those rights, there were, in the circumstances of the case good and sufficient reasons associated with the common good for the deportation of R.C. with the inevitable consequences for C.C.

It follows that S.C. and R.C. and C.C. are entitled to relief against the respondent including an order of certiorari quashing the decision of the respondent to refuse to revoke the deportation order in respect of R.C.

The position in relation to A.C. is different. A.C. commenced his relationship with T.C. in December of 1999. He lived together with T.C. and her three children from March, 2000 until September, 2002, when he was deported.

On 30th January, 2003, A.C. and T.C. were validly married in Romania.

A.C.'s application for a visa permitting him to travel to this jurisdiction and his application to revoke the deportation order which precluded his presence in the State were refused on 26th March, 2003. I have already found that the decision of the respondent to refuse to revoke the deportation order in respect of A.C. was made after a full consideration of A.C.'s application on its merits.

It is clear from the decision of the Supreme Court in *A.O. and D.L. v. Minister for Justice* [2003] 1 I.R. 1 that the protection afforded by the Constitution to the family is not dependant entirely upon whether it counts amongst its members a citizen of the State.

I have already referred to the judgment of the Supreme Court Murray J. (as he then was) in that case. At p. 83 he declared:-

> *"In the present context it is only when the deportation of a family arises that a distinction is made between families, as was in Fajujonu v. Minister for Justice [1990] 2 I.R. 151 and that distinction is the fact of citizenship of one or more of the children of the family. It is a distinction based on citizenship and not on family rights."*

Later he observed:

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

In the instant case I am satisfied that the decision made by the respondent was made lawfully after a due and proper consideration of all relevant material then before the respondent. I am satisfied also that the power exercised by the respondent pursuant to the provisions of s. 3(11) of the Act of 1999 was exercised lawfully and proportionately having regard to the exigencies of the common good.

A.C. has relied upon the provisions of Article 8 of the European Convention on Human Rights in support of his contention that the respondent's decision should be quashed.

In particular he has relied upon the decision of the Court of Appeal in England in *R.(Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840.

However it is clear from the decision of Lord Phillips M.R. (at p. 861) that Article 8 does not impose upon any State a general obligation to respect the choice of residence of a married couple.

In particular the court held that:

> *"(5) Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates article 8*
>
> *(6) Whether interference with family rights is justified in the interests of controlling immigration will depend on:*
>
> > *(i) the facts of the particular case and*
> >
> > *(ii) the circumstances prevailing in the State whose action is impugned."*

I am satisfied on the facts of this case that the power exercised by the respondent pursuant to s. 3 (11) of the Act of 1999 to refuse to revoke the deportation order in respect of A.C. was lawful, was proportionate having regard to the rights of T.C. and A.C. and the exigencies of the common good and did not in any respect offend the provisions of article 8 of the European Convention on Human Rights or any other provision within that Convention.

It follows that the relief sought on behalf of both T.C. and A.C. will be declined.