**THE COURT OF APPEAL**

Neutral Citation Number: [2015] IECA 210

**Ryan P.**
**Finlay Geoghegan J.**
**Peart J.**

**Appeal No.: 2015/56**

**IN THE MATTER OF THE REFUGEE ACT, 1996 (AS AMENDED), IN THE MATTER OF THE IMMIGRATION ACT, 1999 (AS AMENDED) AND IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000**

**BETWEEN/**

**ODENIS RODRIGUES DOS SANTOS, ANTONIA ALEXANDRE DE MORAIS, ITALO ALEXANDRE DUARTE, CAMILA ALEXANDRE DUARTE (A MINOR SUING BY HER FATHER AND NEXT FRIEND, ODENIS RODRIGUES DOS SANTOS), KARINE ALEXANDRE RODRIGUES (A MINOR SUING BY HER FATHER AND NEXT FRIEND, ODENIS RODRIGUES DOS SANTOS), GIOVANNA ALEXANDRE RODRIGUES (A MINOR SUING BY HER FATHER AND NEXT FRIEND, ODENIS RODRIGUES DOS SANTOS), JOAO ALEXANDRE RODRIGUES (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, ODENIS RODRIGUES DOS SANTOS)**

**APPLICANTS/APPELLANTS**

**-AND-**

**THE MINISTER FOR JUSTICE AND EQUALITY,**

**THE ATTORNEY GENERAL AND IRELAND**

**RESPONDENTS**

**JUDGMENT of the Court delivered by Ms. Justice Finlay Geoghegan delivered on the 30th of July 2015**

1. The appellants all members of a Brazilian family who arrived in Ireland at various dates between 2002 and 2007. They appeal against the judgment of the High Court (McDermott J.) of the 19th November, 2014, and an order of the 21st January, 2015, made pursuant thereto. The High Court dismissed the appellants' application by way of judicial review for orders of *certiorari* quashing the decisions of the respondent Minister making deportation orders in respect of the applicants. The trial judge by order of the same date certified that his decision to refuse the reliefs sought by the applicants involved points of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken to the Court of Appeal. The trial judge identified and set out five points of law which have focused and informed the appeal.

2. The appeal was heard with the appeal in *C.I. and Others v. Minister for Justice and Equality and Others* in which judgment is also being delivered today. The appeal raises similar issues in relation to Article 8 of the European Convention on Human Rights to that raised in the appeal of *C.I.* albeit in a context where the trial judge did not consider the Minister to be in error in the approach taken in addressing the question recommended by Lord Bingham of Cornhill, in his majority opinion *Regina (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27,[2004] 2 AC 368. This appeal raises additional issues which require determination.

**Background Facts**

3. The applicants are all Brazilian nationals and a family unit consisting of a father, mother, and five children. At the time of the hearing of the appeal, the mother had returned to Brazil by reason of the illness of her father. The father and five children remain in Ireland. The father had arrived in Ireland lawfully on a work permit in 2002. It expired in 2003. Nevertheless he remained in the State, continued initially to work and paid all appropriate taxes without the relevant immigration permission. In 2007, he was stopped by gardaí at a routine road check in Roscommon and was requested to present his passport to an immigration officer in Roscommon. His unlawful status was discovered and he was subsequently refused permission to remain in the State. He was then sent a letter pursuant to s. 3 of the Immigration Act 1999 and after some initial difficulties in relation to receipt of letters, ultimately a solicitor took up correspondence with the Minister and made submissions under the Act of 1999. However, a deportation order was made on the 12th March, 2012.

4. The mother arrived in Ireland in 2003, and appears to have purported to enter the State for the purpose of a holiday with her brother who was in the State on a work permit. Three of the children came into the State in February 2007, accompanied by an uncle who resided in Ireland and the two further children came into the State in either June 2006 or 2007, again accompanied by their uncle.

5. By 2009 the father had ceased employment and was in receipt of unemployment benefit. In the course of his application to remain in Ireland, the remaining members of the family came to the attention of the Irish National Immigration Service (INIS). Correspondence was sent by solicitors on their behalf. In August 2011, the Minister indicated that he was proposing to consider the deportation of each of the applicants. Thereafter further submissions were made by solicitors on their behalf with limited submissions made on behalf the children identifying the schools being attended and the progress being made. The applicants' solicitors sent letters in September and October 2011.

6. The applicants have never made an application for asylum, notwithstanding the reference to the Refugee Act in the title to the proceedings.

7. An examination of file in relation to the father was concluded on the 10th February, 2012 and the official recommended that the Minister make a deportation order. A separate examination of file was concluded in respect of the mother and five children on the 13th February, 2012 which also recommended deportation of all. On the 12th March, 2012, the Minister made deportation orders in respect of all members of the family. Leave to apply for judicial review was granted by the High Court (MacEochaidh J.) on the 30th May, 2013. The post leave grounds of challenge and the grounds of appeal pursued on behalf of the children applicants are similar as the trial judge rejected each of the grounds pursued. In summary they fall under three headings:

1. Alleged breach of a personal right to a private life in the State under Article 40.3 of the Constitution.

2. The alleged obligation of the Minister pursuant to s. 3 of the Immigration Act 1999 as amended when construed in accordance with Article 3(1) of the Convention on the Rights of the Child to consider and treat as a primary consideration the best interests of the child when making a decision whether or not to deport the child.

3. The approach to and determination as to whether Article 8 of the Convention on Human Rights was engaged in relation to a potential interference with the child's right to private life.

8. In the appeal whilst the father and the mother remained nominally joined in the appeal, the focus of the appeal was the children's rights and in substance the appeal was pursued on behalf of the children appellants.

**Article 40.3**

9. The appellants submit that a non-national child, such as one of the applicant children herein, who is not a citizen and is not lawfully present in the State has as part of his or her personal rights protected by Article 40.3 of the Constitution, a right to a private life in the State including a right to remain in the State and continue to participate in a community life established while in the State. The trial judge at paras. 28 to 41 of his judgment carefully considered relevant authorities in relation to the rights under the Constitution, including Article 40.3 of children who are not citizens of the State and who are present in the State albeit without lawful permission. As appears, the authorities make clear that such children do have rights protected by the Constitution whilst present in the State. They have in particular rights guaranteed to them as a member of a family pursuant to Articles 41 and 42 and also certain personal rights under Article 40.3. These latter rights may include rights such as those identified by O'Higgins C.J. *in G. v. An Bord Uchtala* [1980] I.R. 32 (at pp. 55 to 56) and rights to fair procedures referred to by the trial judge

10. Whilst at certain points the trial judge referred to these children as non-national children the essential difference in relation to the present claim pursuant to Article 40.3 is between children who are citizens of the State and those who are not. The decision of the Supreme Court *in Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 795, related to citizen children (of non-national parents) who were determined to have a constitutionally protected right to live in the State. It is the citizenship which grants such a constitutional right protected by Article 40.3. The children in these proceedings do not have any such personal right within the meaning of Article 40.3. Persons who are not citizens may be given a right by law or permission by executive decision to live in the State.

11. The trial judge was, in my judgement, correct in the conclusion reached from a consideration of relevant authorities of the Supreme Court that he could not be satisfied that the applicant children not being citizens of the State have a personal right within the meaning of Article 40.3 to remain in the State and/or participate in community life in the State.

**Interpretation of s. 3(6)(a) of the Immigration Act 1999, as amended**

12. The appellants make a subtle submission in reliance on Article 3(1) of the United Nations Convention on the Rights of the Child as to the proper interpretation of s. 3(6)(a) of the 1999 Act, insofar as it applies to consideration by the Minister of deportation of a child. Article 3(1) of the Convention on the Rights of the Child provides as follows:-

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

The Convention has been ratified by Ireland. However, it has not been implemented by an Act of the Oireachtas and it is accepted on behalf of the appellants that by reason of Article 29.6 of the Constitution, it does not form part of the domestic law of the State.

13. Section 3(6) of the Immigration Act 1999 as amended, obliges the Minister in determining whether to make a deportation order in relation to a person to have regard to eleven matters set out in paras. (a) to (k) inclusive "so far as they appear or are known to the Minister". The matter specified in para. (a) is "the age of the person". The appellants submit that s. 3(6)(a) of the 1999 Act, is open to two interpretations: (1) the Minister must simply make a correct assessment of the age of the person and note same or (2) if the Minister determines that the person is a child (or, it was submitted, a person of advanced years) then he is required to give some further special consideration to the possible deportation of that person.

14. The appellants submit that the latter is the preferred interpretation and they submit that notwithstanding Article 29.6 of the Constitution and the fact that the Oireachtas has not enacted into domestic law the Convention on the Rights of the Child that s. 3(6)(a) should be interpreted in the manner consistent with the State's obligation under relevant international law i.e. Article 3(1) of the Convention on the Rights of the Child. In doing so, they rely upon the majority judgment of Henchy J. in *O'Domhnaill v. Merrick* [1984] I.R. 151, where in a claim to dismiss for inordinate and inexcusable delay proceedings initiated within the time limit provided by the Statute of Limitations 1957, in relation to a submission made in reliance on Article 6 of the European Convention on Human Rights having noted that the Convention was not part of domestic law, Henchy J. stated at p. 159:-

> "Still, because the Statute of Limitations, 1957, was passed after this State ratified the Convention in 1953, it is to be argued that the Statute, since it does not show any contrary intention, should be deemed to be in conformity with the Convention and should be construed and applied accordingly."

15. In reliance on this principle the appellants submit that where the Minister learns from the age of the person that he or she is a child the words used in s. 3(6) should be interpreted as requiring the Minister to consider the child's best interests as "a primary consideration" when determining whether or not to make a deportation order in respect of the child in order that it conform with Article 3(1) of the Convention on the Rights of the Child.

16. The trial judge accepted, correctly in my view, that s. 3(6) specifies matters to which the Minister must have regard which are relevant factors pertaining to the best interests of a child but that it cannot be construed as requiring that the best interests of the child be a "primary consideration" in determining whether or not to make a deportation order. As pointed out by Fennelly J. in *Kavanagh v. Governor or Mountjoy Prison* [2002] 3 I.R. 97, where the Government, having entered into an international agreement, wishes its terms to have effect in domestic law it may ask the Oireachtas to pass the necessary legislation, but if it does not do so, then Article 29.6 applies.

17. The Oireachtas, in requiring in s. 3(6) of the 1999 Act that the Minister have regard to the age of a person, intends *inter alia* that he identify whether the person is or is not a child, and if so of what age, and then consider the remaining relevant matters set out in s. 3(6) to a child of that age. Amongst the other matters are: (b) duration in the State; (c) family circumstances; (d) connection with the State and (h) humanitarian considerations. Certain of these relate to the welfare or best interests of the child. However it is not permissible to interpret the words used in s.3(6) in the context of the full section and scheme of the 1999 Act as requiring the Minister, to consider the child's best interests as "a primary consideration" when determining whether or not to make a deportation

order in respect of a child. There is nothing in the Act which warrants such an interpretation. To so interpret s. 3(6) of the 1999 Act would be in breach of Article 29.6 and the power of the Oireachtas to determine the implementation in domestic law of the Convention on the Rights of the Child.

18. This interpretation is also reinforced by Article 42A of the Constitution which came into force only after the judgment of the trial judge. The type of decisions in respect of which laws must be enacted to provide that the best interests of the child shall be "the paramount consideration" pursuant to Article 42A.4.1 does not include a decision such as that to be taken by the Minister in relation to the deportation of a child.

19. It should be noted that whilst reference was made in submissions to Article 24.2 of the Charter of Fundamental Rights of the European Union which provides "In all actions relating to children, whether taken by public authorities or private institutions, the child's bests interests must be a primary consideration", the deportation decisions taken by the Minister herein were not ones to which the Charter applies.

20. Accordingly, in my view the trial judge was correct in determining that s. 3(6)(a) of the 1999 Act cannot be interpreted as requiring the Minister, when he ascertains the age of the person and identifies that the person is a child, to treat as a primary consideration the best interests of the child or, as alternatively put, to expressly decide whether deportation is consistent with the child's best interests. The Minister must of course as pointed out by the trial judge have regard pursuant to s. 3(6) to a number of factors (in particular the family circumstances) which relate to the child's welfare or bests interests and in reaching his decision, take these into account.

**Article 8 of ECHR**
21. The examination of file of the mother and five children considered the impact of a deportation order on their rights to respect to private and family life under Article 8(1) of the ECHR. The author set out the five questions recommended by Lord Bingham in the decision in the House of Lords in *Razgar*. She then identifies, in considering the first question, that if the Minister decided to deport the mother and the five children that "this 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. This relates to their educational and other social ties that they formed in the State as well as matters relating to their personal development since their arrival in the State". The examination of file then points out that no information had been submitted regarding the mother's personal development since arriving in the State. This was not disputed before the trial judge or on appeal.

22. The examination of file then set out the submission that the five children were then attending primary and secondary schools in the State and, in respect of the two elder children, stated their point in the secondary cycle, and in respect of the three younger children identified the primary schools, and in one case a class. It then quoted the correspondence received from the applicants' solicitors which, having acknowledged the fact that members of the family remained in the State without legal status, stated: "I am instructed that the children have settled in well and have made friends here and consider Ireland to be their home".

23. The official who conducted the examination of file, then concluded:-

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

24. In the examination of file of the father a different approach was taken by reason of the fact that he had initially arrived in the State and was given permission to remain in the State for approximately one year as he was in possession of a valid work permit. It was acknowledged that during that period he had the opportunity to develop links with his community and develop his private life in the State. The official then considered the proposed interference by deportation with that private life in accordance with the principles applicable to Article 8(2) and concluded and recommended that the signing of a deportation order was in accordance with law, pursued a pressing social need and legitimate aim and was necessary and proportionate. There was no challenge to the validity of that assessment and it was submitted on behalf of the children that a similar assessment pursuant to article 8(2) of the ECHR should have been conducted.

25. The trial judge having considered the facts, submissions and much of the relevant law of the ECtHR set out in my judgment delivered today in CI concluded at para. 67 of his judgment:-

> "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."

He further considered the distinction made in the case law of ECtHR between the position of settled migrants and those who were never lawfully living in a country and stated at para. 80:-

> "The court is satisfied, in any event, that the conclusion reached in respect of Question 2 on the *Razgar* test is implicitly based on a finding that the deportations proposed would not give rise to any more serious consequences than those that normally flow from the movement of a family from one jurisdiction to another and, therefore, did not give rise to a breach or potential breach of the right to private life which determines the matter."

26. The submissions made on behalf of the appellants against the conclusions reached by the trial judge on this issue were similar to those made in support of the judgment of MacEochaidh J. in *CI*. The applicants herein were represented by the same counsel as the applicants in *CI*.

27. For the reasons set out in my judgment in *CI* I have concluded that the trial judge herein was correct in the conclusion he reached in upholding the lawfulness of the approach in the examination of file conducted on behalf of the Minister in relation to the State's obligations pursuant to Article 8 ECHR and the Minister's consequent obligation pursuant to s.3(1) of the European Convention on Human Rights Act 2003, and further that the trial judge was correct in his conclusion that on the facts before the Minister the decision 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 was reasonable.

**Conclusion**
28. It follows that the trial judge was correct in dismissing the applicants' claim for *Certiorari* of the decisions of the Minister to make

deportation orders in respect of the applicants. Accordingly I would dismiss the appeal herein.

**Addendum**
Since reaching the above conclusions and preparing a draft judgment in this and *C.I. and Others v. Minister for Justice and Equality and Others* 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 on the issue are not inconsistent with those of the Supreme Court in the recently delivered judgments it did not seem necessary to reconvene the parties. The judgments are not directly relevant to the other issues in this appeal.