THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 343 J.R]

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

BETWEEN

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

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 30th day of May 2013

1. This is a decision on an application for leave to seek judicial review of deportation orders made by the Minister for Justice and Equality (the "Minister") in respect of all of the above named applicants.

Reliefs sought
2. The applicants in this case are seeking an order of certiorari quashing the decisions of the respondent Minister making deportation orders against them and a declaration that section 3 of the Immigration Act 1999 is unconstitutional and/or incompatible with the European Convention on Human Rights as it requires the respondents to regard such orders as indefinite and therefore lifelong.

3. The applicants also seek an interim or interlocutory injunction restraining the Minister, his servants or agents from taking any steps to deport the applicants pending the determination of these proceedings and an order granting an extension of time for the pursuance of such proceedings.

Background
4. The applicants are Brazilian nationals and form a family unit of father, mother and their five children, residing in Roscommon Town. Three of the children are minors, being under the age of eighteen, and are suing through their father in these proceedings. One of the children reached the age of majority on 2nd September 2012 but was a minor when the deportation order was made against her. The first named applicant arrived in the State on 24th September 2002 in order to work and notwithstanding the fact that his work permit had expired on 24th September 2003, continued to reside and work here. His wife and children subsequently joined him in June 2006 and February 2007 and he seeks to assert that he has established deep roots in Ireland and that his children are wholly integrated into Irish society.

5. The first named applicant sought permission to remain in Ireland through his solicitor by letter on 14th October 2009. The Irish Naturalisation and Immigration Service ("INIS") in response informed his solicitor that a "Section 3" letter had issued in respect of him on the 1zth May 2008, however it is not clear that such letter was received by the first named applicant. In light of this, the Minister, as an "exceptional measure", granted an extension of ten days in which submissions could be made on behalf of the first named applicant by his solicitor.

6. The applicants' solicitor submitted updated details in respect of the schooling being received by the applicant children to the INIS. The INIS responded and made clear that it was their position that the first named applicant had been served with a notification to deport on 6th May 2008 and that he has been an 'illegal' in the State since his work permit expired on 24th September 2003. Further, it is clear from the correspondence that the INIS was not aware that the first named applicant had made arrangements to bring his wife and five children to the country subsequent to his arrival here or that they had actually been residing together for some time in Roscommon.

7. Contrary to this, the first named applicant submitted that the Gardaí in Roscommon were in fact aware of his and his family's presence in the town. Furthermore, the first named applicant's passport was in fact being held by the Immigration Officer at Roscommon Garda Station and had been so held for the previous three or four years.

8. Following further correspondence between the relevant parties in respect of the present circumstances of the family, the above named applicants were formally notified by letter on 26th March 2012 that deportation orders had been made by the Minister in respect of each of them.

Applicants' Submissions
9. The applicants submit that m making the deportation orders the Minister concentrated almost exclusively on the immigration status of the applicants and the rights of the State regarding immigration control. As such, it is asserted that the Minister failed to consider and vindicate the constitutional and Convention rights of the applicants' and failed to consider the practical implications of the interference with their private lives. In particular, it is claimed that the Minister failed to respect the applicants' rights under Art. 40.3 of the Constitution, Arts. 2 and 8 of the European Convention on Human Rights ("ECHR") and Arts. 4, 9 and 10 of the EU Charter of Fundamental Rights and made reference to the case of *Aslam v. Minister for Justice and Equality* [2011] IEHC 512 in this regard.

Further, the applicant submits that the Minister failed to act in the best interests of the child by failing to vindicate the minor applicants' rights under the UN Convention on the Rights of the Child (the "UN Convention").

10. The applicants also submit that the Minister failed to consider the distinct rights of the children to have their views heard, a right which they contend has been recognised by Denham J. in the Supreme Court case of *A.Bu. v. J Be.* [2010] IESC 38. Further, they contend that the Minister failed to consider the practical consequences of removing the minor applicants from their schooling and present safe environment and therefore failed to respect and vindicate their rights under Article 40.3 of the Constitution and also failed to make a reasoned assessment of the interference with their rights pursuant to Article 8 of the ECHR. It is also contended that the Minister acted in breach of the principle of acting 'in the best interests of the child' on which the court received more detailed submissions elaborated on below.

11. It is asserted that the Minister erred in law by placing undue regard on the unlawful residence of the applicants in the State without affording consideration to the fact that the applicant father has endeavoured to work and contribute to the exchequer while resident here. Further, it is claimed that the Minister failed to give reasonable consideration to the long period of time the applicants have resided in the State and erred in finding that the deportation of the applicants 'is necessary and proportionate'. The applicants claim that the Minister has, in particular, failed to consider the disruption to the education of the children in the middle of term and the fact that the younger children lack an ability to understand written Portuguese.

12. The applicants say that the Minister had regard to inaccurate information with respect to the third named applicant (namely that she has ceased to be a minor) and as such failed to fulfil his duties under s. 3(6) of the Immigration Act 1999. The applicants refer to *Abdukhareem v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Gilligan J., 7th July 2006) as support for the proposition that the Minister cannot base his considerations on false evidence. The applicants also raise the argument that the Minister erred in law by failing to personally make the deportation decision.

13. The applicants also say that in circumstances where the deportation order is of lifelong duration and is in effect a ban from entering Europe into the future, that s. 3 of the Immigration Act 1999 is disproportionate and unconstitutional in light of the particular and individual circumstances of the applicants. The applicants acknowledge that this argument is dependent on the outcome in the case of *Sivsivadze v. Minister for Justice* [2012] IEHC 244 which is currently under appeal to the Supreme Court.

Supplemental Submissions of the Applicants

14. Supplemental submissions were received from counsel for the applicants in respect of their contention that the making of deportation orders by the Minister is flawed because he did not expressly consider whether the making of a deportation order was in the best interests of the minor applicants or not. The applicants claim that Article 3(1) of the UN Convention should inform the proper interpretation of s. 3(6) of the Immigration Act 1999. Article 3(1) of the UN Convention states: "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*." Further, section 3(6) of the Immigration Act 1999 requires the Minister to have regard for "the age of the person" and as such the applicants contend that the Minister should expressly address the question whether or not deportation is in the interest of a minor.

15. The case of *R. v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 A.C. 696 is cited by the applicants as support for the proposition that the UN Convention should inform the interpretation of s. 3(6) of the Immigration Act 1999. In that case, the House of Lords considered the effect of the European Convention on Human Rights (prior to the Human Rights Act 1998) on the interpretation of the Broadcasting Act 1981, an Act which enabled the Secretary of State to direct a broadcaster from broadcasting certain material. Lord Harwich stated:

> *"It is accepted, of course, by the applicants that, like any other treaty obligations which have not been embodied in the law by statute, the Convention is not part of the domestic law, that the courts accordingly have no power to enforce Convention rights directly and that, if domestic legislation conflicts with the Convention, the courts must nevertheless enforce it. But it is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it. "*

16. The applicants also refer to the decision of the Canadian Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 which examined the relevance of the UN Convention to a ministerial discretion exercisable in the immigration context. In that case the court held that the discretion to allow a mother to remain in Canada on compassionate and humanitarian grounds, for the purpose of making an application for permanent residence, had to be exercised in a manner which was "alert, alive and sensitive" to the interests of the children. This obligation stemmed, in part at least, because Canada had ratified the UN Convention whose provisions, though not directly applicable, reflected values which might "inform the contextual approach to statutory interpretation and judicial review". L'Heureux Dube J. quoting *Driedger on the Construction of Statutes* (3rd ed. 1994): "*The legislature is presumed to respect the values and principles contained in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.* "

17. The decision of the Supreme Court in *Okunade v. Minister for Justice, Equality and Law Reform* [2012] IESC 49, while primarily concerned with the criteria for the granting of an interlocutory injunction, is submitted by the applicants as evidence of the solicitude shown by the law for the interests of children. In that case, the Supreme Court upheld the appeal against Cooke J.'s refusal to grant an injunction restraining the deportation of a mother and her four year old son. The four year old had lived in Ireland since birth and it was said he "*would face significant educational problems if forced to relocate to Nigeria, including substantial language difficulties*." Clarke J. stated: "*I feel that it is not possible, on the facts of the case, to overlook the fact that one of the applicants is a child of some four years of age who has known no country other than Ireland. It is hardly the fault of that child that the substantial/apse of time involved in this whole process has led to such a situation. Rather that current status is a function of the lack of a coherent system and sufficient resources. As pointed out earlier a significant disruption of family life is a countervailing factor which, provided it be of sufficient weight, can be enough to tip the balance in granting a stay or an injunction.* "

18. With regard to the issue of delay and the discretion as to whether the court should grant an extension of time in this matter, the applicants state that the reasons for any such delay are contained in the affidavit of the first named applicant. Namely, that the notification of the deportation orders arrived on 26th March 2012 whereupon the applicants immediately contacted their solicitor. A brief was forwarded to counsel at the Law Library on 2nd April 2012, which fell during the Easter vacation. The brief was not forwarded to the counsel's home address and as such was not received until 16th April 2012 and papers were duly drafted and filed in the Central Office of the High Court on 20th April 2012.

19. In *CS v. Minister for Justice, Equality and Law Reform* [2005] 1 I.R. 342 the Supreme Court examined the question of an extension of time where there had been a delay on the part of the lawyers. In that case the court upheld the grant of an extension of time where there had been a delay of two weeks, McGuinness J. noting: *"It appears to me that while the first applicant was responsible for her own actions in seeking further legal and other advice when the Refugee Legal Service withdrew its services from her it would be going too far to categorise her own actions as personally blameworthy. Nor, despite my considerable reservations arising from the various deficiencies of her present solicitors, do I consider that she should be held vicariously liable for their actions."*

Respondents' Submissions

20. The respondents state that the first named applicant has been unlawfully in the State since his permission to remain expired on 24th September 2004 and that he was identified by Gardaí in Roscommon on or around the 8th June 2007 at which point he was formally refused permission to remain in the State. The respondents say that that refusal has never been challenged in these or any other proceedings. Further, the Minister issued a letter pursuant to section 3 of the Immigration Act 1999 in which the first named applicant was informed of the intention to deport him. The respondents state that this letter, dated 8th June 2007 was sent to the first named applicant but was returned marked "gone away". It is the respondents' view that the service of this letter was effective in line with s. 6 of the Immigration Act 1999, albeit such service is not in issue in these proceedings.

21. The respondents say that no information was presented as to how any of the second to seventh named applicants gained entry to the State. The respondents submit that it appears from the passports of the third, fourth and sixth applicants that they arrived on 19th February 2007 via Madrid and that the fifth and seventh named applicants arrived in June 2006.

22. The respondents assert that owing to section 5 of the Immigration Act 2004, non-nationals who do not enjoy a permission of the Minister to enter or be in the State pursuant to section 4 of that Act are unlawfully in the State and that that is the position of the applicants. Further, the respondents argue that the making of a deportation order does not alter that fundamental status in respect of the first named applicant, since his permission expired on 24th September 2003, or in respect of the remaining applicants in respect of the entire period of their stay here. Rather, the making of a deportation order is what empowers the Minister and his agents to remove the applicants from the State.

23. In rejecting the applicants claims, the respondents point to Article 51 of the EU Charter of Fundamental Rights which provides: "*The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law*." The respondent contends that when making deportation orders in respect of non-EU citizens, the State is not implementing EU law, rather it is implementing national immigration law and as such the EU Charter has no application.

24. The respondents are also of the view that the reliance placed by the applicant on Article 2 of the European Convention on Human Rights is misplaced and do not make any substantial submissions in that regard as they believe there is no evidence of any threat to the lives of the applicants. With regard to Article 8, the respondents submit that insofar as that Article has been held to prevent arbitrary interference by the State with family life it does not, save in exceptional cases, confer positive rights. The respondents cite Feeney J. in *Agbonlahor v. Minister for Justice* [2007] 4 I.R. 309 in support of this proposition. The respondents are of the view that the principle is of direct application to this case as they submit that the applicants are seeking to rely on Article 8 to gain, for the first time, permission to be in the State.

25. The respondents contend that there is no interference with the right to respect for family life in this case because it is intended to deport all of the applicants and no separation of the family members is envisaged. It is the respondents' submission that Article 8 is not engaged by the deportation of these applicants and that the central issue in this case is the position of the applicants in the State and their immigration status.

26. The respondents also refute the applicants' submissions with regard to the third to seventh named applicants' right to be heard and note that representations were made on behalf of all the applicants during correspondence with the Minister and in the course of these proceedings and as such believe that no breach of this principle has been shown.

27. The respondents also address the applicants' contention that the Minister erred in fact and law by repeatedly referring to the third named applicant as a minor and as a result failing to consider the applicant as an individual for the purposes of section 3(6) of the Immigration Act 1999. The respondents state that this submission fails to recognise the nature of the section 3 process. They cite Hardiman J. in *F.P. v. Minister for Justice* [2002] 1 I.R. 164 who stated that the nature of a section 3 application is as an *ad misericordium* application. As such, it is the nature of the decision only to require the Minister to consider the representations actually made to him. The respondents submit that in this case, as in F.P. the Minister has stated that he has considered the representations and therefore no ground for review exists.

28. Further, the respondents contend that Clarke J. (in applying the approach of Hardiman J.) in the case of *Kouaype v. Minister for Justice* [2011] 2 I.R. 1 took the view that once the representations made have been considered, no grounds for review can remain as there is nothing in law to constrain the power of the Minister to make a deportation order, aside from considerations under s.5 of the Refugee Act 1996 or Article 8 of the European Convention on Human Rights, which they do not view as applicable here.

29. The respondents also reject two of the applicants' submissions with regard to the making of a deportation personally by the Minister and as regards the indefinite nature of the duration of a deportation order. They submit that the case of *L.A.T v. Minister for Justice* (Unreported, Hogan J., 2nd November 2011) is clear authority for the proposition that the Minister does not personally have to make a deportation order as the Carltona principle applies. Second, they refer to the judgment of Kearns P. in *Sivsivadze v. Minister for Justice* [2012] IEHC 244 that the *pima facie* nature of a deportation order does not breach the fundamental human rights of a non-national illegally in the State. The respondent concedes that these cases are under appeal to the Supreme Court; however, both are clearly binding on this court pending any contrary decisions. In the respondents' view the applicants are therefore unable to show "*substantial grounds*" in respect of these issues.

30. With regard to the seeking of an interlocutory injunction by the applicants, the respondents state that no affidavit evidence as to the existence of a threat of irreparable harm has been put before the court. As such they believe that the *Campus Oil* principles have not been satisfied and that the application for interlocutory relief should be refused even if leave is granted to challenge the deportation orders. The respondents contend that this approach has been previously taken by Cooke J. in *A.P.A. v. Minister for Justice* (Unreported, July 20, 2010) and *K.I.K. [Pakistan] v. Minister for Justice* (Unreported, Cooke J., November 25, 2011).

Supplemental Submissions of the Respondents

31. The supplemental submissions of the respondents relate primarily to the question as to whether, in light of the Australian authority of *Minister for State for Immigration and Ethnic Affairs v. Teoh* [1995] 3 LRC 1, the Minister is obliged to give effect to the principle

recognised in Article 3 of the UN Convention on the Rights of the Child when making deportation orders. The respondents also refer to the decision of the Supreme Court in *Okunade v. Minister for Justice* (supra) inasmuch as they say that that decision is not material to these proceedings and does not confer any rights on an infant non-national to remain in the State.

32. The respondents address the formal position of the UN Convention within Irish law and note that while the UN Convention was ratified on 281h September 1992 it has not been incorporated into Irish law. In this regard the respondents quote Article 15.2.1 and Article 29.6 of the Constitution respectively to the effect that: "*The sole and exclusive power of making law for the State is hereby vested in the Oireachtas.* " and "*No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.* "

33. The respondents refer to the case of *In re O Laighléis* [1960] I.R. 93 as the authoritative interpretation of Article 29.6 and the remit of the courts in such matters, with Maguire C.J. deciding: "*The Oireachtas has not determined that the Convention of Human Rights and Fundamental Freedoms is to be part of the domestic law of the State, and accordingly this Court cannot give effect to the Convention if it be contrary to domestic law or purports to grant rights or impose obligations additional to those of domestic law.* " The respondents note that this statement was not restricted to a situation where the principle to be derived from the international instrument was not contrary to domestic law and state that the principle also applies so as to prevent the grant of rights or the imposition of obligations additional to those of domestic law.

34. The respondents refer to the wording of s. 3 of the Immigration Act 1999 and state that the applicants are seeking to find an ambiguity where none exists. The respondents state that it is clear from the terms of s. 3(1) that the power given to the Minister in making a deportation order is a discretionary one and that the provisions of s. 3(6) require the Minister to take certain factors into account but do not identify any overriding principles which are binding on him. The respondents cite *F.P. v. Minister for Justice* [2002] I.R. 164 as recognising that the Minister has a wide discretion pursuant to section 3. The respondents also point out that while section 3 of the European Convention on Human Rights Act 2003 requires the Minister to act in compliance with the European Convention on Human Rights there is no equivalent section giving any effect to Article 3 of the UN Convention.

35. In addressing the case of *Teoh* (supra) the respondents point out that in that case the applicant Minister in Australia was not obliged to regard the best interests of the children as paramount. Rather, four of the five judges held that there was a legitimate expectation arising from the ratification of the UN Convention that the Minister would act in compliance with it and if he proposed not to act in compliance with it, that he should simply inform the respondents of this fact as a matter of procedural fairness, prior to considering whether to grant resident status and consider submissions on the matter. The respondents also submit that the Australian High Court were careful in stating that any form of legitimate expectation could not give rise to the imposition of obligations or the establishment of rights.

36. Further, the respondents submit that *Teoh* has been distinguished in several judgments in this jurisdiction to date, including in *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 I.R. 97. In that case the Supreme Court noted that, unlike Australia, the Irish Courts operated under a constitutional framework which included Article 29.6 and that while Australia also operated a dualist approach to the implementation of international agreements, it did not appear to replicate in its laws any dualist provision with "*the same constitutional rigour with which it is embodied in Article 29.6 of the Constitution.* "

37. It is also noted by the respondents that while the relevant provision at issue in the Teoh case was of a more general nature than section 3(6) of the Immigration Act 1999, the High Court of Australia did not regard the statutory provision as being ambiguous and capable of interpretation in line with the UN Convention. In the case of *N.S. v. Anderson* [2008] 3 I.R. 417, O'Higgins J. examined an attempt to rely on the provisions of Article 31 of the Geneva Convention 1951 on the basis that the Refugee Act 1996 had fully incorporated that Convention into Irish law. While O'Higgins J. accepted that the 1996 Act "gave effect to" the Geneva Convention, it did not incorporate the entire Convention into Irish law and its inclusion in the Schedule to the 1996 Act was merely for ease of reference, not for the purpose of incorporating the entire Convention. In reaching his decision O'Higgins J. considered *Teoh* and *Kavanagh* and found that the ratification of the Geneva Convention could not give rise to any obligation which would affect either the provisions of the statute or the judgment of a court without coming into conflict with the Constitution. In the respondents' view, O'Higgins J. thereby rejected the notion that the applicant had a legitimate expectation that he could rely on the provisions of the Geneva Convention in that case and to decide otherwise would " *...be usurpation by the courts of the power of the legislature. It would clearly amount to incorporating the provisions of 'the unincorporated convention into a municipal law by the back door '."*

38. The respondents state that just as O'Higgins J. found that the ratification of the Geneva Convention did not confer rights on the applicants in that case which might be invoked before the courts and deprive the Director of Public Prosecutions of his functions as laid down by law, similarly in this case the same approach is applicable. The respondents also make reference to the case of *R.G.G. v. Director of Public Prosecutions* [2008] 3 I.R. 733 where Gilligan J. considered the effect of Article 31 of the Geneva Convention on the power of the D.P.P. to prosecute certain offences. The court rejected the notion that merely because the D.P.P. had a broad discretion to prosecute that a restriction could be read into such discretion by reason of the ratification of the Geneva Convention. Gilligan J. held that to enforce a legitimate expectation against the D.P.P. conflicted not only with statutory provisions but also with Article 30 of the Constitution. The respondent accepts that Article 30 of the Constitution is not applicable in this case but notes that the power to deport and to regulate the entry and stay of non-nationals has been recognised as arising pursuant to the executive power under Article 28 of the Constitution.

39. The respondents also contend that the decision in *Teoh* was distinguishable because it only concerned the procedures prior to a decision being made and not to a substantive right. The respondents aver that s. 3 of the Immigration Act 1999 simply does not provide that the principle referred to in Article 3 of the UN Convention forms any part of the decision making process. They submit that to seek to incorporate it by the back door is to conflict with a statutory provision and therefore to conflict with the Constitution and specifically Article 29.6.

40. Similarly, the respondents note that in *K-M v. Minister for Justice* [2009] IEHC 125 Charleton J. found that the court could only have regard to Article 3 of the UN Convention where there was an ambiguity in the statutory provisions involved. That case included a challenge to a deportation order and the respondents submit that it is clear the court was referring to the exercise of the powers under s. 3 of the Immigration Act 1999 when it found that there was no ambiguity in the provision.

41. Finally, the respondent makes reference to the wording of the new Article 42A.4.1 amendment recently passed by referendum. That provision states that: "*1▫ Provision shall be made by law that in the resolution of all proceedings-*

> *i. brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or*

ii. concerning the adoption, guardianship or custody of or access to, any child,

the best interests of the child shall be the paramount consideration. "

The respondents contend that the above amendment clearly shows that the "best interests" principle is clearly intended only to apply to certain types of proceedings and does not apply in the current proceedings.

Findings:
42. Referring to the last point made by the respondent, my view is that proposed Art 42A.4.1 of the Constitution has no relevance to these proceedings, not least because it was not at the material time, nor is it now, part of the Constitution, the referendum by which its terms were agreed being under challenge at present.

43. The complaints advanced by the applicants in these proceedings rest primarily on the contention that the particular circumstances of, and the impact of deportation on, the minor applicants was not lawfully considered by the Minister before he made deportation orders in respect of each of them. This complaint must be assessed by looking at the manner in which the Minister and his officials actually considered the children's circumstances.

44. In respect of the second named applicant, the mother of the family, a Deportation Order was made on 12th March 2012, and a separate examination of file under s. 3 of the 1999 Act was also carried out. Separate Deportation Orders were made in respect of the five children, though the s. 3 examination is the same in respect of the mother and her five children.

45. In the s.3 File Examination, under the heading 'Section 3(6) of the Immigration Act 1999 (as amended) and Section 3(6)(a) - Person's Age', the author sets out the name and date of birth of the mother and each of the children. The age range is between 18 and 10 years of age. Under s. 3(6)(b) 'Duration of Residence in the State of the Person', the author notes in respect of Italo that he has lived in the State since 2007; a copy of his passport is on file; he arrived in the State in February 2007 and he has been in the State approximately five years. In respect of Camila, that she has been in the State since 2007; her passport is on file; that she arrived in February 2007 and that she has been in the State five years. In respect of Karine, that she has lived in the State for four years; her passport is on file indicating that she arrived in June 2006, and that she has lived in the State five and a half years. In respect of Giovanna, that she has lived in the State for four years; her passport is on file indicating that she arrived in February 2007, and that she has been in the State five years. In respect of Joao, that he has lived in the State since 2007; his passport is on file; that he arrived in June 2006, and that he has been in the State five and a half years.

46. Under s. 3(6)(c) 'Family and Domestic Circumstances of the Person', the date of birth of each of the children is set out and a quotation from a letter from the applicants' solicitor says:

> "I am instructed that the children have settled in well and have made friends here and consider Ireland to be their home."

47. Under s. 3(6)(d) 'Nature of Person's Connection with the State', the information previously set out in connection with information about the duration of the person's residence in the State is repeated. Apart from an analysis of how long the children had been in the State, this section does not appear to address any connection between the children and the State.

48. Under s. 3(6)(e) 'Employment (including Self-Employment) Record of the Person', the author notes that this section is not applicable to children.

49. In relation to s. 3(6)(f) 'Employment (including Self-Employment) Prospects of the Person', it was indicated that this is not applicable to the children.

50. In relation to s. 3(6)(g) 'Character and Conduct of the Person (both within where relevant and ascertainable outside the State including any criminal convictions)' the author indicates that this is not applicable to the children.

51. In relation to s. 3(6)(h) 'Humanitarian Considerations', the date of birth of each of the children is again set out. The author repeats the quotation from the applicant's solicitor to the effect that the children have settled in well and have made friends and concludes:

> "Having considered the humanitarian information on file in this case, there is nothing to suggest that [the mother and the children] should not be returned to Brazil."

52. All of the foregoing indicates that the children's circumstances, in so far as they were known, were set out by the Minister's officials,

53. The final section of the s. 3 report is entitled 'Consideration under Article 8 of the European Convention on Human Rights (ECHR)'.

54. The author says that if the Minister signs Deportation Orders in respect of the mother and the children, that this decision would "engage their right to respect for private and family life under Article 8(1) of the ECHR".

55. The question of the interface between the children's Article 8 rights and the State's entitlement to deport the children is approached by the author by reference to the guidance given by Bingham L.J in the well known decision of the House of Lords in *R. (Razgar) v. Home Secretary* [2004] 2 AC 368. At p. 389, the approach is expressed in the following way by the learned judge:

> "17. In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8, these questions are likely to be:
>
> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

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

18. If the reviewing court is satisfied in any case, on consideration of all the materials which are before it and would be before an adjudicator, that the answer to question (1) clearly would or should be negative, there can be no ground at all for challenging the certificate of the Secretary of State. Question (2) reflects the consistent case law of the Strasbourg court, holding that conduct must attain a minimum level of severity to engage the operation of the Convention: see, for example, *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112. If the reviewing court is satisfied that the answer to this question clearly would or should be negative, there can again be no ground for challenging the certificate."

56. It appears to be the policy of authors of s. 3 examinations that the approach advised by Bingham L.J. in *Razgar* is correct. I have seen no Irish decision which dissents from that approach.

57. The author says that the deportation of the children "*has the potential to be an interference with their rights ... within the meaning of Article 8(1) of the ECHR. This relates to their educational and other social ties that they have formed in the State as well as matters relating to their personal development since their arrival in the State.* " The author then sets out (again) the current educational status of Italo and Camila and in respect of Karine, Giovanna and Joao, the name of the school being attended is set out. In quoting from the solicitor's letter, the fact that the children have settled in well and have made friends is repeated. On balance, it seems to me that the author accepts that the removal of the children from the State will be an interference with the children's private and/or family lives.

58. Moving to the second '*Razgar*' question, the author attempts to address the consequences of the interference with the children's rights and whether the interference will be of such gravity as to engage the operation of Article 8. The author deals with that enquiry as follows:

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

As a result, a decision to deport [the children] does not constitute a breach of the right to respect for a private life under Article 8 of the ECHR."

59. Does this analysis answer the second 'Razgar question' for each of the children should they be removed from the State? Did any other part of the report identify and address the impact of deportation on the children? Case law gives some guidance on how far these questions should be answered.

60. The extent of enquiry into the impact of deportation required to be undertaken by the Minister and his officials has been considered by the superior courts. In *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795 the Supreme Court described the correct approach of the Minister when dealing with a proposed deportee who is the parent of a citizen child. Denham J. noted that the real dispute in the case was as to the nature of the consideration to be made by the Minister of facts relevant to the citizen child. Denham J. said:

"67 I would affirm the decision [of the High Court] that the consideration of the Minister should be fact specific to the individual child, his or her age, current educational progress, development and opportunities. This consideration relates not only to educational issues but also involves the consideration of the attachment of the child to the community, and other matters referred to in s. 3 of the Act of 1999.

68 The extent of the consideration will depend on the facts of the case, including the age of the child, the length of time he or she has been in the State, and the part, if any, he or she has taken in the community. Thus, his or her education, and development within the State, within the context of his or her family circumstances, may be relevant. If the child has been in the State for many years, and in the school system for several years, and taken part in the community, then these and related facts may be very pertinent. However, if the child is an infant then such considerations will not arise.

69 However, I respectfully disagree with the learned High Court judge, and I believe the High Court erred, in holding that the Minister was required to inquire into and take into account the educational facilities and other conditions available to the Irish born child of a proposed deportee in the country of return, in the event that the child accompany the deportee. I am satisfied that while the Minister should consider in a general fashion the situation in the country where the child's parent may be deported, it is not necessary to do a specific analysis of the educational and development opportunities that would be available to the child in the country of return. The Minister is not required to inquire in detail into the educational facilities of the country of the deportee. This general approach does not exclude a more detailed analysis in an exceptional case. The decision of the Minister is required to be proportionate and reasonable on the application as a whole, and not on the specific factor of comparative educational systems."

61. Having affirmed the approach of the High Court, Denham J. said at para. 72:

"In the exercise of his discretion the Minister is required to consider the constitutional and the Convention rights of the parents and children and to refer specifically to factors he has considered relating to the position of any citizen children. The circumstances and factors will vary from case to case. The formal approach with specific questions as required by the High Court is not necessary, each case will depend on its own relevant facts."

62. Denham J., speaking for the court, agreed with the High Court that the Deportation Order should be quashed because express consideration of, and a reasoned decision on, the rights of the Irish citizen child was not contained in the Minister's decision. Describing the correct approach to the exercise of the Minister's discretion, the learned judge said:

"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.
>
> …
>
> 6. [Referring to the rights of an Irish born citizen child] 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."

63. As will be immediately apparent, the decision of the Supreme Court dealt specifically with the impact of a Deportation Order on an Irish born citizen child whose parent is to be deported. Those circumstances do not apply in this case. However it is arguable that the assessment required of the position of the Irish citizen child whose parent is to be deported is also required in respect of children who are themselves proposed to be deported. Nothing in the judgment of the Supreme Court suggests that the impact of deportation on non-citizen children does not have to be addressed carefully and in some detail. There is an obvious argument that the deportation impact assessment required in respect of a citizen child expresses a desire to protect children rather than an exclusive desire to promote special rights for citizen children.

64. The impact of deportation on children was considered by the High Court in a case entitled *E. & Anor. v. The Minister for Justice, Equality and Law Reform* [2008] IEHC 68. In that case, the Minister decided not to revoke a Deportation Order made and criticism was made of the Minister's decision which, it was said, failed to consider the rights of an unborn child. The learned Irvine J. found that the unborn infant was entitled to have his or her rights considered. The judge found as a fact that the Minister had not considered the rights of the unborn child and she described the extent of the Minister's failure in the following passage:

> "In this case the Court has all of the memorandum and information that was available to the Minister from which it is clear that the only thing he knew about the [unborn child] at the time of his decision under s. 3(11) was that he was about to be born and the name of his mother. He knew nothing regarding the age of [the child's mother], her financial or employment position, whether the child would be supported financially if the father was deported, whether [the unborn child's mother] had any personal or family support, whether the couple could, if they wished, maintain their family unit by moving to Nigeria together or whether the [unborn child's] father would ever be in a position because of his financial means to visit his son in the event of his deportation being affirmed."

The judge concluded in the following terms:

> "For the reasons stated above I am driven to the conclusion from the evidence that the respondent failed to conduct a proper inquiry into the [unborn child's] personal constitutional rights at the time he refused to revoke or vary the deportation order referable to O.E. when requested to do so under s. 3(11) of the Act, on the 15th March, 2006 ...Regrettably, the respondent did not have available to him sufficient facts which would have allowed him to consider in a meaningful way the effect of the deportation order on the [unborn child's] constitutional rights, so as to be in a position to balance those rights and their potential loss against the need to maintain the integrity of the asylum process or the common good. I conclude that the Minister was driven into error in the aforementioned circumstances. Accordingly, the decision made by the respondent on the 15th March, 2006 did not afford to the [unborn child] natural justice or fair procedures."

65. In that case, one can see that there is a finding of fact that the Minister did not consider the impact of a deportation on the unborn child. The judge found that there was a duty of enquiry on the Minister because he had been informed of the impending birth.

66. By reading the decisions in *Oguekwe* in *E.* together, some useful guidance in respect of this case may be observed. At the very least the applicants can use these authorities to sustain an argument for the purposes of the leave stage that the impact of a Deportation Order on children requires particular consideration by the Minister. Although there is no general duty on the Minister to make enquires beyond those matters submitted to him, further enquiry and better analysis may be justified when children are proposed to be deported.

67. In view of these propositions, my view is that substantial grounds have been made out that the analysis quoted at paragraph 58 above and in the s.3 report generally does not address the consequences for each of the children should they be removed from the State and I therefore grant leave to seek judicial review.

68. Argument has also been addressed to the court that the decision is unlawful because the decision "in failing to consider the practical consequences of removing the minor applicants from their schooling and present safe environment or the corresponding practical consequences for the minor applicants of relocating to Brazil, the Minster failed to respect and vindicate the rights of the applicants pursuant to the UN Convention on the rights of the child". Article 3.1 of the Convention on the Rights of the Child provides that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". The respondents have submitted that the Convention has been ratified but not incorporated into Irish law (it was ratified by Ireland on 28th September 1992).

69. I have considered the authorities opened by the applicant and the respondents on the nature and extent of the impact of the Convention on the Rights of the Child in the Irish legal system. There can be no doubt that the non-implementation of the Convention seriously restricts and might even prevent its application in Ireland. On the other hand, the fact that it has been ratified cannot be ignored. It appears to me that the well known dictum of Maguire C.J. in *In Re Ó Laighleis* [1960] I.R. 93, to the effect that:

> "The Oireachtas has not determined that the Convention of Human Rights and Fundamental Freedoms is to be part of the domestic law of the State, and accordingly this Court cannot give effect to the Convention if it be contrary to domestic law or purports to grant rights or impose obligations additional to those of domestic law."

might be read, in a context such as this, by reference also to the *dictum* of Henchy J. in 6 *Domhnaill v. Merrick* [1984] I.R. 151, who observed:

> "Apart from implied constitutional principles of basic fairness of procedures, which may be invoked to justify the termination of a claim which places an inexcusable and unfair burden on the person sued, one must assume that the statute was enacted (there being no indication in it of a contrary intention) subject to the postulate that it would be construed and applied in consonance with the State's obligations under international law, including any relevant treaty

obligations."

The *Ó Laighleis* doctrine was comprehensively reviewed by Kearns J. (as he then was) in *Horgan v. An Taoiseach & Ors.* [2003] 2 I.R. 468. The learned judge examined the restatement of the principle by the Supreme Court in *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 I.R. 97, and said that Irish courts are not inhibited or precluded from identifying principles of international law and considering if and how those principles apply domestically.

Kearns J. expressed his understanding of the *Ó Laighleis* doctrine as follows:

> "Over a long number of years since *In Re Ó Laighleis* [1960] I.R. 93 was determined, and even in cases where invasion of personal rights was alleged, the Irish courts have repeatedly stressed, as exemplified by the decision of *O'Sullivan J. in M.F.M v. MC. (Proceeds of Crime)* [2001] 2 I.R. 385, and the Supreme Court (Fennelly J.) in *Kavanagh v. Governor of Mountjoy Prison* [2002] 3 I.R. 97, that a clear distinction is to be maintained between obligations binding in international law and those which are binding by virtue of domestic law, as stated by Fennelly J. in the latter case at p. 129;
>
> > 'The Constitution established an unmistakable distinction between domestic and international law. The Government has the exclusive prerogative of entering into agreement with other States. It may accept obligations under such agreements which are binding in international law. The Oireachtas, on the other hand, has the exclusive function of making laws for the State. These two exclusive competences are not incompatible. Where the Government wishes the terms of an international agreement to have effect in domestic law, it may ask the Oireachtas to pass the necessary legislation. If this does not happen, Article 29.6 applies. I am prepared to assume that the State may, by entering into an international agreement, create a legitimate expectation that its agencies will respect its terms. However, it could not accept such an obligation so as to affect either the provisions of a statute or the judgment of a court without coming into conflict with the Constitution'.
>
> One can only conclude, therefore, that principles of international law enter domestic law only to the extent that no constitutional, statutory or judge made law is inconsistent with the principle in question. Where a conflict arises, the rule of international law must, in every case, yield to domestic law".

The consonance between ratified but non implemented international law and subsequently adopted domestic law, expressed by Henchy J. in *Ó Domhnaill v. Merrick*, is echoed in other jurisdictions. In *R. v. Secretary of State for the Home Department ex p Brind* [1991] 1 A.C. 696, the House of Lords considered the effects of the European Convention on Human Rights (prior to the enactment of the Human Rights Act 1998) on the interpretation of a provision of a domestic statute in the United Kingdom. Lord Bridge said:

> "It is accepted, of course, by the applicants that, like any other Treaty obligations which have not been embodied in the law by statute, the Convention is not part of the domestic law, that the courts, accordingly, have no power to enforce the Convention rights directly and that, if domestic legislation conflicts with the Convention, the courts must nevertheless enforce it. But it is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislation in conformity with the Convention, not in conflict with it."

As noted earlier in the description of the applicants submissions, in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 (a case dealing with the Convention on the Rights of the Child), L'Heureux Dubé J. said "I agree.... that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law. Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R.Sullivan, '*Driedger on the Construction of Statutes*' (3rd Ed. 1994) at p. 330:

> "[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. Insofar as possible, therefore, interpretations that reflect these values and principles are preferred. [emphasis added]"(emphasis in original judgment)

Having regard to these Irish and foreign decisions some observations are possible though only tentatively, given that this is an application for leave to seek judicial review:

> (i) No provision of the UN Convention on the Rights of the Child could enter Irish law where a contrary rule exists, whether in the Constitution, in a statute or in judge-made law.
>
> (ii) Laws adopted after the ratification by Ireland of the Convention are be interpreted and applied in consonance with the Convention unless a contrary intention is apparent from the legislation.
>
> (iii) No provision of the Immigration Act 1999 contains a rule which is of contrary effect to Article 3 of the Convention which provides that decisions affecting children shall be taken by reference to the best interests of the child which are a primary consideration in that process.

70. Having regard to the foregoing I agree that it is arguable that the Minister was required to treat the best interests of the children as a primary consideration when making the deportation orders in suit. If this is correct, then the best interests of the children would need to be identified following proper enquiry. The respondent conceded that the best interests of the children was not a primary consideration in the deportation decisions because Irish law does not so require. The applicants have established substantial grounds on this point and I grant leave to pursue the matter further.

71. The applicants sought leave to challenge the decisions in suit on a basis refused by Hogan J. in a decision entitled *LAT v. The Minister for Justice and Equality* (Unreported, High Court, 2nd November 2011) and on the basis of a ground refused by Kearns J. on 21st June 2012, in a case entitled *Sivsivadze & Ors v. Minister for Justice & Ors* [2012] IEHC 244. Certificates of appeal were granted in both cases and decisions are awaited from the Supreme Court. In view of the clear judgments of the High Court I am obliged to refuse leave to pursue these matters. That they are under appeal does not suspend their effect on this court as precedents which must be followed unless I disagree with the decisions and I do not.

72. I also refuse leave to pursue complaint relative to any breach of the EU Charter of Fundamental Rights and Freedoms as that Charter only applies when EU law is engaged and no EU law or rights affect the applicants here.

73. I grant leave to seek judicial review to each of the applicants on the grounds set out at E1, E2, E5, E6, and I extend the time for the purposes of s. 5 of the Illegal Immigrants (Trafficking) Act 2000 good and sufficient reason so to do having been established.

74. The applicants also seek injunctive relief restraining deportation. In *Okunade v. Minister for Justice and Equality and the Attorney General* [2012] IESC 49 Clarke J. indicated that generally such applications will be refused and the default position is not to restrain deportations pending trial of the judicial review proceedings. However in that case the court had regard to the fact that it was intended to deport a child. As referred to above, the court said as follows: "I feel that it is not possible, on the facts of this case, to overlook the fact that one of the applicants is a child of some four years of age who has known no country other than Ireland. It is hardly the fault of that child that the substantial lapse of time involved in this whole process has led to such a situation. Rather that current status is a function of the lack of a coherent system and sufficient resources. As pointed out earlier a significant disruption of family life is a countervailing factor which, provided it be of sufficient weight, can be enough to tip the balance in favour of the granting of a stay or an injunction."

75. In view of the number of children and the age range and thus the varying impacts deportation might have on them, it seems to me that the balance is tipped in favour of restraining deportation until the determination of these proceedings. I note that the deportation orders were signed on the same day and that in reality a decision was taken to deport this family together. It would not be realistic to restrain the deportation of the children only. If there was a deficiency in the deportation orders of the children it must be arguable that such defect tainted the decisions taken in the parent's cases and the balance of justice favours restraining the deportation of the entire family in this instance.