Neutral Citation: [2016] IEHC 531

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 154 J.R.]

BETWEEN

E.B. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND, A.B.),

J.B. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, A.B.),

W.B. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND, A.B.),

A.B. AND F.B.K.

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 27th day of July, 2016

1. This is a post leave application for judicial review seeking an order of *certiorari* quashing the decision of the respondent dated 31st January, 2013 to refuse to revoke the deportation order which is in force against the fifth named applicant. Leave to apply for judicial review having been refused by the High Court, was, on appeal, granted in respect of the decision by order of the Supreme Court dated 29th July, 2014.

Background

2. The first, second and third named applicants (hereinafter referred to as the minor applicants) are citizens of this state and were born on 16th April, 2001, 2nd December, 2006 and 3rd April, 2008 respectively. The fourth named applicant is the mother of the minor applicants and the wife of the fifth named applicant who is the minor applicant's father.

3. The fifth named applicant came to Ireland on 19th May, 1998 from the Democratic Republic of Congo and applied for asylum. The fourth named applicant arrived in Ireland in 1999 and also applied for asylum. Both applicants were refused refugee status. Following the birth of the first named applicant in 2001, the fourth and fifth named applicants were granted permission to reside in this state on 19th June, 2002, based on the first named applicant's rights as an Irish citizen.

4. According to the grounding affidavit sworn by the fourth named applicant on 28th February, 2013, she and the fifth named applicant, together with the minor applicants, lived in the state as a family unit during the 2000's. During this period the fifth named applicant received a number of criminal convictions. Between December 2002 and December 2005, such convictions comprised road traffic offences. Between July 2008 and November 2008 the fifth named applicant was convicted of a number of offences, largely under the Theft Act 2001, in addition to further road traffic convictions. The upshot of the 2008 convictions was that the fifth named applicant received a number of custodial sentences which resulted in his imprisonment for some 13 ½ months. In all, 34 convictions were recorded against the applicant between 2002 and 2008.

5. The convictions led to a decision by the respondent to revoke the fifth named applicant's permission to remain in the state in light of the fifth named applicant not having complied with the conditions under which he was granted permission to remain in the state, namely "*conditional on [the fifth named applicant] remaining in compliance with Irish Law in every respect during that time*". The fifth named applicant was so informed by letter dated 27th July, 2009. By reason of the foregoing, and given that the fifth named applicant's permission to remain in the state had expired in January 2009, the respondent proposed to make a deportation order pursuant to s. 3 of the Immigration Act, 1999 as amended. On 23rd September, 2009 and 25th September, 2009 respectively, the fifth named applicant made application for leave to remain and subsidiary protection both of which applications were refused on 18th November, 2009. A deportation order, signed on 18th November, 2009, issued on 23rd April, 2010. The fifth named applicant was ultimately removed from the state on 16th February, 2011. According to the fourth named applicant's grounding affidavit, following his deportation to the DRC, the fifth named applicant "*was detained and abused by the authorities when deported to Kinshasa*" for a period of time following which he moved to Kenya.

6. On 18th April 2011, the applicants' solicitor applied to have the deportation order revoked and placed reliance on recent judgment of the European Court of Justice in *Zambrano v. Office National de L'emploi*, a decision rendered on 8th March, 2011. On 28th February, 2012, the respondent department wrote to the applicants' solicitor advising that the application to revoke the deportation order had been considered and refused. One of the findings, *inter alia*, in the examination of file document which accompanied the refusal letter was that "*it cannot be accepted that* [the fifth named applicant] *is playing an active parental role in his children's lives. Consequently, it cannot be accepted that the applicant's Irish citizen children are dependent on him, as is stipulated in the Zambrano judgment*." The application for a visa was refused on 29th February, 2012.

7. By letter dated 25th June, 2012, the applicants' solicitor again wrote to the Department and applied for revocation of the deportation order and this application included, *inter alia*, country of origin information on the DRC and submissions in respect of the fifth named applicant's role as a father, together with a letter from the first named applicant to the respondent which explained how much she missed her father and her personal plea that he be allowed to return. The submissions stated, *inter alia*:-

> *"With respect to the Applicant's parental role in his children's lives, please note our submissions in accordance with our instructions as follows.*
>
> *Apart from the period of approximately 12 months spent in custody, the Applicant lived with his children in Ireland from their birth until he was deported in February 2011. When in prison in Ireland the Applicant had almost daily telephone contact with his children. The children also visited the Applicant in prison on a number of occasions. Since being deported, the Applicant has been in daily telephone contact with his children. The Applicant has played a central role in*

his children's upbringing and continues to be a central part of their lives. Their (sic) is clearly an ongoing dependency by the children on their father. With respect to our client's active parental role we refer to the enclosed letters as set out below.

Moreover, many of the limitations on the Applicant's parental role are caused by the Minister's refusal to permit the Applicant to reside in Ireland. It is submitted that the Minister cannot reasonably rely on the sundering of the family unit occasioned by the Minister's deportation of the Applicant and refusal to revoke the deportation order as a basis for continuing to refuse to permit the Applicant to enter and reside in the State.

It is submitted that the Applicant's children clearly have an ongoing need for the company and care of their father. Notwithstanding the almost daily contact the Applicant has had with his children since deportation, it is submitted that there is an abiding need for the children to have their father with them in Ireland. The children depend on the company and care of their father for the full enjoyment of their private and family life rights as well as their rights as children."

8. It was submitted that the fifth named applicant could not reasonably be said to represent a "genuine, present or sufficiently serious threat to….society" as to warrant depriving his wife and children of his care and company in the State. It was asserted that he had paid his debt to society by serving his prison sentence. A medical report was also furnished.

9. Representations were also made by the fourth named applicant and the fifth named applicant's sister who is resident in Ireland. Two of the fifth named applicant's sisters together with his mother are resident in Ireland, his mother and one sister having obtained refugee status. Additionally, his mother has citizenship of Ireland.

Further submissions were made on 17th and 21 September, 2012 and 3rd October, 2012. On 19th October 2012, additional submissions were made to the respondent on the absence of the fifth named applicant from the minor applicants' lives, including reference to Article 24 of the EU Charter on Fundamental Rights and the provision of extracts from a US study on "*The Importance of Fathers in the Healthy Development of Children*". A further letter addressed to the respondent from the first named applicant was also included in these submissions.

On 27th November, 2012, on foot of the representations that were made on 25th June 2012, the respondent sought details of the role the fifth named applicant was playing in the minor applicants' lives.

10. On 20th December, 2012, the fourth named applicant swore an affidavit in response to the queries raised by the respondent. She averred as follows:

"[The fifth named applicant] is currently in Nairobi, Kenya in a precarious situation. I say that approximately two weeks after my husband was deported in February 2011 he telephoned me, explaining that he had been detained and mistreated in Kinshasa. Since then my children have been in almost daily telephone contact with him. Most of the time I telephone him, using my 'pay as you go' number……because it is much cheaper that way. On some occasions my husband rings me on this number. Recently I have obtained an Eircom landline account….. and on approximately two occasions my husband has rung me on this number…….

My children were devastated when their father was deported in February 2011. They often ask me when he is going to come back. They love to speak to him on the telephone, which they do almost daily. They tell him about school; [The first named applicant] in particular, tells him in detail about the homework she is doing. They tell him that they love him and they ask him when he will he be coming home. My husband sang happy birthday to [the second named applicant] *on 7th December and* [the second named applicant] *was thrilled. My husband also did this for the* [third and first named applicants'] *birthdays in April, and this made them very happy. Through our telephone contact, we keep my husband informed about all the news, big and small, concerning the children- sports, friends, bumps and scratches, arguments etc. Their telephone contact with their father is a comfort to my children in coping with being separated from him and has been a really important part of their lives since his deportation. But my children really miss their father and need to have him with them at home in Ireland."*

11. On 31st January 2013, the respondent issued his decision, refusing the application to revoke. This decision is the subject of the present application.

12. In the course of the within proceedings, it was agreed as between the parties that this court would firstly determine the challenge to the decision based on the minor applicants asserted Article 20 TFEU rights, in effect grounds 1 and 2 of the statement of grounds.

13. For the reasons set out in *E.B & Ors v. Minister for Justice* (High Court 29th January, 2016), this court determined that the respondent lawfully concluded that the minor applicants' Article 20 rights were not engaged by the affirmation of the deportation order which had been made in respect of the fifth named applicant.

14. In this judgment, the issues which fall to be considered are grounds 3-6 of the statement of grounds, as summarised below:

- Whether the refusal to revoke was disproportionate contrary to the Constitution;

- Whether the refusal to revoke was disproportionate contrary to the ECHR and or EU law.

- Whether the refusal decision was irrational and unreasonable by reason of the failure to consider the best interests of the children and or otherwise irrational or unreasonable; and

- Whether the fourth named applicant and the minor applicants have been afforded an effective remedy to challenge the respondent's refusal to revoke the deportation order.

The applicants' submissions on grounds 3-6, in summary

15. Counsel for the applicants submits that the consideration of the applicants' constitutional rights is deficient as it fails to vindicate the rights of the minor applicants' to have access to their father and to his care and company. It is submitted that the decision-maker failed to recognise the constitutional presumption that a child's best interests are served by being with both parents. In

particular, counsel takes issue with the contention that the applicants did not provide "probative evidence" or "verifiable" evidence that the fifth named applicant had a significant involvement in his children's lives and that it was accordingly reasonable to conclude that he had not established that his children's best interests would be adversely affected. It is argued that such a conclusion was entirely irrational and appeared to suggest that there was no family life between the fifth named applicant and his children. Given the constitutional presumption that a child is entitled to the care and company of his or her parents, the approach adopted by the respondent was entirely wrong in principle. Furthermore, it was entirely erroneous to suggest that no evidence was put forward by the fourth named applicant of contact with the fifth named applicant. The fourth named applicant swore an affidavit to this effect and provided evidence of telephone contact.

16. The primary issue is that there was no weighing exercise embarked on by the respondent that it is in the minor applicants' best interests that their father should be allowed to return to the State. All the decision-maker has said is that insofar as she was concerned, the applicants had not satisfied him that the minor applicants' best interests would be adversely affected. This was in the teeth of the constitutional presumption which the minor applicants enjoy, namely their entitlement to the care and company of their parents, and it was in the teeth of the evidence which had been presented to the respondent including the letters written by the first named applicant. It is submitted that in light of the failure by the respondent to commence his consideration from the presumption that it is in the minor applicants' best interests that they be allowed the care and company of their father, the proportionality exercise conducted by the respondent is so flawed as to vitiate the decision.

17. In aid of his arguments, counsel for the applicant cites *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795.

18. While the decision-maker recorded the constitutional rights of the minor applicants, there was, it is submitted, no engagement with those rights.

19. The respondent did not adopt the approach advocated by Denham J. in *Oguekwe*, rather the emphasis was wrongly placed on the assertion that the applicants had not established that the minor applicants' best interests would be affected which amounted to a wholly unfair reversal of the presumption which should ordinarily apply, namely that the minor applicants' best interests require the care and company of their father.

20. It is submitted that the argument that the minor applicants' best interests are best served by being with both parents. This is aptly set out in in *Re O'Brien (an infant)* [1954] I.R. 1.

21. The presumption that the children's best interests are best served in the family unit comprising of both parents (albeit, counsel acknowledges, there may be exceptions) is also set out in *in Re J.H. (an infant)* [1985] 1 I.R. 375.

22. Counsel relied on *N.W.H.B. v. H.W. and C.W.* [2001] IESC 90 in support of the "*constitutional presumption that the welfare of a child is to be found within the family*".

23. Counsel cited *N v. HSE* [2006] IEHC 278, where McMenamin J. also recognised, citing *inter alia J.H.*, the "*constitutional presumption that the needs of a child are to be met and its welfare secured within its family*" and cited McGuinness J. in the Supreme Court decision in the same case, who stated, with reference to *J.H.*:-

> *"…the test set by Finlay C.J. in his judgment - compelling reasons why the child's welfare could not be achieved within the natural family - is so exacting that it would be difficult to see it being met other than in the most extreme circumstances. This is particularly so when the test is given the added weight of being set in the context of the constitutional declaration of the rights of the family and of parents, and the related constitutional presumption that the welfare of the child is to be found within the family. These constitutional rights and presumptions apply, of course, to the legally married family alone."*

24. In support of the argument that the respondent erroneously placed the onus of proof on the applicants to establish that the fifth named applicant's absence adversely affected the interests of the minor applicants, counsel relied on the decision of Denham J. in *N.McKay v. Information Commissioner* [2006] I.R. 260 where she states:-

> *"21. The Act of 1997 and the Regulations fall to be interpreted in accordance with the Constitution. A parent, the appellant, has rights and duties in relation to a child. It is presumed that his or her actions are in accordance with the best interests of the child. This presumption while not absolute is fundamental. The respondent took an incorrect approach in requiring tangible evidence of the parent rather than applying the presumption that a parent was acting in the child's interests. The "tangible evidence" test of the respondent reversed the onus of proof."*

Counsel contends also that while the UN Convention on the Rights of the Child has not been ratified by Ireland, it should nevertheless be employed as a mechanism to inform the constitutional rights which the minor applicants enjoy.

25. Notwithstanding the approach of the Court of Appeal in *Dos Santos v. Minister for Justice* [2015] IECA 210 the EctHR has nonetheless interpreted the European Convention on Human Rights in the context of the provisions of the UN Convention on the Rights of the Child.

It is submitted that the conclusion on Article 8 rights was arrived at in the teeth of a failure by the decision-maker to proceed from first principles, namely that the minor applicants' best interests are served by being allowed to live as a family unit with the fifth named applicant, and in the teeth of the evidence provided by the fourth named applicant of the children's upset at the separation from their father, as evidenced by the letters from the first named applicant to the respondent and her desire that the respondent would meet with her. The respondent's conclusion that it was not disproportionate to refuse to revoke the deportation order is entirely flawed as the weighing of the minor applicants' best interests as being of paramount importance was not engaged in as a primary consideration. In this regard, counsel for the applicant relies on the judgment of the European Court of Human Rights (EctHR) in *Jeunesse v. the Netherlands* (2014) ECHR 1309. The approach of the EctHR is important in that specifically in *Jeunesse* the Court had regard to the UN Convention on the Rights of the Child. *Jeunesse* is authority for the proposition that the minor applicants' best interests must be taken into account and that their best interests, being of paramount importance, must be afforded significant weight. It is submitted that this exercise was not embarked on with regard to the minor applicants in the present proceedings, contrary to the guidelines set out in *Jeunesse*.

26. Counsel submits that the fifth named applicant's circumstances in the present case were stronger than those pertaining in *Jeunesse*, as prior to his deportation he could be said to have the status of a settled migrant, as opposed to being an illegal migrant as was the case with Ms. Jeunesse.

27. Counsel also submits that the weight attached to the fifth named applicant's history of criminality was disproportionate having regard to the jurisprudence of the EctHR. In the context of proportionality, it was important to note that the respondent acknowledged that the fifth named applicant's crimes were on the lower end of the scale. In this regard, counsel cites *Omojudi v. United Kingdom*. As authority for the disproportionate nature of a lifelong deportation order counsel relied on the decision of the EctHR in *Yilmaz v. Germany* [2004] 38 EHRR 23 and *Emre v. Switzerland* (No. 2) (2011) ECHR.

28. Counsel lays emphasis on the statement in *Sivsivzadi v. Minister for Justice* [2015] IESC 53 that the respondent in considering an application to revoke has to "*take into account all relevant factors, including any fundamental rights concerning the family and any right to family life, where relevant, of those directly affected by "a deportation order"*." It is submitted that *Sivsivzadi*, unlike the approach taken by Cooke J. in *Smith v. Minister for Justice* [2012] IEHC 113 is authority for the proposition that there does not have to be a change in circumstances for an application for revocation of a deportation order to be made. In any event, counsel submits, in the present case there was such a change of circumstances, being the passage of time between the making of the deportation order and the application to revoke. Even if this were not the case, it is clear from *Sivsivzadi* that the circumstances which were required to be assessed in the present case were the representations that the applicants made to the respondent, including the affidavit sworn by the fourth named applicant and the first named applicant's letters.

29. It is submitted that on the evidence before her it was entirely unreasonable for the respondent to hold that the fifth named applicant had not established that his children's best interest would be adversely affected by a refusal to revoke the deportation order. It was unreasonable and unfair in circumstances where at all times up to his deportation and save for a period of time spent in prison the fifth named applicant lived with his wife and the minor applicants as a family unit and was involved in their upbringing.

30. The respondent found that no "verifiable evidence" and "no probative evidence" had been submitted to show that the fifth named applicant was actively involved or played a significant role in his children's lives. This conclusion was an error of law and a material error of fact on the part of the respondent. Furthermore, such assertions were unfair given the evidence before him. The veracity of the applicants' assertions have not been questioned, nor was it ever put in issue that the fifth named applicant had lived in the family unit prior to his deportation save for his custodial sentence. It is submitted that this flawed finding of itself renders the contested decision unlawful.

31. Insofar as the respondent's statement of opposition refers to "evidential deficits", it is submitted that in answer to a request from the respondent on 27th November, 2012, for evidence of the fifth named applicant's regular contact with his children, the fourth named applicant provided such evidence by way of receipts of telephone contact. The approach of the respondent in requesting such information again reinforces the failure to recognise that the proper starting point was the presumption that the children's best interest required their father to be with them, as a natural right. Insofar as evidence of money transfers from the fifth named applicant to his family were required by the respondent, the fifth named applicant's circumstances were such that he was in Kinshasa/Kenya without means, a factor made known to the respondent. Moreover, the first named applicant had sought to meet with the respondent to relay in person how much the minor applicants needed their father to be with them but the respondent chose not to respond to this request.

32. In aid of ground 6, it is submitted that the applicants are in a position where there is no effective appeal mechanism by which they can challenge the respondent's refusal to revoke the deportation order.

The respondent's submissions in summary

33. It is submitted on behalf of the respondent that the general tenor of the applicant's submissions is that the deportation order should not have been made in the first place and that the minor applicants' best interests trumps all other considerations and that effectively the respondent is not entitled to enquire as to the level of contact between the fifth named applicant and his children. It is submitted that the applicants' contentions in these regards are unstatable.

34. While the best interests arguments canvassed on behalf of the applicants are appealing, they are not grounded in the Constitution or in Irish law. Nor are they grounded in the Convention notwithstanding the reference in the judgment of the EctHR in *Jeunesse* to the UN Convention on the Rights of the Child and Article 3, 7 and 9 thereof, upon which the applicants' counsel sets such store. The UN Convention on the Rights of the Child is not part of Irish domestic law and moreover the Court of Appeal in *Dos Santos* has also made it clear that situations where the best interests of the child shall be "the paramount consideration" do not include deportation decisions.

35. Furthermore, in *Dos Santos* the Court of Appeal stated unambiguously that the deportation decisions taken by the respondent are not decisions to which the EU Charter on Fundamental Rights applies. More specifically, while the respondent must pursuant to s.3(6) of the Immigration Act 1999 have regard to family circumstances which relate to a child's welfare or best interests, *Dos Santos* also states that the respondent is not required "*to expressly decide whether deportation is consistent with the child's best interests*". Moreover, the applicants have not pointed to any decision of the EctHR which runs counter to *Dos Santos*. No jurisprudence of the ECtHR has been cited which states that decision-makers in the context of immigration must expressly refer to the child's best interests or commence their consideration with specific reference to best interests.

36. The matter has to be looked at in context; what is in issue in these proceedings is a judicial review of a second application to revoke a deportation order. The deportation in February 2011, was not challenged. Nor was there any challenge to the first refusal to revoke of 28th February, 2012. Thus, both of those decisions are valid decisions. Yet a challenge has been launched against the second refusal to revoke notwithstanding that it is predicated on an evidential deficit, as communicated by the respondent to the applicants in the decision. Even in this context, all of the applicants' relevant circumstances were considered by the respondent.

37. Insofar as ground 3 of the statement of grounds argues that the decision maker failed to give adequate weight to the minor applicants' rights to co-habit with their father, that is not the case as the minor applicants' constitutional rights to the care and company of their parents are expressly referred to in the decision. It cannot be said that the decision maker applied the wrong test under the Constitution.

38. The balancing exercise that is urged on the court by counsel for the applicants, namely the paramount nature of the children's best interests and the asserted minor nature of the offences, is not a balancing exercise which could be engaged on given that the Constitution does not provide that the minor applicants' best interests is to be a paramount consideration in the present context and given that the respondent did not find the offences for which the fifth named applicant was deported to be minor offences.

39. Insofar as the applicants' written submissions seeks to impugn the decision as saying it was "a grotesque injustice" to the minor applicants for the respondent to penalise them based on their parents wage earning potential, that was not the reason for the refusal to revoke – the focus in the decision is on the fifth named applicant's convictions and how they would present to a potential

employer, leading the respondent to conclude that the fifth named applicants chances of employment were poor.

40. With regard to Article 8 ECHR rights, counsel submits that it is only in exceptional cases that there will be a breach of Article 8(1) rights that cannot be justified by reference to Article 8(2), given the wide margin of appreciation afforded to member states. In the present case, the decision maker expressly considers that there is a breach of Article 8(1) but concludes that it is justified having regard to Article 8(2). Such considerations are entirely a matter for the respondent, subject only to the principle of proportionality.

41. Pursuant to *Sivsivadze*, the principle of a deportation order with no final duration is compatible with the Constitution and Article 8 ECHR. Accordingly, there is no merit in the argument canvassed at the applicants in grounds 3 and 4 with regard to the lifelong duration of deportation orders.

42. The applicants have not produced the evidence to show a threshold of activity by the fifth named applicant in the minor applicant's lives notwithstanding that such information was requested by the respondent on 27th November, 2012. In circumstances where the fifth named applicant has been outside the State since February, 2011 the question has to be asked as to why further evidence of contact between the fifth named applicant and the minor applicants has not been provided. For example, there was no evidence of letters, cards or photographs or emails passing between the minor applicants and the fifth named applicant despite this type of evidence having been requested.

43. While the fourth named applicant has sworn an affidavit detailing telephone contact and while there is on record letters from the first named applicant to the respondent setting out how much she misses her father, no hard evidence was furnished at the time of the second application to revoke such as might have resulted in the balancing exercise embarked on by the respondent having a different outcome.

44. Yet it is against this evidential deficit which confronted the respondent that the applicants' counsel contends that the minor applicants' best interests trump all other considerations.

45. The respondent's function in the context of deportation is to have regard, pursuant to s. 3(6), to a number of factors, including family circumstances which relate to the child's welfare or best interests, and in reaching his decision take those into account, which was done. Counsel acknowledges that the principles set out by Denham J. in *Oguekwe* apply to the revocation decision in issue here, particularly in light of the decision of the Supreme Court in *Sivsivadze* as to the obligations on the Minister when considering an application under s3(11) of the Immigration Act 1999.

46. Notwithstanding that a somewhat different approach to the approach taken in *Sivsivadze* was taken by Charlton J .in *PO and SO v. Minister for Justice* [2015] IESC 64/1 on the question of the obligation on the respondent, it is submitted that the *dictum* of Charlton J. in is particularly apt in the present case as the substance of the decision to revoke in this the second application brought by the applicants is one which has already been determined in the deportation decision. It is conceded however that the view posited by Charleton J. as to the obligations on the Minister in revocation applications is not on point with the approach set out by Murray J. in *Sivsivadze* (para. 52) where it is stated that the obligation on the Minister in s. 3(11) applications "*is not to be confined to enabling the Minister to amend or revoke a deportation order only where there has been a change of circumstances* .."

Albeit there is some inconsistency in the approaches set out in *PO and SO* and *Sivsivadze* as to the nature of the Minister's obligation in revocation cases, as far as the present case is concerned this is an irrelevant factor given the extensive consideration afforded by the respondent to the revocation application, an approach which the respondent argues brings the present case within the more expansive obligation which *Sivsivadze* says exists.

47. Counsel relies on the *dictum* of Dunne J. in *Falvey v. Minister for Justice, Equality and Law* Reform [2009] IEHC 528 (albeit a leave decision) in the context of how the respondent balanced competing interests in the present case.

48. Counsel cites the decision of the EctHR in *Grant v. United Kingdom* (2009) ECHR as an important authority of the European Court in the context of criminal offences, albeit *Grant* is not on all fours with the present case, and also relies on *Khan v. UK* [2011] ECHR 2253.

49. The approach of McDermott J. in *F.E. v. Minister for Justice* [2013] IEHC 93 is urged on this court in the context of the proportionality of the respondent's decision. Counsel also submits that the decision adheres to the guidelines set out in *Isof v. Minister for Justice, Equality and Law Reform (No. 2)* [2010] IEHC 457 as referred to in *FE*.

50. Counsel also cites *DOM v. Minister for Justice, Equality and Law Reform* [2014] IEHC 193 – a decision where a challenge was brought to a deportation order in respect of the Nigerian father with three Irish citizen children. He had 45 convictions in Northern Ireland and one conviction in this state. His convictions were not dissimilar to the convictions in the present case.

51. With regard to ground 5, it is submitted that the applicants' are requesting the court to quash the refusal decision not on the basis that it is unreasonable or irrational on *O'Keeffe* or *Keegan* principles (which, it is submitted, continue to apply post *Meadows v. Minister for Justice* [2010] 2IR 701, rather it is posited that the decision is unlawful by reason of the respondents failure to adhere to the best interests principle. Insofar as the case is being made that the decision should be vitiated for unreasonableness, it is submitted that the applicants place undue emphasis on the affidavit sworn by the fourth named applicant and the letters written by the first named applicant in urging the court to find the refusal to revoke the deportation order unreasonable. It cannot be said that the decision not to revoke is unreasonable in circumstances where all the facts and matters of relevance were considered.

52. What the applicants request is that this court substitute its own view for that of the respondent, an approach which is not open to the court. What the court has to look at is the respondent's balancing exercise to see if the respondent was rationally entitled to take the approach reached in the decision, even if the court had come to a different conclusion. The applicants have not advanced any argument as to why the decision is disproportionate in the legal sense. They have not said how or when the decision not to revoke was rendered disproportionate. This is important given that the decision to deport was accepted without challenge.

53. With regard to the applicants sixth ground of challenge, it is submitted that there is no merit to the challenge advanced by the applicants on the issue of lack of remedy. There is no entitlement under Irish or EU law or under the Convention to have "an independent administrative appeal mechanism" by which the applicants can challenge the decision to affirm the deportation order. The applicants cannot invoke Article 47 of the EU Charter in the absence of engagement of EU rights. It is further submitted that the jurisprudence of the Irish courts and the EctHR has established that in expulsion cases judicial review is an effective remedy. In this regard counsel cites *FE v. Minister for Justice, Equality and Law Reform* [2014] IEHC 62.

54. In the correspondence from the respondent on this issue, the applicants were advised that they could seek to revoke again if they had new information. This is an important factor as it shows that the respondent did not approach the matter with a closed mind. The offer made is in line with the recent Supreme Court decision in *Sivsivadze* where Murray J. stated that a deportation order can always be revoked by the respondent, on her motion or after further request.

Considerations

55. It is contended on behalf of the applicants in the statement of grounds and in submissions that the contested decision is, *inter alia*, disproportionate in its effect given that at the time of the decision three years and three months had passed since the deportation order issued and two years had passed since the fifth named applicant was removed from the State during which time the fourth named applicant and the minor applicants have been deprived of the fifth named applicant's company. It is further argued that it is disproportionate in continuing the lifelong prohibition on the fifth named applicant entering the State. It is argued that the continuing exclusion from the State of the fifth named applicant in an unlawful interference with the minor applicant's rights under the Constitution, the Convention and EU law.

56. The first issue to be considered in the present case is the scope of the respondent's obligations, pursuant to the Constitution and Article 8 ECHR and EU law, when considering whether to revoke a deportation order made in respect of the non-national parent of an Irish citizen child. As a married couple the fourth and fifth named applicant and the minor applicants constitute a family under the Constitution with all the attendant rights as a family.

57. In the course of his submissions, counsel for the applicants referred the court to a long line of jurisprudence dealing with rights of the minor applicants under the Constitution, both personal rights and as members of a family unit. He cited, in particular, Finlay CJ in *In re JH. (an infant)* 1985 1 IR 375:-

> *"1. The infant, being the child of married parents…….has in addition to the rights of every child, which are provided for in the Constitution and were identified by O'Higgins C.J. in G. v. An Bord Uchtála [1980] I.R. 32 at p. 56, rights under the Constitution as a member of a family, which are: (a) to belong to a unit group possessing inalienable and imprescriptible rights antecedent and superior to all positive law (Article 41, s. 1); (b) to protection by the State of the family to which it belongs (Article 41, s. 2); and (c) to be educated by the family and to be provided by its parents with religious, moral, intellectual, physical and social education (Article 42, s. 1)."*

58. It is contended there was no recognition in the decision of the minor applicants' rights under Article 42 to be educated by the fifth named applicant in the manner envisaged by Article 42 and as expressed by Finlay C.J. in *J.H.* It is submitted that the limited contact which the minor applicants now presently have with their father is not sufficient to satisfy Article 42.

59. It is accepted that the constitutional rights referred to above comprise a compelling argument for the minor applicants to have the care and company of their father. However, their constitutional rights are not absolute. In *AO and DL v. Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1, it is expressly stated that it is lawful for the state to deport the non national parents of Irish citizen children:-

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

60. The decision in issue in the within proceedings is the respondent's refusal to revoke the deportation order in respect of the fifth named applicant which was signed on 18th November, 2009 and effected on 16th February, 2011 when the fifth named applicant was removed from the State. The deportation order itself was never challenged by the applicants. On 18th April, 2011, following the ECJ ruling in *Zambrano*, an application was made to revoke the order, which was refused on 28th February, 2012. That decision was not challenged. What is under challenge is the application to revoke dated 25th June, 2012 and which was the subject of a refusal as notified to the fifth named applicant on 28th January, 2013.

61. In terms of what the respondent is required to have regard to when considering an application to revoke a deportation order made against a non-national parent of an Irish citizen child, I am satisfied that any application to revoke must be considered in accordance with any relevant principles as set out in *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 795. While that case concerned the considerations for the making of a deportation order and not a revocation decision, the guidance given by Denham J. as to what must be taken into account where a citizen children are involved is equally applicable in the revocation context. It is apt to set out these guidelines.

62. Denham J. stated:-

> *"56. The High Court identified personal rights of an Irish citizen child, within Article 40.3.1 of the Constitution, which the Minister was obliged to have regard to as:-*
>
> *'1. The right to live in the State.*
>
> *2. The right to be reared and educated with due regard to his/her welfare including a right to have his/her welfare considered in the sense of what is in his/her best interests in decisions affecting him/her.*
>
> *3. Where as in the case of the applicants herein the parents are married to each other the rights which as an individual, the child derives from being a member of a family within the meaning of Article 41.'"*

63. At para. 85 of her judgment, she set out "*a non-exhaustive list*" which may assist and relate to the position of Irish citizen children whose parents may be considered under s. 3 of the 1999 Act for a deportation order. These are:-

> *"1. The Minister should consider the circumstances of each case by due inquiry in a fair and proper manner as to the facts and factors affecting the family.*

2. Save for exceptional cases, the Minister is not required to inquire into matters other than those which have been sent to him by and on behalf of applicants and which are on the file of the department. The Minister is not required to inquire outside the documents furnished by and on behalf of the applicant, except in exceptional circumstances.

3. In a case such as this, where the father of an Irish born child citizen, the mother (who has been given residency), and the Irish born citizen child are applicants, the relevant factual matrix includes the facts relating to the personal rights of the Irish born citizen child, and of the family unit.

4. The facts to be considered include those expressly referred to in the relevant statutory scheme, which in this case is the Act of 1999, being:-

(a) the age of the person/s;

(b) the duration of residence in the State of the person/s;

(c) the family and domestic circumstances of the person/s;

(d) the nature of the person's/persons' connection with the State if any;

(e) the employment (including self-employment) record of the person/s;

(f) the employment (including self-employment) prospects of the person/s;

(g) the character and conduct of the person/persons both within and (where relevant and ascertainable) outside the State (including any criminal convictions);

(h) humanitarian considerations;

(i) any representations duly made by or on behalf of the person/persons;

(j) the common good; and

(k) considerations of national security and public policy; so far as they appear or are known to the Minister.

5. The Minister should consider the potential interference with rights of the applicants. This will include consideration of the nature and history of the family unit.

6. The Minister should consider expressly the constitutional rights, including the personal rights, of the Irish born child. These rights include the right of the Irish born child to:-

(a) reside in the State,

(b) be reared and educated with due regard to his welfare,

(c) the society, care and company of his parents, and

(d) protection of the family, pursuant to Article 41.

The Minister should deal expressly with the rights of the child in any decision. Specific reference to the position of an Irish born child of a foreign national parent is required in decisions and documents relating to any decision to deport such foreign national parent.

7. The Minister should also consider the Convention rights of the applicants, including those of the Irish born child. These rights overlap to some extent and may be considered together with the constitutional rights.

8. Neither Constitutional nor Convention rights of the applicants are absolute. They require to be considered in the context of the factual matrix of the case.

9. The Minister is not obliged to respect the choice of residence of a married couple.

10. The State's rights require also to be considered. The State has the right to control the entry, presence, and exit of foreign nationals, subject to the Constitution and international agreements. Thus the State may consider issues of national security, public policy, the integrity of the immigration scheme, its consistency and fairness to persons and to the State. Fundamentally, also, the Minister should consider the common good, embracing both statutory and Constitutional principles, and the principles of the Convention in the European context.

11. The Minister should weigh the factors and principles in a fair and just manner to achieve a reasonable and proportionate decision. While the Irish born child has the right to reside in the State, there may be a substantial reason, associated with the common good, for the Minister to make an order to deport a foreign national who is a parent of an Irish born child, even though the necessary consequence is that in order to remain a family unit the Irish born child must leave the State. However, the decision should not be disproportionate to the ends sought to be achieved.

12. The Minister should consider whether in all the circumstances of the case there is a substantial reason associated with the common good which requires the deportation of the foreign national parent. In such circumstances the Minister should take into consideration the personal circumstances of the Irish born child and the foreign national parents, including, in this case, whether it would be reasonable to expect family members to follow the first applicant to Nigeria.

13. The Minister should be satisfied that there is a substantial reason for deporting a foreign national parent, that the deportation is not disproportionate to the ends sought to be achieved, and that the order of deportation is a necessary measure for the purpose of achieving the common good.

14. The Minister should also take into account the common good and policy considerations which would lead to similar decisions in other cases.

15. There should be a substantial reason given for making an order of deportation of a parent of an Irish born child.

16. On judicial review of a decision of the Minister to make an order of deportation, the court does not exercise and substitute its own discretion. The court reviews the decision of the Minister to determine whether it is permitted by law, the Constitution, and the Convention."

64. My view that the *Oguekwe* guidelines are applicable in the revocation context is reinforced by the judgment of Murray J in *Sivsivadze v. Minister for Justice*. He states:-

"52. The making of a decision to amend or revoke a deportation order by the Minister invariably arises on the application of the person the subject of the deportation order. In any event, the Minister, when the occasion arises for him to make a decision as to whether to amend or revoke such an order, is again bound to exercise his statutory power in a manner compatible with the Constitution. This means that he must take into account all relevant factors, including any fundamental rights concerning the family and any right to family life, where relevant, of those directly affected by such an order. As the learned President correctly pointed out in his judgment in the High Court in this case, s.3(11) is not to be confined to enabling the Minister to amend or revoke a deportation order only when there has been a change of circumstances arising between the time of "the making of the deportation and the time of its implementation" (although any such change in circumstances would, of course, be relevant factors). Similarly, there is nothing in sub-section 11 of s.3 to suggest that the Minister is confined to making an amendment or revocation of an order under s.3 subsequent to deportation only when there has been a change of circumstances in the situation of the deportee or those affected by the order, such as members of his family."

Whenever an application to revoke a deportation order is made the Minister acts having regard to all the pertinent circumstances of the case and, again, a change of circumstances (or the fact of no change of circumstances) may be relevant, but the important point is that the decision is made having regard to all the relevant circumstances as they are at that time. Whether a decision to make a deportation order (or not to revoke one) interferes with a person's fundamental rights depends on the circumstances of the case. More important, whether any such interference is proportionate or disproportionate must depend on the particular circumstances of the case. Thus, in making any such decision, the Minister must take into account such factors as the statute or the Constitution require him to take into account and his decision pursuant to s.3(11) may be the subject of judicial review, brought by those directly and adversely affected."

65. There is perhaps a question as to whether the decision of the Supreme Court in *Sivsivadze* has departed from earlier jurisprudence. Counsel for the respondent acknowledges that it may well be the case (as contended for by counsel for the applicants) that the decisions in *PO and SO v. Minister for Justice, Equality and Law Reform* and that of Cooke J. in *Smith v. Minister for Justice* are somewhat inconsistent with *Sivsivadze*. In *PO and SO*, Charlton J. states:-

"… it is not necessary for a decision maker to initiate any new investigation or enquiry where the substance of an application to revoke a deportation order is that which has already been made and has been rejected in the context of a representation that a person should not be deported. Section 3 (11) confers a broad discretion on the respondent Minister. Essentially, it is part of the statutory scheme to enable those whose country of origin situation has changed to make a plea, from the time of a refugee application or a plea against deportation that, as a matter of discretion, the Minister should revoke a deportation order. In genuinely exceptional circumstances, it may be as well that a change in personal circumstances might also be part of such reconsideration."

66. Without having to determine one way or another extent of any divergence in case law as to the necessary breadth of the respondent's obligations in a revocation application, I am satisfied that *Sivsivadze* provides the legal principles to be applied for the purposes of this judicial review.

67. Clearly, by the refusal decision in this case, the applicants' family rights were engaged, both under the Constitution and the Convention. As I have already set out in *E.B & Ors. v Minister for Justice (High Court 29th January, 2016)*, the minor applicants' Art. 20 TFEU rights were not engaged by the decision. However, other aspects of EU law are relied on by the applicants, which I will refer to in due course.

68. Much of the argument advanced on behalf of the applicants concerns the manner in which the minor applicants' rights were considered in the decision in issue here.

69. A principal argument advanced on behalf of the applicants is that the correct way to approach the application to revoke the deportation order was for the decision-maker to afford the best interests of the children primary consideration in the decision-making process, which was not done, counsel submits, thus rendering the exercise conducted by the respondent so flawed as to vitiate the decision.

70. The matter of the primacy of the best interests' principle was addressed in *Dos Santos v. Minister for Justice* [2015] IECA 210. In rejecting the argument that Article 3(1) of the Convention on the Rights of the Child required the respondent, when he learns from the age of a person that he or she is a child, to interpret the words in s.3(6) of the 1999 Act as requiring consideration of the child's best interests as "a primary consideration", Finlay Geoghegan J. stated:-

"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."

71. *Dos Santos* concerned non-national children who with their parents were the subject of a removal order. The question arises as to whether the minor applicants here as Irish citizen children whose non-national parent is the subject of a consideration under s.3(11) of the 1999 Act are entitled to have their best interests considered as a *primary* or *paramount* consideration in the context of whether or not to affirm the deportation order in force against their father. I find however the *dictum* of Finlay Geoghegan J. to be applicable to the minor applicants' circumstances whose non-national parent is being considered in the context of the Immigration Act, 1999, as is the case here. If, as stated in *Dos Santos*, the best interests principle as *the* paramount consideration or *a* paramount consideration cannot be imported into to considerations under s. 3(6) the 1999 Act, it seems to me to follow from *Dos Santos* that equally a consideration under s. 3(11) is not required to give primacy to the best interests principle.

72. While the applicant's counsel's written submissions rely on Article 42 A4.1 of the Constitution (as signed into law on 28th April 2015) in support of the primacy of best interests, he acknowledged in oral submissions that the manner in which this provision has been interpreted in *Dos Santos* runs counter to the argument put forward in his written submissions. Finlay Geoghegan J. makes it clear that:-

"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."

73. The present proceedings do not fall within the scope of Article 42A.4.1 as they are not brought by the State with regard to the safety of the minor applicants. Nor do they relate to adoption, custody or access as envisaged by Article 42A.4.

74. Insofar as reliance is placed on Article 7, 21, 24 and 45 of the EU Charter of Fundamental Rights to underpin the primacy of the best interest principle, it is by now well-settled in jurisprudence that the EU Charter does not apply to deportation decisions (save in *Zambrano* type situations where Art. 20 TFEU is engaged.) By analogy therefore, subject of course to a *Zambrano* type situation, the Charter does not apply to revocation decisions. (*Smith v. Minister for Justice, Equality and Law Reform* [2012] IEHC 113 refers).

75. The decision of the Court of Appeal in *Dos Santos v. Minister for Justice* reinforces the non applicability of the EU Charter, as evidenced by the *dictum* of Finlay Geoghegan J:-

"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".

76. The applicants argued in oral submissions that while it may well be the case that the minor applicants' Article 20 TFEU rights will only come into play if they have to leave the territory of the EU, that did not mean that Article 24 of the EU Charter did not apply to the minor applicants' circumstances given that they are resident in Ireland both as Irish citizens and EU citizens. I am not persuaded by this argument. By their residence in Ireland, the minor applicants are not exercising any free movement rights. Moreover, the revocation decision is made solely under domestic legislation in accordance with the exercise of the State's sovereign entitlement to control its borders. (*Smith v. Minister for Justice* refers)

77. Counsel for the applicants cites the decision of the EctHR in *Jeunesse v. The Netherlands* (2014) ECHR 1036 as obliging the respondent to afford paramount status to the best interests of the child in cases such as the present.

78. In the context of the decision made to remove the non-national parent in *Jeunesse*, the Court stated:-

"109. Where children are involved, their best interests must be taken into

account (see Tuquabo-Tekle and Others v. the Netherlands, no. 60665/00, § 44, 1 December 2005; mutatis mutandis, Popov v. France, nos. 39472/07 and 39474/07, §§ 139-140, 19 January 2012; Neulinger and Shuruk v. Switzerland, cited above, § 135; and X v. Latvia [GC], no. 27853/09, § 96, ECHR 2013). On this particular point, the Court reiterates that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance (see Neulinger and Shuruk v. Switzerland, cited above, § 135, and X v. Latvia, cited above, § 96). Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it.

…….

For that purpose, in cases concerning family reunification, the Court pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in the country or countries concerned and the extent to which they are dependent on their parents (see Tuquabo-Tekle and Others v. the Netherlands, cited above, § 44)."

79. I do not find *Jeunesse* authority for the proposition that the minor applicants' best interests must be the *paramount* consideration. Certainly, *Jeunesse* states that children's best interests are of paramount importance and must be afforded "*significant weight*" when Convention rights are engaged and the Court mandates decision-makers in deportation decisions "*to advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non national in order to give effective protection and sufficient weight to the best interests of the children affected by* [such decisions]." This approach has again been reinforced by the Court's decision in *Sarkozi v. Austria* (2015) ECHR 343.

80. However, the Court also stated: "…*The Court has also consistently held that the Contracting States have a certain margin of appreciation in assessing the need for interference, but it goes hand in hand with European supervision. The Court's task consists in ascertaining whether the impugned measures struck a fair balance between the relevant interests, namely the individual's rights protected by the convention on the one hand and the community's interests on the other.*"

81. It seems to me that the approach of the EctHR does not in any significant regard compel a decision maker to do otherwise than what is already mandated by the jurisprudence of the Irish courts. In this regard, I note that in *Oguekwe*, Denham J. describes the personal rights of a child as including "*a right to have his/her welfare considered in the sense of what is in his/her best interests in decisions affecting him/her*."

82. Thus, it is not the case that the best interests of children are not a significant part of the decision- maker's remit in deportation decisions or indeed in applications to revoke a deportation order, or that the child's best interests are immaterial in such circumstances. They rank highly, particularly in the context of Irish citizen children. To hold otherwise would be inconsistent with *Oguekwe*. (Paras. 56 and 85) In *Dos Santos*, Finlay-Geoghegan J states:-

> *The Minister must of course ……. 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(sic) interests and in reaching his decision, take these into account."*

83. While there are no statutory factors set out in s.3(11) of the 1999 Act, unlike s.3(6), the obligations on the respondent to have regard to the minor applicants' constitutional and Article 8 rights, as set out in *Sivsivadze*, provide an adequate means of ensuring the safeguarding of those rights against disproportionate infringement.

84. In summary therefore, insofar as it is argued that the decision is vitiated by the failure of the respondent to commence his consideration from the presumption that the minor applicants' best interests is the primary or paramount consideration, for the reasons set out above I find that the challenge in this regard has not been made out.

The Contested Decision

85. I now turn to the contested decision and the consideration afforded to the fifth named applicant's request to have the deportation order lifted so that he could resume family life in the State with the fourth named applicant and the minor applicants.

86. The review of the decision falls to be considered in accordance with the legal guidelines referred to earlier in this judgment.

87. The consideration of file commenced with a summary of fifth named applicant's failed asylum history in the state and his subsequent receipt of residency based on his parentage of an Irish citizen child and the subsequent birth of his other children. Reference was made to his criminal record in the State and the events which led to the notification of a proposal to deport and the representations for subsidiary protection and leave to remain which followed. There follows reference to the fifth named applicant's case having been "comprehensively examined" under s. 3 of the 1999 Act, s. 5 of the Refugee Act, 1996 and s.4 of the 2000 Act. It was noted that consideration was given to the applicants' Constitution and Article 8 rights in the deportation decision. Reference was also made to the first revocation application and the subsequent affirmation of the deportation order.

88. The consideration of file then turned to the revocation application in issue in these proceedings. The fifth named circumstances in the DRC/Kenya as advised to the respondent were addressed with reference to country of origin information on the DRC and the medical report which had been submitted. No issue is taken in these proceedings with the findings set out in the file. The fifth named applicant's criminal convictions are then set out.

89. Thereafter, the consideration addresses family rights under the Convention and the Constitution.

90. In the context of the consideration given to the rights of the applicants under the Constitution, the decision-maker stated:-

> *"[The minor applicants] are Irish citizens and have personal rights under Article 40 of the Constitution, as well as rights under Articles 41 and 42 of the Constitution. These rights include the right of [the minor applicants] to reside in the State, be reared and educated with due regard to their welfare, to the society, care and company of their parents, as well as protection of the family, pursuant to Article 41. It is noted that as a married couple, [the fourth and fifth named applicants] enjoy family rights under Article [41] of the Constitution."*

91. The decision continued as follows:-

> *"However, all of these constitutional rights are not absolute and must be weighted against the rights of the State. The rights of the State include the right to prevent disorder and crime, to ensure the economic wellbeing of the country and to control the entry, presence and exit of foreign nationals, subject to the Constitution and to international agreements….To be considered are issues of national security, public policy, the integrity of the Immigration System, its consistency and fairness to persons and to the State, as well as issues relating to the common good.*
>
> *It is acknowledged that, as Irish citizens, [the minor applicants] have rights of residence in Ireland, the right to be reared and educated with due regard to their welfare, the right to the society, care and company of their parents, as well as protection of the family, pursuant to Article 41. However, as noted above, no probative evidence has been submitted to substantiate [the fifth named applicant's] contention that he has had a significant involvement in his children's lives. Given this, it is reasonable to conclude that [the fifth named applicant] has not established that his children's best interests would be adversely affected by a decision to affirm his deportation order."*

92. As to the position of the fourth and fifth named applicants, the decision-maker noted:-

> *"[the fourth named applicant] is currently residing in the State and has permission to remain until 2016. While family life rights arise in respect of the couple under the Constitution, these rights are not absolute and must be weighed against the rights of the State.*
>
> *In relation to the position of the couple, it is noted that they are living apart as a result of the choice made by [the fourth named applicant] to reside in Ireland rather than return to DR Congo. Furthermore, it is of relevance that her husband has had several prison sentences imposed upon him during the time he spent in Ireland and that he was deported from the State in February 2011. Although information has been submitted that [the fourth named applicant] has been in contact with the applicant by telephone, no evidence has been submitted to support this claim. In light of these facts, it is reasonable to conclude that if the deportation made in respect of [the fifth named applicant] were to be affirmed, this would not have the same impact on the couple as it would if there were evidence to suggest that there was significant contact between them."*

93. Addressing the rights of the State in the constitutional context, the decision-maker opined:-

> *"While there is an obligation on the Minister to consider each case on its individual merits, he is entitled to take into account the consequences of allowing a particular applicant to enter the State where that would inevitably lead to similar decisions on other cases. If the Minister is satisfied for good and sufficient reason that the common good requires that the deportation order made in respect of the non-national parent should be affirmed, then that is a decision he is entitled to make. In weighing the rights of the applicant and his family against these rights of the State, it is submitted that a decision to affirm the applicant's deportation order is not disproportionate as the State has the right to prevent disorder and crime, ensure the economic wellbeing of the country, uphold the integrity of the State and control the entry, presence, and exit of foreign nationals, subject to international agreements. This, therefore, is a substantial reason associated with the common good, which requires that the deportation order made in the name of [the fifth named applicant] should be affirmed."*

94. In the course of the considerations give to Article 8 rights, it was noted that if the respondent affirmed the deportation order which was made in respect of the fifth named applicant on 18th November, 2009:-

> *"this decision would engage his right to respect for family life under Article 8(1) ECHR……[the fifth named applicant's] legal representatives assert that he plays a substantial role in the children's lives and that any limitations on his parental role are caused by the Minister's refusal to allow him to reside in the State. They maintain that, apart from the period of approximately 12 months spent in custody, the applicant lived with his children from their birth until he was deported in February 2011. When in prison in Ireland, they contend, he had almost daily telephone contact with his children, and they visited him in prison on several occasions. According to his legal representatives,[the fifth named applicant] has been in daily contact with his children since his deportation and he continues to play a central role in their lives and upbringing…."*

95. The decision then addressed the fourth named applicant's affidavit:-

> *"[The fourth named applicant] currently resides with her three children in…. She has submitted that her children are 'heartbroken not having their dad at home…they speak to him almost everyday on the phone since he has been deported and they need him here in Ireland.' In addition, she asserts that 'their telephone contact with their father is a comfort to [her] children in coping with being separated from him and has been a really important part of their lives since his deportation. But [her] children really miss their father and need to have him with them at home in Ireland.' In support of the contact that these children have with the applicant, various receipts and photocopies of call cards have been provided.*
>
> *[The first named applicant] was born in the State on 16/04/2001 and she is an Irish citizen. She is now 11 years old and attending National School… , however no further details have been submitted in relation to her educational progress in the State. In a letter to the minister, [the first named applicant] has stated that 'we can't live without [our] daddy. If you give him a visa we will be the happiest children in the world.' [The second named applicant] was born in the State on 07/12/2006 and he is an Irish citizen by virtue of the fact that his parents were legally resident in the State for three out of the four preceding years at the time of his birth. [The second named applicant] is approaching six years of age at the time of writing this submission and no details have been submitted in relation to [his] educational progress in the State. [The third named applicant] was born in the State on 30/04/2008 and she is an Irish citizen by virtue of the fact that her parents were legally resident in the State for three out of the four preceding years at the time of her birth. [The third named applicant] is four years old at the time of writing this submission.*
>
> *[The fifth named applicant's] legal representatives assert that there is no reasonable basis consistent with the rights of the applicant's wife and children as Irish and European Union citizens for concluding that they should attempt to relocate to DR Congo in order to enjoy the company of their husband/father. They go on to assert that it would be wholly disproportionate to expect the applicant's wife and children to leave their home in the State. In addition, they contend, it is in the best interest of the applicant's children to reside with their father in the State and no reasonable decision maker could conclude that they should leave their home in Ireland, the only country that they had known, and live in the DRC in an attempt to be with their father.*
>
> *The applicant's legal representatives maintain that he is currently living in Kenya having left DR Congo soon after his return there. The applicant's children are currently residing in the State with their mother. [The fourth named applicant] currently has permission to remain in the State until March 2016 and has not communicated any intention of leaving the State. Although it is noted that the family are living apart as the result of a conscious decision taken by [the fourth named applicant] to reside in Ireland rather than return to DR Congo, any decision regarding her residence is one for [the fourth named applicant] to make. Therefore, in spite of the assertions made by [the fifth named applicant's] legal representatives, it has not been concluded that the applicant's wife and children should leave their home in Ireland.*
>
> *[The fourth named applicant] has the choice to continue to reside in the State with her children if she so desires, as she has permission to remain in the State. There is no obligation on the State to accede to the wish of [the fifth named applicant] and his wife to live together in this jurisdiction…"*

96. The file consideration noted the rights of the State in the common good "to uphold the aim of the State to prevent disorder and crime" and "ensure the economic well being of the country". This aim was considered with reference to the fifth named applicant's criminal offences and the impact of same on his employment prospects.

97. There was reference to the consequences of allowing a particular applicant to enter and remain in the State "that would inevitably lead to similar decisions in other cases".

98. The Article 8 balancing exercise concluded that the affirmation of the deportation order would not impact on family life "as it currently exists". Reference was made to the fact that the fifth named applicant was deported from the State in February. 2011 and "no verifiable evidence" has been produced to support his contention that he has been actively involved in the upbringing of his children over a substantial period. As a result, it is reasonable to conclude that the applicant has not established that his children's best interests would be adversely affected by a decision to affirm his deportation order."

99. The factors relating to the rights of the State were found to be "weightier" than the factors relating to the applicants rights as a family, hence it was concluded that the affirmation of the deportation order was not disproportionate given the State's right "to

prevent disorder and crime" and "to protect the economic wellbeing of the country which was a substantial reason associated with the common good which required the deportation order to be affirmed.

100. As this court is not exercising an appellate function, it can only enquire as to whether the applicants' rights and all relevant facts and circumstances were correctly identified and whether the ultimate decision was arrived at fairly and accorded with the principles of proportionality, rationality and reasonableness in accordance with the principles set out in *Meadows v. Minister for Justice* [2010] 2 IR 710.

101. As put by Murray J. states in *Sivsivadze*, "*insofar as in the particular circumstances of a case a deportation order may interfere with constitutional family rights of those concerned, it is a matter for the Minister to decide whether a consideration of such rights means that a deportation order should not be made, or should be revoked. Any such decision adverse to the deportee or his family is subject to scrutiny as to its proportionality under the Constitution in the circumstances of each case*." (para. 62)

102. Similarly, at para. *73* of his judgment he states:-

> " *..the question of compatibility with obligations under the Convention fall to be examined in the light of the duty on the Minister to, inter alia, ensure that a deportation order or a decision not to amend or revoke constitutes a proportionate balance between the State's interest in protecting the common good on the one hand, and limiting the exercise of a fundamental right, including a right to family life, by those directly affected"*

103. The representations which were before the respondent were those that were known to him from the correspondence furnished between June, 2012 and December, 2012, including the affidavit sworn by the fourth named applicant on 20th December, 2012 and the letters written by the first named applicant to the respondent.

104. The decision expressly refers to the submissions which were put forward by the applicants' legal representative regarding the best interests of the minor applicants. Additionally, there is express reference in the decision to the constitutional rights of the minor applicants as Irish citizens to the care and company of their father and their rights as a family. Their Article 8 rights to respect for family life are acknowledged as being engaged by the decision. Hence, there can be no question but that the decision-maker was aware of the minor applicants' rights under the Constitution and the Convention and the case being made on their behalf for revocation. It is also evident that he was aware of the rights of the fourth and fifth named applicants as a married couple.

105. The nature of the assessment to be afforded to the minor applicants' constitutional rights was expressed by McDermott J. in *D.O.M. v. Minister for Justice* [2014] IEHC 193 as follows:-

> *"[t]he constitutional rights of the children to the care, support and society of their parents must be assessed against the reality of the actual relationships and strength of bonds existing between the parents and children and the degree of participation and interest demonstrated by the father on the evidence in the case."*

106. This approach echoes what Denham J. states in *Oguekwe* when she refers to the constitutional and convention rights of the applicants requiring to be "*considered in the context of the factual matrix of the case*". In *Sivsivadze*, in the context of a revocation application, Murray J. puts it thus:-

> *"Whenever an application to revoke a deportation order is made the Minister acts having regard to all the pertinent circumstances of the case and, again, a change of circumstances (or the fact of no change of circumstances) may be relevant, but the important point is that the decision is made having regard to all the relevant circumstances as they are at that time."*

107. It seems to me that the relevant factual matrix or circumstances which fell to be considered were those as made known to the respondent through the representations made on behalf of the applicants or otherwise known to the respondent.

108. An analysis of the consideration of file satisfies the court that the representations made in the second revocation application were considered, as were the contents of the fourth named applicant's affidavit and the letters written by the first named applicant. The fifth named applicant's circumstances were referred to, in particular his residence in Kenya and the claimed reasons why he left the DRC after his deportation.

109. The essential components of the representations, affidavit and the letters as repeated in the decision evidences that the decision-maker was aware, in particular, of the import of the fifth named applicant's absence on the minor applicants and the emotional attachment they have to their father and their evident and entirely understandable distress and heartbreak as a result of his absence from their daily lives.

110. The ages of the minor applicants and their living arrangements under the care of the fourth named applicant is noted. Counsel for the applicants submits that the consideration of file makes no reference to the fact that the first named applicant required assistance with her homework, a task that used to be carried out by the fifth named applicant prior to his deportation, which was made known to the respondent in the representations sent on 25th June, 2012. Additionally, he says there was no reference to a school report for the first named applicant which had had been furnished under cover of the 25th June, 2012 letter. Counsel also queried whether it could be accepted that the decision-maker took account at all of the fact that the second and third named applicants were in school.

111. Clearly, the decision refers to the first named applicant's school attendance. Notwithstanding the lack of any reference to the first named applicant's school report or any specific mention to the second and third named applicants being in school, of which the respondent was advised on 21 September, 2012 with a letter from the school confirming their attendance attached, the court is not satisfied that same constitutes a material error of fact such as might warrant the quashing of the decision. It has not been suggested that the documentary information which was not specifically referred to was of such a compelling nature such as might persuade the court that the decision-maker acted unfairly or irrationally in failing to specifically address it.

112. An issue which falls to be considered is whether the failure on the part of the respondent to meet with the first named applicant, who wrote on two occasions setting out the role played by her father in her life and how much she missed him, renders the decision unlawful. In the representations made to the respondent on 25th June, 2012, it was requested that the decision maker would meet with the first named applicant. This was repeated on 21st September, 2012 and 19th October, 2012 when a second letter from the first named applicant was furnished to the respondent. The request was not acceded to. As I have said, there is however reference in the consideration of file to the first named applicant's letter of 7th October, 2012 and portion of this letter is quoted. While only

one of the letters was expressly referred to, as I have said, I am satisfied that the respondent was aware of the message being conveyed in that correspondence.

113. Insofar as counsel for the applicants argues that the failure of the decision-maker to meet with the first named applicant breached the provisions of the Constitution, the EU Charter or the provisions of the Convention on the Rights of the Child, I have already found the provisions of the EU Charter and the Convention on the Rights of the Child not to be applicable for the reasons stated. As I am satisfied that the first named applicant's fervent wish that her father be allowed return to the State was known to the respondent, as is evident from the consideration of file, I do not find that the failure to accede to the request that the respondent meet with the first named applicant was in breach of her right to be heard as a matter of constitutional or natural justice, or otherwise unlawful or that it suggests that the message being conveyed by the first named applicant in her correspondence went unheard. I find no authority in case law which otherwise supports the proposition that the respondent should have met with the first named applicant before rendering a decision. In *PO &SO v Minister for Justice*, Charlton J. states: "*Fairness of procedure will involve reading the representations made under section 3(3) on behalf of an applicant and, where the revocation of a deportation order is sought, considering any new representations made under the section 3(11)*." (Emphasis added) Furthermore, there is no suggestion in the "*non exhaustive list*" set out in *Oguekwe* that the respondent was obliged to accede to the request made by the applicants' legal representative.

114. In aid of ground 5, the applicants' counsel challenges the finding that there was no "probative" or "verifiable" evidence produced to show that the fifth named applicant was actively involved in the upbringing of his children. He also submits that the respondent unlawfully concluded that the fifth named applicant did not play a significant role in his children's lives. He points to the letters sent by the first named applicant to the respondent and the affidavit sworn by the fourth named applicant and the exhibits therein contained. He submits that while the fifth named applicant is presently on another continent, it had never been previously suggested that he did not bring up his children.

115. I do not find that the decision-maker suggested that the fifth named applicant never had a role in his children's upbringing. The fact that the fifth named applicant lived with his children from their birth to his deportation, save for the period of his incarceration, is set out in the decision. It is clear that the decision-maker was dealing with the factual matrix as it presented at the time of the decision. The family unit was fractured as of February, 2011 following the deportation of the fifth named applicant. In the Article 8 assessment, there is reference to "no verifiable evidence" having been produced that the fifth named applicant was involved in his children's lives "over a substantial period" In the assessment of constitutional rights (which came after the Article 8 consideration) a similar conclusion is arrived at. It is also the case, as set out in the consideration of file, that the fifth named applicant had been separated from the minor applicants while in the State having been imprisoned for 13 months in 2008-2009, albeit the fourth named applicant avers that there was daily telephone contact with the minor applicants while the fifth named applicant was in prison and that the children visited him in prison on occasions. She avers to similar daily telephone contact since his deportation. Obviously, post deportation in February, 2011, the fifth named applicant has had no physical presence in his family's life. I accept that the respondent was required to reasonably take account of the fact that that following the fifth named applicant's removal from the State, his involvement in his children's lives was going to be of a different nature to his erstwhile involvement given the reality of the deportation. I am satisfied that this was taken account of by the respondent by the nature of the enquiry made on 27th November, 2012 which sought details of the fifth named applicant's contact with his children by way of "*telephone records, receipts of money transfers email records or any other similar correspondence*" It is, however, noteworthy, in light of the arguments made by the applicants' counsel as to why such enquiries would have to be made in the first place, that the enquiry made of the fifth named applicant on 27th November, 2012 followed upon the representation that the fifth named applicant "*continues to be a central part of* [his children's lives] *and "that there is an abiding need to have their father with them*..". This was a substantial part of the case put to the respondent to revoke the deportation order.

116. At the end of the day, the respondent effectively concluded that the information supplied, namely the fourth named applicant's affidavit with exhibited receipts and phone cards for a "pay as you go" telephone number used by the fourth named applicant to call her husband was not sufficiently probative or verifiable for the respondent to conclude that the fifth named applicant at the time of the decision was actively involved in the upbringing of his children. The evidential quality of the contact that has taken place between the fifth named applicant and his family was something to which the respondent was reasonably entitled to have regard albeit, as I have already said, the respondent had to be cognisant of the realities of the situation given the separation of the fifth named applicant from his children. However, the weight to be afforded to any evidence is a matter entirely for the decision-maker and the court is constrained from interfering with such assessment, absent unreasonableness or irrationality or want of fairness in any such assessment, which I do not find. Neither am I satisfied that there was any material error of fact in the respondent's description of the means of contact. There is no suggestion that the respondent failed to have regard to any other evidence of contact other than the telephone cards exhibited in the fourth named applicant's affidavit. Of course he had over and above the exhibited call cards the sworn assertion from the fourth named applicant that there was almost daily telephone contact between the minor applicants and their father, but at the end of the day this was not adjudicated sufficiently probative to establish that he was playing a substantial role in his children's lives.

117. Overall, the court is satisfied that the examination of file contains an assessment of the extent and character of the relationships in this family at the relevant time. It had due regard to the submissions and the material produced and clearly reached a conclusion in that respect based on the evidence furnished.

118. For the reasons I have set out above, I do not find that the respondent committed any material error of fact upon which would entitle the court could quash the decision on judicial review.

119. Counsel for the applicant also contends that the respondent seeks effectively to penalise the applicants by impugning the quality of the contact in circumstances where the state of affairs whereby the fifth named applicant finds himself on another continent has come about as a result of a deportation order. Undoubtedly, the reality of the situation is that the fifth named applicant's present factual situation has come about as a consequence of the deportation order. However, it is not the function of the court to adjudicate on the factors which were taken account of in the consideration of file which preceded the deportation or on the balancing exercise which was engaged in as between the rights of the applicants and the rights of the State, as the deportation decision is not before the court for review, having never been challenged by the applicants. The deportation order cannot be impugned at this remove. The same position applies to the first revocation decision. It is of note, however, that many of the representations which were made in the present case with regard to the minor applicants and their need for the care and company of their father was the subject of consideration prior to the decision to deport the fifth named applicant. In the course of his submissions, counsel for the respondent argued that with regard to the present case, the court should adopt the approach of Charlton J. in *P.O & S.O. v. Minister for Justice Equality and Law Reform* as quoted earlier in this judgment. I do not believe that anything particularly turns on counsel's submission in this regard since counsel has equally made the case that the consideration afforded by the respondent to the revocation application in issue here in any event satisfies the approach set out in *Ougekwe* and *Sivsivadze* and, accordingly, the court

has proceeded to consider the decision from this perspective.

120. It is also the case that the consideration of file which preceded the deportation order noted that the fourth named applicant "may continue to reside in the State with her children if she chooses". The fourth named applicant chose that option and communicated as much to the respondent in the context of the second revocation application and she has stated in the context of the within proceedings that she and the minor applicants intend to continue to reside here. This is reflected also in the consideration of file in the present case. Thus, regard was had to the potential consequences for the minor applicants and the fourth named applicant if the deportation order was upheld. The jurisprudence of the Irish courts and the EctHR establishes that Article 8 does not impose a general obligation to accept the choice of residence of a married couple. (principle 9 of Denham J's non exhaustive list in *Oguekwe* refers)

121. It is argued on behalf of the applicants that the decision-maker wrongly required the fifth named applicant to "establish" that the minor applicants' best interests would be adversely affected by a decision to affirm the deportation order. It is submitted that given the constitutional presumption that a child is entitled to the care and company of his or her parents, the approach adopted by the respondent was entirely wrong in principle and had the effect of shifting the burden of proof onto the applicants to establish that the fifth named applicant's absence adversely affected their constitutional rights as a family and the minor applicants' best interests, in circumstances where the Constitution expressly recognises and protects those rights.

122. The court has already pronounced on the manner in which best interests are to be considered in cases such as the present; I have quoted the guiding principles as set out in *Oguekwe* and the *dictum* of Finlay Geoghegan J. in *Dos Santos*. While I find that the respondent's choice of language unhelpful, I am not persuaded that it is, of itself, such as to vitiate the decision on grounds of irrationality, as contended by counsel for the applicant. Nor am I persuaded that the terminology suggests that the respondent was not cognisant of the applicants' constitutional or Article 8 rights, as both of the analyses, under the Constitution and the Convention respectively, give express acknowledgement to and consideration of those rights. I am satisfied that all the factors put forward by the applicants in aid of the application to revoke were given due consideration with regard to the factual matrix and against the acknowledged backdrop of the minor applicants' constitutional rights under Articles 40, 41 and 42 and of their Article 8 rights and the rights of the fourth named applicant.

Balancing of Rights

123. In terms of the constitutional rights and convention rights of the applicants, a pertinent issue in this case is the manner in which the respondent has balanced the competing rights of the applicants against the entitlement of the State to control its immigration policy.

124. The respondent was entitled to take account of the fifth named applicant's criminal history in the State in the consideration of the application to revoke. This is consistent with the jurisprudence of the Irish courts and the EctHR. No issue is taken by the applicants' counsel with the factual matrix regarding the fifth named applicant's offences, as set out in the decision. The factual matrix involves the fifth named applicant having been convicted of some 34 offences between 2002 and 2008. They ranged from a series of road traffic offences committed in 2002-2003 including "hit and run" offences Failing to remain at the scene), to theft, handling stolen property, deception, possession of stolen goods and road traffic offences between July 2007 and November, 2008. I do not accept the applicants' submission that the respondent accepted that the offences were at the minor end of the scale; what was stated in the decision is as follows:-

> *"although it is acknowledged that [the fifth named applicant's] convictions individually were not of the most serious end of the spectrum of criminal activity, it is submitted that, when considered as a whole, the nature, number and time span of the events demonstrates that the applicant showed a profound and flagrant disregard for the criminal laws of Ireland, given rise to a compelling public interest in the affirmation of his deportation order."*

125. The fifth named applicant was a forty plus year old man who over a period was involved in a pattern of offences. This was against a backdrop of where he arrived in the State in 1998 and sought and was refused asylum and where ultimately in June 2002 he was given permission to reside based on the Irish citizenship of the first named applicant. It is apparent that the decision-maker noted the pattern of offending from 2002, including more serious type offences in 2005 and a number of offences in 2008 resulting in a eighteen month sentence being imposed (of which the fifth named applicant served approximately 13 months) with concurrent sentences of between two and five months.

126. In *FE v. Minister for Justice, Equality and Law Reform* [2013] IEHC 93 McDermott J., referring to the *dictum* of Dunne J. in *Falvey v. Minister for Justice* [2009] IEHC 518, stated:-

> *"the Falvey case is a demonstration of how the criminal convictions of a non national parent of an Irish citizen child may properly be considered in the exercise of the power to deport. Once the decision to deport is made in accordance with the guideline principles set out in Oguekwe v. Minister for Justice, Equality and Law Reform [2008] 3 I.R. 795 and other cases, the decision will be regarded as lawful".*

127. In the first instance, I am satisfied, notwithstanding the obligation to consider the application to revoke on its individual merits, that the respondent may decide not to revoke a deportation order lawfully made under s.3 of the 1999 Act, provided that a lawful consideration of the application to revoke was embarked on and subject to the proportionality requirement as mandated by the Constitution and the Convention and the jurisprudence of the courts. The constitutional rights of those affected by a decision to affirm the deportation must be balanced against the rights of the State. The balancing exercise requires "*a consideration of all the facts and circumstances of a case so as to ensure the interference by the State is necessary in a democratic society, in pursuance of a pressing social need and goes no further than is necessary to achieve those aims*" (*Alli v. Minister for Justice* [2010] 4I.R.)

128. The respondent is entitled to take into account the consequences of allowing a particular applicant back into the State where that would inevitably lead to similar decisions in other cases. She is also entitled to take account of whether the scale of offences, as described in the decision, gave rise to a substantial reason, based on the common good and on the prevention of disorder and crime in the State and the economic well-being of the country, to affirm the deportation order. *Oguekwe* is authority for the proposition that such matters are legitimate considerations in the balancing exercise which must be engaged in. I am satisfied that the fifth named applicant's criminal offences were considered in the context of other factors in the case and I am satisfied that the listed offences were capable of justifying the affirmation of the deportation order and give rise to a substantial reason based on the common good and the prevention of disorder and crime. The consideration of file also specifically concluded that there was "no less restrictive process available which would achieve the legitimate aim" of the State "to prevent disorder and crime, and…. ensure the economic well-being of the country."

129. In ground 3 of the statement of grounds, it is asserted, *inter alia*, that the decision to affirm "discriminated unlawfully against the first, second, and third named applicants for socio-economic reasons by denying them the right of the company of their father on the basis of his poor employment prospects". I am not satisfied that the applicants have made out this challenge. I agree with the respondent's counsel's submission that the overall focus in this particular context was on how the fifth named applicant's criminal record might present to a potential employer, leading to the conclusion that his economic prospects were poor. Additionally, this assessment was made in the context of the consideration given by the respondent to the common good to which the respondent was entitled to have regard.

130. The question arises as to whether the refusal to revoke the deportation order conforms to the principles laid down by the case law of EctHR.

131. In *F.E. v. Minister for Justice and Law Reform*, McDermott J. considered the principles which have been formulated in the jurisprudence of the EctHR in the context of Article 8 rights and proportionality in the context of criminal convictions: He stated:-

> *"In Boultif v. Switzerland [2001] 33 EHRR 1179, the European Court of Human Rights examined in detail the factors that might be relevant to the assessment of proportionality in considering the application of Article 8 in a deportation case arising out of a criminal conviction. The decision maker must determine a number of matters:-*
>
> *(1) Whether there was an interference with the applicant's right under Article 8 of the Convention:*
>
> *(2) Whether the interference was "in accordance with the law";*
>
> *(3) Whether the interference pursued a legitimate aim;*
>
> *(4) Whether the interference was "necessary in a democratic society" – this involves an inquiry as to whether the interests of national security, public safety, the economic wellbeing of the country, the prevention of disorder or crime or the protection of health and morals or the protection of the rights and freedoms of others are engaged.*
>
> *54. The court noted that the Convention did 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. The removal will infringe the Convention if it does not meet the requirements of para. 2 of Article 8. The court in Boultif held that a fair balance must be struck between the relevant interests namely, the applicant's right to respect for his family life, on the one hand, and the prevention of disorder or crime, on the other. It established a number of guiding principles in order to examine whether the deportation was necessary in a democratic society and stated at para. 48:-*
>
> > *'In assessing the relevant criteria in such a case, the court will consider the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he is going to be expelled; the time which has elapsed since the commission of the offence and the applicant's conduct during the period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage, and if so, their age. Not least, the court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion.'*
>
> *55. In Uner v. the Netherlands (2007) 45 EHRR, the European Court of Human Rights when applying the criteria set out in Boultif stated that it wished to make explicit two further criteria which may be implicit in those identified in the Boultif judgment: namely:-*
>
> > *(i) The best interests and wellbeing of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and*
> >
> > *(ii) The solidity of social, cultural and family ties of the host country and with the country of destination. (para. 58)"*

132. In *F.E*,. McDermott J. also conducted a lengthy consideration of the case law of the EctHR on the question of criminal convictions and proportionality, including *Boultif v. Switzerland; Uner v. the Netherlands; Moustaquim v. Belgium; Beljoudi v. France; Yilmaz v. Germany; Omojuidi v. UK; A.W. Khan v. UK; Boughanemi v. France; Grant v. UK; Emre v. Switzerland (Nos. 1 and 2);* and *A.A v. UK*). *The very detailed summary of the case law of the EctHR set out in F.E. by my learned colleague was of assistance to this court in the review which the court is obliged to undertake in assessing proportionality*.

133. In *Moustaquim v. Belgium* (1991)13 EHHR 802, the deportation of a 21 year old Moroccan national, in Belgium from aged two and with his entire family in Belgium and, with little or no connection to Morocco and who was a persistent juvenile offender, was found by the Court to breach Article 8, the Court placing emphasis on the fact that the offences were committed when he was a juvenile.

134. In *Beljoudi v. France* (1992)14EHRR 801, it was determined that the deportation of the applicant was disproportionate. The applicant was born in France in 1950 of Algerian parents. His mother and sisters were long term French residents. He had lost his French nationality in 1963 through inadvertence. He had had a long history of serious criminal convictions for which he received prison sentences from six months to eight years. In finding the expulsion order of indefinite duration to be in breach of Article 8 the court emphasised that the applicant had spent his whole life in France including 20 years of married life.

135. At paragraphs 60-64 of *F.E.*, McDermott J. discusses further jurisprudence of the EctHR on the issue of criminal convictions and proportionality, as follows:-

> *"61. In A.W. Khan v. United Kingdom [2010] ECHR 27, the court determined that the applicant a Pakistani who had arrived in the United Kingdom at the age of three, could not be deported at the age of 34 years notwithstanding the fact that he had been convicted of the importation of a significant quantity of heroin for which he received a severe sentence. He had not previously committed any serious criminal offences in the United Kingdom and had not committed*

offences following release from prison. It was determined that his good conduct since the commission of the offence had a "certain impact" on the assessment of risk which the applicant posed to society. He had no continuing ties to Pakistan. It was found that his deportation would not be proportionate in the circumstances.

62. It is to be noted that all of these cases concern applicants who had long term residence at the time deportation orders were made against them. That does not invariably work in the applicants favour. In Boughanemi v. France (Application No. 22070/93 – judgment of 24th April, 1996), the applicant was born in Tunisia in 1960. He was brought to France when he was eight and lived there until he was deported. He resided with his family and ten siblings. He was in a relationship with a French national and had one son born in 1993. Between 1981 and 1987 he was convicted of various offences including assault and living off the earnings of prostitution in aggravating circumstances (using violence) for which he was sentenced to three years imprisonment. A deportation order was made in 1988. In this case the applicant was found to have maintained strong contacts with Tunisia and the Tunisian community in France. He could speak Arabic. He had evinced no intention of seeking French nationality. Above all, the court placed particular importance on the fact that the deportation was made after he had been sentenced to a long period of imprisonment for very serious offences which weighed heavily against him.

63. In Grant v. United Kingdom (2009) ECHR 26, the applicant arrived in the United Kingdom at the age of fourteen. It was proposed to deport him when he was forty four years old by reason of his extensive criminal history. Between 1983 and 2006 he had committed numerous petty offences. Between 1985 and 2006 he had sustained 32 convictions in respect of 52 offences involving various types of sentences including many short sentences not exceeding twelve months. In 2003 he was convicted of robbery and sentenced to twelve months imprisonment on a plea of guilty. In 1989 he had been considered for deportation following a conviction for supplying drugs with a low street value. A decision was taken not to deport him in 1990 but he was warned that if there were to be a further lapse into criminality, deportation would be reconsidered. By the time of his deportation he had fathered four children all of whom are British citizens and had a grandchild. His mother and two brothers lived in the United Kingdom. However, he had never cohabited with any of his children and though he enjoyed family life with his youngest daughter, deportation was unlikely to have had the same impact as if the applicant and his daughter had been living together as a family. With the exception of a four year period between 1991 and 1995, there was no prolonged period during which the applicant was out of prison and did not re-offend. The court found that a fair balance was struck by making the deportation order and the decision was deemed to be proportionate.

64. In Khan v. United Kingdom [2011] ECHR 2253, the court considered whether the deportation of a Pakistani man who had been given indefinite leave to remain in the United Kingdom was in accordance with his Article 8 family rights. He had resided in the United Kingdom since he was four, having arrived in 1978. His mother and siblings also resided in the United Kingdom and were nationalised British citizens. He had six children all brought up in the United Kingdom by two mothers between the ages of twelve and seventeen. He was in a relationship with a third British woman. He had been convicted of sexual interference with an underage girl and two counts of robbery. He had served a number of other prison terms between 1992 and 2007. The court held that because he had lived in the United Kingdom from an early age the state would have to establish a "serious reason" before such a deportation could be regarded as proportionate. The applicant's repeated offending indicated that his previous convictions and sentences had no rehabilitative effect and rendered "all the more compelling" the reasons to deport. The "serious reason" required to deport a settled immigrant was indicated by his serious convictions and recidivism. There was a real risk of serious offending and harm to the public. It was, therefore, proportionate in those circumstances to order his deportation. There was no violation of his Article 8 rights."

136. A prevailing factor in those of the above quoted cases where deportation was found to be disproportionate were the applicants' long established roots in the host country, whether arising from being born there or having lived a significant part of their adult life there.

137. In support of the disproportionate nature of the refusal to revoke the deportation order, the applicants rely, in particular, on *Omojudi v. United Kingdom* [2009] E.C.H.R. 1820.

138. The factual backdrop to this case is set out by McDermott J. in F.E., as follows:-

"The applicant was born in Nigeria in 1960 and lived there until 1982 when he arrived in the United Kingdom and was permitted a two months leave to enter as a student. This was extended to 1986. He was joined in the United Kingdom by his partner in 1983 and they married in 1987. They had three children born in 1986, 1991 and 1992 who were all born in the United Kingdom and were British citizens. The eldest child had a daughter. In 1989 the applicant was convicted and sentenced to four years imprisonment on theft and conspiracy to defraud charges and other matters. In 2005, notwithstanding these convictions both the applicant and his wife were granted indefinite leave to remain in the United Kingdom. In 2006 the applicant was convicted of sexual assault for which he was sentenced to fifteen months imprisonment and was registered as a sex offender. The offence was considered particularly serious as the applicant was in a position of trust at the time it was committed. A deportation order was made in 2007 on the basis that it was necessary for the prevention of disorder and crime and the protection of health and morals."

139. The EctHR found the order disproportionate to the legitimate aim pursued noting, *inter alia*, that between 1989 and 2005 the applicant had largely stayed out of trouble and that he was not a habitual offender, thereby distinguishable from the case of *Grant v. United Kingdom*. In the course of its judgment in *Omojudi*, the Court noted:-

"45. Their family life began in the United Kingdom before the applicant committed his first criminal offence and at a time when the applicant and his wife had leave to remain. Their children were born in the United Kingdom and are British citizens. Moreover, all three children have always lived in the family home and the family continued to live together as one unit until the applicant's deportation to Nigeria. The applicant's oldest son now has a daughter of his own and prior to his deportation the applicant and his wife were helping him to raise her while he pursued his studies.

46. The Court attaches considerable weight to the solidity of the applicant's family ties in the United Kingdom and the difficulties that his family would face were they to return to Nigeria. The Court accepts that the applicant's wife was also an adult when she left Nigeria and it is therefore likely that she would be able to re-adjust to life there if she were to return to live with the applicant."

140. The Court went on to state:-

"48. Having regard to the circumstances of the present case, in particular the strength of the applicant's family ties to the United Kingdom, his length of residence, and the difficulty that his youngest children would face if they were to relocate to Nigeria, the Court finds that the applicant's deportation was not proportionate to the legitimate aim pursued.

49. There has accordingly been a violation of Article 8 of the Convention."

141. Counsel for the applicants emphasises the reasons the Court found a breach of Article 8, in particular Mr. Omojudi's close family ties in the UK. Furthermore, he points to the serious nature of the offence in *Omojudi* compared to the nature of the fifth named applicant's offences. I am satisfied however that *Omojudi* is sufficiently distinguishable from the factual matrix in the present case, particularly in the context of the number and time span of the offences in the case of the fifth named applicant, as considered by the respondent, for this court not to find the failure of the respondent to adopt a similar approach disproportionate. Furthermore, in *Omojudi*, the length of residence in the UK was a factor to which the EctHR had regard.

142. In the course of the Article 8 consideration, the decision-maker records the submission made on behalf of the applicants that it would be "wholly disproportionate to expect the applicant's wife and children to leave their home in the State" and that "no reasonable decision maker could conclude that they should leave their home in Ireland, the only country that they have known, and live in the DRC in an attempt to be with their father." The decision-maker's response to this representation, in addition to noting that the fourth named applicant had not communicated any intention of leaving the State, was that it "has not been concluded that the applicant's wife and children should leave their home in Ireland". In oral submissions to this court, counsel for the applicants accepted that this was the case. The clear statement from the fourth named applicant as made known to the respondent was that neither she nor the minor applicants would be leaving the State, notwithstanding the representation made in that regard.

143. In the within proceedings however, it is submitted that the respondent (implicitly) accepts that neither the fourth named applicant nor the minor applicants can return to the DRC, yet persists in keeping the fifth named applicant separate from his children which, it is submitted, is disproportionate to the minor applicants' best interests under Article 8 ECHR.

144. I do not accept that the essential thrust of the applicants' argument in this regard. The fact of the consequent continuing separation of the minor applicants from their father which arises on foot of the affirmation of the deportation order, and which is, I accept, a continuing interference with Article 8 (1) rights, does not offend against the principle of proportionality provided that the balancing of respective rights was done in accordance with the guidelines set out in the jurisprudence of the Irish courts and the EctHR.

145. In aid of his submission that the respondent's reliance on the fifth named applicant's offences as grounds for the affirmation of the deportation order was disproportionate in its effect, counsel for the applicants cites *Emre v. Switzerland (No. 2)*. The case concerned a Turkish national who came to Switzerland aged six with his parents. He resided there from that time with his parents and brothers one of whom was a Swiss national. He was educated in Switzerland. He had been convicted of a number of offences including theft, firearms offences and assault between 1994 and 2000 for which he received suspended sentences and a sentence of imprisonment. The EctHR found that a 10 year exclusion period to be "a lengthy and disproportionate period in relation to the offences committed". The decision of the court came after an earlier ruling where the Court had found the imposition of a removal of indefinite duration to be in breach of Article 8. In *Emre v. Switzerland (No. 2,*, the Court emphasised the factors which had led to its previous ruling which included, *inter alia*, the nature of the offences, the strength of the applicant's social, cultural and family ties with the host country and the destination country, the applicant's health problems and "*the indefinite nature of the exclusion measure*".

146. Counsel for the applicants also relies on *Yilmaz v. Germany* [2004] 38 EHRR 23 and contends that while the EctHR did not find the measure of deporting the applicant in that case (who was a Turkish national born and educated in Germany and who had a child there, and whose parents and sister also lived in Germany) disproportionate having regard to the nature of the crimes, the Court did find that the making of the deportation order "*without any time limit*" amounted to "*disproportionate interference*" having regard to the applicant's family situation including the birth of his son and having regard to the fact that the applicant had unlimited permission to reside in Germany at the time of the deportation.

147. Again, this court notes that a factor in *Emre* was the applicant's long association with the host country. With regard to the applicants' submissions on the lifelong nature of the deportation order in issue in the within proceedings, I am satisfied that the affirmation of the order without regard to this particular aspect does not of itself render the decision to affirm disproportionate given that it remains open to the fifth named applicant to continue to seek to revoke a deportation order and indeed it is open to the respondent to revoke it of her own volition. This is the *ratio* of *Sissivadze v. Minister for Justice* [2015] IESC 53 and it answers the proportionality challenge inherent in grounds 3 and 4 regarding the indefinite or lifelong nature of a deportation order and adequately addresses the concerns expressed by the EctHR in *Emre* and *Yilmaz*.

148. In the course of his judgment in *Sivsivadze*, Murray J. addressed the question of the indefinite or lifelong nature of a deportation order as follows:-

"51. First, it should be said that a deportation order is not necessarily unlimited in time. It will not contain within itself a limitation, but the provisions of s.3(11) cannot be ignored. This provides:-

'The Minister may by order amend or revoke an order made under this section including an order under this subsection.'

As is evident from that provision, although a deportation order made pursuant to s.3 does not contain any limitation period on the duration of the effect of the order, its effect may be brought to an end at any time should the Minister in his discretion consider it appropriate to do so."

149. He goes on to state:-

"Section 3(11) in any event ensures that a deportee can apply at any time within reason to the Minister for a revocation or amendment of the deportation and it is incorrect to describe the deportation order as simply indefinite, and no more."

150. As already referred to, at paragraphs 62 and 73 of the judgment, he states that "[a]*ny such decision adverse to the deportee or his family is subject to scrutiny as to its proportionality*".

151. In *DOM Minister for Justice, Equality and Law Reform* [2014] IEHC 193, in the context of Article 8 rights, McDermott J. again addressed the principles set out by the European Court of Human Rights in *Boultif v. Switzerland* [2001] 33 EHRR 1179 as to the necessity for a fair balance to be struck between the relevant interests at stake, being the applicant's right to respect for his family

life and the prevention of disorder and crime. After acknowledging that Article 8 (1) rights were engaged in *DOM*, McDermott J. went on to state:-

> *"30. The respondent was entitled to consider the nature and seriousness of the offences committed by the applicant and the number of crimes committed over an extended period. The Minister was also entitled to have regard to the fact that during this period he was the beneficiary of permission to remain in the state which was expressly subject to a condition that he comply with the law.*
>
> *31. It is suggested that the best interests and wellbeing of the children were not considered in the course of the adjudication. The court is not satisfied that this is so. There is extensive consideration of the best interests of the children insofar as that was made possible by the information submitted."*

152. In the revocation decision in issue here, the criteria set by the EctHR in *Uner* and *Boultif* are acknowledged.

153. In the present case, I am satisfied that the decision-maker complied with the criteria set out in *Boultif* and I am satisfied that the minor applicants' best interests were considered in the context of the information provided to the decision-maker and the representations made.

154. In the course of his judgment in *F.E.*, McDermott J. quoted Cooke J. in *Isof v. Minister for Justice, Equality and Law Reform* (No.2) [2010] IEHC 457 in the context of how a court should apply the principles of reasonableness and proportionality when a decision encroaches upon a person's fundamental rights either under the Constitution or the Convention. He stated:-

> *"In Isof v. Minister for Justice, Equality and Law Reform (No.2) [2010] IEHC 457, Cooke J. considered the application of the Meadows decision in respect of cases under the Immigration Act 1999, as follows:-*
>
> > *'Where the validity of an administrative or quasi judicial decision maker comes before the court on judicial review, the court's starting point is the decision itself; the basis upon which it has been reached and the process by which it has been decided. It does not have before it an appeal against the decision, much less a merits based appeal by way of re-adjudication of the original issue. Its jurisdiction is based upon the content of the decision and the law applicable thereto. Where the challenge to the decision is based upon the assertion that it has the effect of intruding disproportionately upon the fundamental rights of those affected by it, it is the duty of the court to assess whether the applicant demonstrates that it is disproportionate in the sense of being irrational or unreasonable according to the Keegan/O'Keeffe test. It does so by reference to the evidence, information and documentation available to or procurable by the decision maker at the time. It does not take account of new information or evidence which has been available since the decision was made. (In the case of a deportation order, the remedy in that regard lies in an application for revocation under s. 3(11) of the Immigration Act 1999, a decision on which is itself susceptible of judicial review for proportionality where necessary). In the judgment of the court no material difference exists between the evaluation of proportionality as regards the interference with 'qualified rights' (as in the present case) and 'absolute rights' (as in the case of Meadows). If constitutional rights are in issue (whether absolute or qualified) it is the function and duty of the High Court to vindicate them. The same can be said for rights entitled to protection under the European Convention on Human Rights and the need for the High Court, in compliance with Article 13 of the Convention, to provide an effective remedy for that protection…"*

155. As it is clear from the manuscript notes attaching to the decision, the present case was considered to be complex but ultimately in terms of the competing rights the balance was tipped in favour of affirming the deportation order.

156. This decision however was only arrived at after consideration of the minor applicants' circumstances and the representations, as made known to the respondent, was carried out, in accordance with the principles set out by the Denham J. in *Oguekwe*. (para. 85). Consistent with principles 6 and 7, the minor applicants' constitutional and convention rights were considered, the latter being analysed both under Article 8(1) and Article 8(2). Consistent with principle 10,11 and 12 the respondent considered the public interest and the common good. Here, the public interest centred on the fifth named applicant's criminal offences which themselves impacted on the common good for the reasons set out by the respondent. Furthermore, the minor applicants' personal circumstances were considered in this regard and it is sufficiently clear from the consideration that the affirmation of the deportation order would not cause the minor applicants to leave the State. Insofar as principle 13 required the respondent to have a substantial reason for the affirmation of the deportation order, this is expressly considered in the decision where the fifth named applicant's criminal offences are considered in the context of a compelling public interest.

157. In all the circumstances, the court finds no basis to impugn the manner in which the respondent's discretion not to revoke the deportation order was exercised.

Accordingly, I find that the challenges (in grounds 3,4 and 5) to the decision on the basis that it was irrational, unreasonable and disproportionate having regard to the applicants' constitutional and convention rights, or otherwise, have not been made out.

The lack of an effective remedy

158. I turn now to the applicants' sixth ground of challenge. Post the respondent's refusal to revoke the deportation order, as communicated to the applicants in January, 2013 and following upon correspondence received from the applicant's solicitor on 5th February, 2013, it was reiterated to the applicants that consideration was given to their rights to family life including those under Article 8 ECHR and that the rights of the State were also considered. The applicants were advised that there was no means by which the decision to affirm the deportation order could be appealed to INIS.

159. However, they were advised that if the fifth named applicant could provide information and documents not previously considered it would be open to him to lodge a further application to revoke.

160. It is submitted on behalf of the applicants that the absence of an appeal mechanism from the refusal to revoke breaches their right to be heard and their right to an effective remedy as required by the Constitution, Article 47 of the EU Charter and Articles 8 and 13 of the Convention. It is argued that there is no independent appeal body to which they can turn. It is said that ground 6 is pleaded in order to highlight the deficiency in the law and the limitations which attach to judicial review as a remedy.

161. Firstly to address the issue of the EU Charter as an aid to the applicants' arguments. I am satisfied that they cannot rely on Article 47 of the EU Charter since for the reasons already set out in this judgment, the decision in issue is not one governed by EU

law.

162. Insofar as complaint is made that the applicants do not have any effective remedy from the respondent's decision, I am satisfied that the jurisprudence of the Irish courts establishes that notwithstanding the constraints imposed upon a court when exercising its function of judicial review, it is nonetheless sufficiently flexible to examine whether the applicants' rights under the Constitution, the Convention or EU law have been respected. I am satisfied that this is the *ratio* of *Efe v. Minister for Justice* [2011] 2 IR 798. In that case, Hogan J. states that "*post-Meadows…, it can no longer be said that the courts are constrained to apply some artificially restricted test for review of administrative decisions affecting fundamental rights on reasonableness or rationality grounds. The test* [in Meadows] *is broad enough to ensure that the substance and essence of constitutional rights will be protected against unfair attack, if necessary through a Meadow's style proportionality analysis*..."

163. As referred to in *Efe*, Meadows has incorporated a consideration of proportionality into judicial review, where an administrative decision bears on constitutional or convention rights, as a means by which the court can ensure compliance with fundamental rights when administrative decisions are being taken which infringe upon such rights.

164. While counsel for the applicants cites *Donnegan v. Dublin City Council* [2012] IESC 18 in aid of his argument, I am satisfied that the decision in *Meadows* was not departed from in *Donnegan*.

165. In the course of his oral submissions, the applicants' counsel clarified that this court was not being asked to hear oral evidence or to direct psychological reports regarding the minor applicants; rather the point that is being made is that the children's voices have not been heard.

166. It is in any event clear from *EPI v. Minister for Justice* [2008] IEHC 23, that it is not within the court's remit in the context of judicial review to embark of its own volition on a merits-based review akin to that conducted by the EctHR in *N. v. Finland* (2012) ECHR 284 in order to establish whether there is compliance with the Convention. Feeney J. stated:-

> *"5.2 Having considered [N. v. Finland], this Court is satisfied that the quotation relied upon by the applicants has no applicability to this Court. That quotation identifies the European Court of Human Rights own procedures and is not and cannot be an authority that this Court, in considering a judicial review, must transform itself into a fact finding body. In this jurisdiction there is in place an extensive statutory regime. Part of that statutory regime is an entitlement to seek judicial review. The jurisdiction of the Court is limited to a review of decisions made and is not and cannot be part of an appeal process making factual determinations."*

167. There is a divergence between the Irish courts and the EctHR in how to ensure compliance with convention rights in view of the latter's willingness to embark on an assessment of evidence of its own motion in order to establish if there has been a breach. That the Irish courts decline to embark on a merits-based review does not, to my mind, impair the effectiveness of judicial review as a remedy in cases of fundamental rights in light of the jurisprudence of the Irish courts in *Meadows* and *Efe* and *Isof*, as already referred to.

168. Thus, I am not persuaded that the challenge in ground 6 has been made out.

Summary

169. The relief sought in the notice of motion is denied.