Neutral Citation Number: [2009] IEHC 598

THE HIGH COURT

JUDICIAL REVIEW

2009 201 JR

BETWEEN/

HENRY UGBELASE, SARAH WALSH UGBELASE AND BABY UGBELASE (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND SARAH WALSH UGBELASE)

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY & LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered on the 17th day of December, 2009.

1. By order of this Court made by consent on 28th May, 2009, the applicants were granted leave to bring the present application for, *inter alia*, an order of *certiorari* to quash a decision made by the respondent Minister on 6th February, 2009 (the "Contested Decision") by which he refused their request to revoke pursuant to s. 3(11) of the Immigration Act 1999 an order which he had made on 4th December, 2008 under s. 3(1) of that Act for the deportation of the first named applicant.

2. The first named applicant arrived in the State from Nigeria on 17th June, 2008 and asked for asylum. In a s. 13 report of 17th June, 2008, the Refugee Applications Commissioner recommended that the declaration of refugee status be refused. This report and recommendation was appealed to the Refugee Appeals Tribunal but the appeal was unsuccessful. A decision of 15th September, 2008 reaffirmed the s.13 report and negative recommendation.

3. The second named applicant is an Irish citizen who says she met the first named applicant and fell in love with him in the Summer of 2008. They married in Cork on 15th October, 2008.

4. By letter of 24th October, 2008, the respondent notified the first named applicant of his intention to make a deportation order in respect of him and invited him to make representations as to why he ought not to be deported. These representations which were sent to the Minister by letter of 4th December, 2008, mentioned the fact that the first and second named applicants had married on 15th October, 2008. No mention was made, however, of the fact that the second named applicant was then expecting the first named applicant's child although it is admitted that this was known to them at the time. The letter of 4th December said:

> "Our clients married one another on 15th October, 2008 at a civil ceremony in Cork. The couple reside together at 8, St. Patrick's Arch, Gerald Griffin Street, Blackpool, Cork… Ms. Walsh is anxious that her husband be granted residency in the State and should you require any further information please do not hesitate to contact this office."

5. By letter of 8th January, 2009, the Minister replied to the request stating that a deportation order had been made on 4th December, 2008 and notified the first named applicant on 13th December, 2008. The letter stated that the request for residence could only be considered in the context of an application under s. 3(11) of the 1999 Act for revocation of that deportation order.

6. By letter of 15th January, 2009, Messrs. Stanley & Co., solicitors on behalf of the first named applicant made an application for revocation of the deportation order, lodging supporting representations which referred for the first time to the fact that Ms. Walsh was pregnant. The letter said:-

> "Mr. Ugbelase is now married to an Irish citizen, Ms. Sarah Joan Walsh, and is currently residing at 8, St. Patrick's Arch, Gerald Griffin Street…. The couple are looking towards [sic] to the birth of their first child and we submit that the family unit should not be interfered with and such interference would be disproportionate given the circumstances that exist."

7. A total of eight submissions were set out in that letter on behalf of the first named applicant. Apart from the sentence quoted above which appears under the heading "Submission 2" none of the submissions related to the position of Ms. Walsh or that of the unborn child. The remaining submissions were specific to the position of the first named applicant and directed at reasons why he should not be returned to Nigeria.

8. With a letter of 6th February, 2009 refusing the request to revoke the deportation order, the repatriation unit of the Irish Naturalisation and Immigration Service enclosed, by way of explanatory statement of the reasons for the Minister's decision, the file note recording the analysis of and consideration given to the application and the basis upon which it was recommended that the Minister refuse the application. The analysis of the request was set out under a series of headings as follows:

> **Background:**
>
> The course of the asylum process since the applicant's arrival was summarised and it was noted that no representations had been made in respect of the Minister's letter of proposal of 28th October, 2008, prior to the making of the order on 4th December, 2008.
>
> **Further correspondence received:**
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> The contents of the letters of 4th December, 2008 and 20th January, 2009, are reviewed and the facts of the marriage and expected child are noted. It is stated "no further information about the baby's due date has been submitted."

Consideration of correspondence:

The representations set out in the correspondence are then considered under a number of headings namely:

- Length of time in the State;
- Section 5 of the Refugee Act 1996, as amended (Prohibition of Refoulement);
- ECHR Article 8 - Private Life
- ECHR Article 8 - Family Life
- Marriage rights under the Constitution.

9. Under the consideration of private life rights for the purposes of Article 8, the note accepts that the deportation of the first named applicant would constitute an interference with his right to respect for private life by the disruption of his work, education and other social ties formed in the State as well as matters relating to his personal development since his arrival. The note does not, however, accept that the deportation would have the consequences of such gravity as to engage the rights under Article 8(1). As a result, it is considered that the deportation in pursuance of lawful immigration control would not constitute a breach of this right.

10. In considering the right to respect for family life, the marriage is referred to and it is pointed out that no representations were made to the Minister under s. 3 of the Act before the deportation order had been made on 4th December, 2008. It is also noted that the Minister was not informed prior to that date of the impending marriage or of the relationship with Ms. Walsh. Reference is made to the jurisprudence of the European Court of Human Rights as confirming that a State has a right to control the entry of non-nationals into its territory and that there is no general obligation to respect the choice by married couples of the country of matrimonial residence. It is stated that:

> "In the present case, the couple married when they were aware that the status of Mr. Ugbelase was precarious. They must have known that (he) had no legal basis for residing in the State and therefore may be required to leave the State".

It is then concluded that:

> "In affirming the deportation order there is no lack of respect for family life and therefore no breach of Article 8".

11. The note then considers marriage rights under the Constitution. It is accepted that family rights under Article 41 of the Constitution may arise but it is pointed out that "these rights are not absolute and may be restricted". It is noted that:

> "There appears to be no authority which supports the proposition that an Irish citizen or a person entitled to reside in the State may have a right under Article 41 … to reside with his or her spouse in this jurisdiction."

Consideration is then said to have been given to the impact of granting permission to remain on the health and welfare systems of the State and how such a decision might lead to similar decisions in other cases. It is concluded that there "exists a substantial reason associated with the common good which requires the deportation of Mr. Henry Ugbelase".

12. It is not disputed, therefore, that no consideration was given by the Minister in arriving at the Contested Decision to the rights, as such, of the then unborn child other than that implicit in the recognition of the fact that the child was expected and in the recognition of the first and second named applicants as constituting a family.

13. It is this absence of consideration of the alleged rights of the then unborn child which forms the basis of the challenge now raised to the legality of the Contested Decision. In effect, the applicants claim that in considering such an application to revoke a deportation order, the Minister is obliged by law to give specific consideration to the effect that the deportation of a non-national father will have upon the personal constitutional rights of his unborn Irish citizen child and that the rights to be thus considered are the same as those which would fall to be taken into account if the application to revoke under s. 3(11) of the 1999 Act were made after the birth of that child.

14. The applicants rely particularly in support of this submission on the judgment of Irvine J. in *O.E. v. MJELR*. [2008] 3 I.R. 760 which, it is said, was correctly decided and must be followed by this court. (The "*O.E.* case")

15. This submission is met by a full rejection on the part of the Minister. The respondent submits that he is under no obligation in law to consider the impact of the deportation order on any particular personal right of an unborn child. The constitutional right of the unborn child is that of the right to life enshrined in the Constitution in Article 40.3.3 by the Eighth amendment and that alone. It is submitted that the *O.E.* case is not authority for the proposition that the unborn child has any other constitutional right capable of being invoked in aid of the first named applicant. It is submitted that if the *O.E.* case is considered by the court to be authority for such a proposition, the case was wrongly decided and that it ought not to be followed in this instance.

16. It is accordingly necessary to decide in this case which of these diametrically opposed contentions is correct. In other words, is the Minister constrained when proposing to deport the non-national parent of an unborn who may at birth be entitled to Irish citizenship, to give specific consideration to the personal constitutional rights of that unborn child as if the child was already born?

17. To appreciate how this legal issue in respect of the unborn child arises it is necessary briefly to recall the law as it now stands in relation to the rights to be considered by the Minister where a possible decision is to be made on the deportation of a non-national parent of an Irish citizen child as enunciated by the Supreme Court in a number of cases in recent years.

18. This issue has been considered by both the High Court and the Supreme Court in a number of cases over the last twenty years including, for example:

Osheku v. Ireland [1986] I.R. 737;
Fajujonu v. Minister for Justice [1999] 2 I.R. 151;
A.O. & D.L. v. Minister for Justice [2003] 1 I.R. 1;

Oguekwe v. Minister for Justice [2008] 3 I.R.795; and

Dimbo (A Minor) v. M.J.E.L.R. (Supreme Court, 1st May, 2008).

19. Referring to the case of a non-national who had been resident in the State and become a member of a family unit containing children who are citizens, Finlay C.J. in the *Fajujonu* case said:-

> "…there can be no question but that those children, as citizens, have got a constitutional right to the company, care and parentage of their parents within a family unit. I am also satisfied that, *prima facie*, and subject to the exigencies of the common good that that is a right which these citizens would be entitled to exercise within the State."

20. Similarly, Murray J. (as he then was) said in the *A.O. & D.L.* case:-

> "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 parents any constitutional or other right to remain in the State."

21. Elsewhere in the same case, Denham J. said of the citizen child:-

> "The child has rights of citizenship and as a consequence he or she also has rights of residence in Ireland. He or she also has the right to the society, care and company of his or her parents. However, it does not flow from the rights of the child that the family or parents and siblings of Irish children have the right to reside in Ireland."

22. What emerges clearly from this case law is that the fact that a minor child who is an Irish citizen has an entitlement to certain personal rights under the Constitution and to respect for private life and family life under Article 8 of the ECHR does not, as such, preclude the exercise by the State of its sovereign right to control the entry and presence in the State of foreign nationals including, in necessary cases, the expulsion from the State of a non-national parent of such a child. The State is not bound by a choice of residence made by a couple for themselves and for their family.

23. The power of the Minister in such a case to make a deportation order under s. 3 of the 1999 Act is, however, constrained by the need to exercise it consistently with and not in breach of the constitutionally protected rights of the child and of other family members who are not to be deported and may not decide to depart and by the obligations arising under s. 3 of the ECHR Act 2003.

24. In the *Oguekwe* case in particular, the Supreme Court set out the considerations which thus arise in the exercise of that power and the facts and factors which may require to be taken into account and balanced as between the constitutional and Convention rights of the child on the one hand and the rights of the State on the other.

25. Those rights of the child include both its rights to respect for private life and family life under the Convention and its personal rights under Article 40.3 and Article 41 of the Constitution to reside in the State, to the society, care and upbringing of its parents and to be supported, educated and protected by them.

26. The judgment of the court as given by Denham J. in the *Oguekwe* case identifies, in effect, two key factors involved in the exercise required of the Minister when deciding whether a deportation order should be made in such cases. First, the Minister must consider all facts relevant to the personal constitutional rights of the child and secondly, he must identify a "substantial reason" which requires the deportation of the non-national parent. Having ascertained "the facts and factors affecting the family" and the child in each case "by due inquiry" he must consider the circumstances in a fair and proper manner so as to arrive at a decision which is reasonable and proportionate in all of those circumstances.

27. In other words, the personal and Convention rights of the child and of the family are not absolute but may be required to yield, or be subordinated to, the public interest of the State in the common good in controlling its frontiers where, after due investigation and consideration, a reasonable and proportionate decision is made that there is substantial reason for interfering with those rights.

28. As regards the first element in the exercise, the facts relevant to the rights of the child include those which are specific to the child and its family such as the child's age, current educational position, the attachment of the child to the community in which he has been living, the particular matters listed in s. 3 of the 1999 Act to be considered and the other factors identified in the non-exhaustive list suggested by Denham J. in that judgment.

29. Thus, the exercise required of the Minister in considering the possible deportation of the non-national parent of an Irish born child involves inquiry into and consideration of a series of facts and factors relating to the personal and family circumstances of the child.

30. Such, therefore, is the constraint imposed by law on the exercise by the Minister of the power to deport a non-national parent of an Irish citizen child. The applicants submit that the same constraint is imposed on the Minister where the child is not yet born. The Minister is obliged, it is argued, to conduct the same exercise when deciding whether or not to deport its non-national parent and he failed to do so in this case.

31. It will be recalled that prior to 1983 Article 40.3 contained two paragraphs as follows:

> "3.1°The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> 2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

32. With effect from 7th October, 1983 the Eight Amendment inserted a third subsection as follows:

> Article 40.3.3
>
> "3° The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

33. With effect from 23rd December, 1992 the Thirteenth and Fourteenth Amendments added two further subsections as follows:

> "This subsection shall not limit freedom to travel between the State and another state.

> This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state."

(These three added texts are hereinafter referred to collectively as "the Amendments".)

34. In presenting the case counsel for the applicants emphasised that the submission made did not rely on the amendment provisions as thus inserted but upon the original text of Article 40.3.1 and Article 40.3.2 as interpreted, she submitted, by the Supreme Court and the High Court in previous judgments given prior to 1983. (See paras. 51 to 58 below)

35. The principal argument advanced, as indicated already, is that this issue as to the identity of the rights of the unborn and the citizen child has been definitively settled by the judgment of Irvine J. in the *O.E.* case and that this Court should and must follow that precedent in the present case.

36. The first answer to that submission is that the judgment in the *O.E.* case does not appear to be authority for the proposition advanced or, at least, one which could be said to constitute a binding precedent for the purpose of the present case.

37. In that case a deportation order had been made by the Minister against a Nigerian national, the first named applicant (*O.E.*) who had been deported from the State but subsequently allowed to return for a limited period in order to complete a course of study. The deportation order had been revoked for that purpose. When he outstayed that limited period, the deportation procedure was again initiated and in representations made to the Minister, *O.E.* disclosed that he had formed a relationship with a woman who was an Irish citizen but he gave no further details. The Minister made the deportation order and it was only in further representations made seeking its reconsideration that the Minister was informed that the woman in question was expecting *O.E.'s* child. The Minister refused to revoke the order and it was that refusal which was the subject of the judicial review proceeding in which the *O.E.* judgment was given.

38. Although it is true that in that judgment the High Court quashed the refusal upon the ground that the Minister had failed to consider the constitutional rights of *O.E.*'s unborn child, it is important for present purposes to note the precise basis upon which the judgment was given.

39. At para. 49 of the judgment the learned judge quotes one of the grounds of opposition which had been raised by the Minister as follows:

> "The applicant was unborn on the date of the decision impugned in the within proceedings. By reason of that fact, the applicant did not, as of the date of the said decision, enjoy any constitutional rights other than those specified in Article 40.3.3 at para. 2 of the Constitution, nor does the applicant have any rights pursuant to Article 8 of the European Convention on Human Rights and/or the European Convention on Human Rights Act 2003."

40. The learned judge then observes in para. 50:

> "Whilst this formal plea was delivered on behalf of the respondent, this argument was not purposefully pursued in the course of the hearing. The respondent did not ask the court to consider the constitutional rights of the unborn child in this case, having regard to its impending birth, as being any different from the rights which he would have enjoyed had he been born at the time the respondent was asked to exercise his power under section 3(11) of the Act of 1999."

41. In other words, the learned judge is expressly drawing attention to the fact that she was not asked to determine the issue to whether, as a matter of law, the unborn child had the same constitutional or Convention rights as the child born as an Irish citizen. That caveat by itself signals that the learned High Court judge did not intend her judgment to be read as a definitive determination of that issue.

42. It is true that the judgment proceeds to refer this "apparent concession" and to quote a passage from the judgment of Walsh J. in *G. v. An Bord Uchtála* and then to say (para. 52):

> "I cannot accept that the only constitutional rights enjoyed by the applicant at the time the respondent was making his decision under s. 3(11) of the Immigration Act 1999 was the right to be born by virtue of Article 40.3.3 of the Constitution, which right the courts had already concluded existed prior to this amendment to the Constitution in October 1983 and which rights are described by Walsh J. in *G. v. An Bord Uchtála* and also by Barrington, J. in *Finn v. Attorney General* [1983] I.R. 154."

43. Notwithstanding this brief observation, however, the learned High Court judge immediately reaffirms the basis upon which the case had been argued by saying (para. 53):

> "In the aforementioned circumstances, it seems only appropriate that counsel for the respondent, as she did, dealt with the present proceedings on the basis that the constitutional rights enjoyed by the applicant at the time of the respondent's decision, particularly having regard to his impending birth, were the same as those he would have enjoyed had he been born at that time."

44. It is also the case that at para. 54 Irvine J. expresses the view that the argument which was not proceeded with "would place the rights of the unborn child, from a constitutional perspective, at a much lower level than the rights afforded to the unborn child at common law". She then refers to the English case of *Burton v. Islington Health Authority* [1993] Q.B. 204 as an instance of the application of the maxim that an unborn child will be deemed to be born whenever its interests require it. The effect of that maxim is that, at common law, a child once born could, for example, pursue a remedy for a wrong which had occurred to it while in the womb. It did not operate, however, to enable justiciable rights to be asserted by or on behalf of the unborn child prior to birth. In any event, as explained later in the present judgment, the limited effect of the principle does not appear to be incompatible with the more extensive protection afforded to the unborn child under Article 40.3.3 of the Constitution.

45. Thus, in para. 55 of the *O.E.* judgment, the learned judge confirms that the balance of the judgment proceeds to examine the issues as to the extent of the rights enjoyed by *O.E.'s* child (A.H.E.) in respect of the deportation decision and how that decision was made, upon the basis that A.H.E.'s entitlements were to be approached as if she had been born at the date of the decision. (A.H.E. had in fact been born nine days after the Minister's decision and on the same day the judicial review proceeding had been commenced). This, however, is clearly based on the "apparent concession" made by the respondent and without the necessity for any detailed exposé or analysis of the constitutional issues implicit in the abandoned ground.

46. It should be recalled, in this regard, that a previous judgment can only be said to be a precedent by reference to its *ratio decidendi* namely, the essential principle upon which the concrete decision in the case is based, abstracted from the specific peculiarities of the case. It is the *ratio* alone which has force of law. As has been observed, it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the *ratio dedidendi* of a case. (*Monk v. Warbey* [1935] 1 K.B. 75 at 81). It is salutary to recall the terms of the dissent in this regard expressed by Lord Denning in *Close v. Steel Company of Wales Ltd*. [1962] A.C. 367 at 388. Referring to the majority view that the point at issue had been decided in a previous judgment he said:

> "I find that a majority of your lordships think that the point is concluded by what was said in the speeches in *Nicholls v. F. Austin (Leyton) Ltd*., not by the decision itself, but what was said in four of the speeches. I read the speeches differently but, accepting that they are to be read contrary to my view, I must express my emphatic dissent from your lordships being bound by them. The doctrine that your lordships are bound by a previous decision of your own is, as I have always understood it, limited to the decision itself and to what is necessarily involved in it. It does not mean that you are bound by the various reasons given in support of it, especially when they contain 'propositions wider than the case itself required'. In saying this, I am only repeating what Lord Selborne L.C. said in *Caledonian Railway Co. v. Walkers Trustees* and Lord Halsbury L.C. in *Quinn v. Leatham*. As Sir Frederick Pollock has well said:
>
> > 'Judicial authority belongs not to the exact words used in this or that judgment, nor even to all of the reasons given, but only to the principles accepted and applied as necessary grounds of the decision.'"

47. Accordingly, since Irvine J. explicitly warned in para. 50 that the court had not been asked to consider whether the constitutional rights of the unborn child were different from the rights of the citizen child when born, the subsequent expression of observations on that topic cannot be taken as statements of reasons or principle which were necessary to the legal basis upon which the decision in that case was made.

48. This Court is accordingly satisfied that it is not constrained by the judgment in the *O.E.* case and is thus obliged to examine on the merits the arguments on the substantive issue which have been put before it in the present case.

49. It is necessary therefore to examine the proposition that it was already settled law prior to the *O.E.* judgment that by reference to Article 40.3.1 & 2, there existed in law no distinction in the protection afforded by the Constitution to the personal rights of a person depending upon whether the subject of the asserted right was a citizen child or an unborn within the jurisdiction of the State.

50. There had, of course, as the *O.E.* judgment clearly indicates, been some judicial references prior to the enactment of the Eighth Amendment in 1983 to the possibility that the right to life of the unborn child was one of the latent or unspecified personal rights that might fall to be protected by the State under Article 40.3. Contrary to the impression given by the *O.E.* judgment, however, it does not appear that any definitive judgment to that effect had been handed down.

51. A number of judgments contained observations which could be construed as indicating an assumption or belief on the part of individual judges that Article 40.3 as it then existed would be so construed if the issue arose. Thus, in the passage cited by Irvine J., at para. 51, of the judgment in that case, Walsh J. in the Supreme Court in *G. v. An Bord Uchtála* observed:

> "Not only has the child born out of wedlock the natural right to have its welfare and health guarded no less well than that of a child born in lawful wedlock, but a *fortiori* it has the right to life itself and the right to be guarded against all threats directed to its existence whether before or after birth. …. The right to life necessarily implies the right to be born, the right to preserve and defend (and to have preserved and defended) that life and the right to maintain that life at a proper human standard in matters of food, clothing and habitation."

52. That case, however, was concerned exclusively with the rights of a citizen child offered for adoption by its mother and with the right of its natural mother to withdraw her consent and obtain custody of the child.

53. In his judgment in the Supreme Court in *McGee v. A.G.* [1974] I.R. 284 at 312, Walsh J. had similarly observed:

> "… any action on the part of either the husband and wife or of the State to limit family sizes by endangering or destroying human life must necessarily not only be an offence against the common good but also against the guaranteed personal rights of the human life in question."

54. Again, however, that case was not concerned with the right to life of the unborn child as such but with the validity of s. 17 of the Criminal Law Amendment Act 1935 which outlawed the sale and importation of contraceptives.

55. In *Finn v. A.G.* [1983] I.R. 154 an attempt was made to stop the holding of the referendum on the bill for the Eighth Amendment upon the ground that the proposed subsection was superfluous given that the right to life of the unborn was already protected by Article 40.3.2 as the statements in the two above cases were said to have established.

56. Barrington J. pointed to one of the factors that could create some doubt as to the application of Article 40.3 to the unborn child namely, that it referred to the "personal rights of the citizen"; so that it was questionable whether an unborn child would be a citizen in that sense. Nevertheless, he stated clearly that on the basis of the authorities that had been opened to him, "I would have no hesitation in holding that the unborn child has a right to life and that it is protected by the Constitution".

57. He immediately pointed out, however, that it was not actually necessary for him to so find in that case because that part of the applicant's argument had not been disputed by the respondent. The actual *ratio* of the judgment in question is thus exclusively concerned with the distinct legal issue as to whether jurisdiction existed in the High Court under Article 34.3 of the Constitution to adjudicate upon the validity of the terms of a proposal in a bill to amend the Constitution. Barrington J. held that the court had no such jurisdiction and an appeal was unanimously rejected by the Supreme Court in a judgment of six sentences to the effect that the courts have no power to interfere with the legislative process and the plaintiff had no standing to bring the action. The Court expressly found it unnecessary to consider the matters dealt with by Barrington J. in his judgment.

58. In that regard, it is to be noted that the learned High Court judge had rejected an argument on the part of the applicant to the effect that, because the right of the unborn child was already implicitly protected by the Constitution, it was not open to the people to amend it by making the protection explicit, upon the ground that it was not an amendment "by way of variation, addition or repeal" in the sense of Article 46.1 of the Constitution. He said:

> "I am satisfied that by Article 46.1 the people intended to give themselves full power to amend any provision of the

Constitution and that this power includes a power to clarify or make more explicit anything already in the Constitution."

Referring to the argument made by counsel for the applicants, he added that it had "failed to convince me that the present proposed amendment, if accepted by the people, would not change or vary the constitutional position of the unborn child…."

59. Accordingly, notwithstanding the strong indications of judicial thinking to be found in observations made *obiter* by a number of learned members of the bench of great authority and experience in constitutional law, the legal fact remains that, at the date of adoption of the Eighth Amendment, no definitive ruling amounting to a binding precedent had yet been handed down to the effect that Article 40.3 as it then stood gave protection to the right to life of the unborn as one of the unspecified personal rights of the citizen. Much less was there any considered judicial pronouncement as to the possible scope or qualification of such protection.

60. As academic writers on this political, social and legal issue record, (see for example Hogan & Whyte: J.M. Kelly on *The Irish Constitution* (4th Ed.) at the commentary on Article 40.3,) the purpose and intended effect of the Eighth Amendment was to remove uncertainty as to the existence of such an entitlement to protection by making the right explicit and subject to the clarification of its being equated with the right to life of the mother. In particular, it seems apparent that it was the uncertainty caused by the words "personal rights of the citizen" and the possibility that the right to individual or marital privacy recognised in the *McGee* case might require or permit the unspecified personal rights of a mother to prevail over the right to life of the unborn that inspired or provoked the proposal for the Eight amendment.

61. As Barrington J. anticipated, the introduction of subsection 3 has the necessary effect of changing the approach to the interpretation of Article 40.3 particularly in the light of the subsequent addition of the two further subsections in the Thirteenth and Fourteenth amendments of 1992. In other words, given the doubts in the minds of legislators and the public as to the existence, basis and scope of constitutional protection for the right to life of the unborn and the absence of definitive ruling by the Supreme Court on the issue, it was both logical and competent for the people to resolve that issue by assigning specific subsections of Article 40.3 to that protection and to do so on an exclusive basis.

62. The provisions of the Constitution must, in the court's judgment, be construed and applied according to the wording of the provisions as they stand on the date of adoption of the decision against which they are invoked. Thus, in the present case, Article 40.3 falls to be construed and applied as of the date of the Contested Decision on the basis that it includes the three subsections of subparagraph 3. This has, the court considers, the necessary consequence that the right to life of the unborn and the scope and limitations with which it has been defined in the Constitution, must be taken as having been made explicit by the enactment of the Amendments so that they are now contained exclusively in the three subsections of subparagraph 3 alone. It is to be noted, for example, that subsection 3 avoids referring to the protection being afforded to rights "of the citizen" unlike the preceding subsections of para. 3, as well as paragraphs 1 and 4 of Article 40. Thus, the possible doubt caused by treating the right to life of the unborn as a "personal right of the citizen" in para. 3.1 as identified by Barrington J. in the *Finn* case above, is removed. The protection afforded to the right to life of the unborn child is, accordingly, not dependent upon the concept of citizenship.

63. It is also significant that the acknowledgment of the right to life of the unborn is limited by the stipulation that the subsection does not "limit freedom to travel between the State and another state". One of the personal rights of the citizen is the right to reside in the State and not to be deported. This is one of the specific personal rights recognised in favour of the citizen child in the cases referred to at para. 18 of this judgment. In the case of the unborn child, however, the effect of the subsection inserted by the Thirteenth amendment must be that the right to life of the unborn child cannot prevail over the right of the pregnant mother, whether an Irish citizen or not, to leave the State, to give birth elsewhere and then to reside outside the State.

64. There is thus enshrined in the Constitution a specific right for a particular subject namely, "the unborn". The right is placed on a footing of equality with the same right of the mother of the unborn but the subsection subordinates the State's guarantee to the respect, defence and vindication of the right of the unborn to that of the mother by the use of the expression "so far as practicable". In so doing, this amendment clearly recognises the obvious and necessary reality that, whilst the respective rights to life of mother and unborn may be equal, it is in practice impossible to give both equal effect in all circumstances, precisely because the unborn is dependent for its existence on the continued life of its mother.

65. It is clear, therefore, that the purpose and effect of the Amendments was to deal specifically and separately with the acknowledged right peculiar to the unborn. As such, Article 40.3.3 explicitly guarantees "the right to life" or, in other words, the right to be born. It is perhaps arguable that the "right to life" encompasses more than the right not to have the natural course towards birth deliberately interrupted such that, for example, it includes the right of the unborn to bodily integrity. Given the acknowledgment of the right to be born, it is undoubtedly arguable that the unborn has a right not to have the natural course of gestation put at risk of deformity or handicap by some wilful misconduct on the part of the mother or of some third party. Thus, the right to be born includes the right to be born in the natural course and to be protected against any unnatural intervention short of termination which might harm or jeopardise the expectation of the unborn being born in normal good health and condition. Such an approach would as mentioned above, would be consistent with the more limited common law view referred to at para. 44 above. Unlike the personal rights of the citizen in Article 40.3.1 therefore, the right to life of the unborn is not merely prospective but vested and justiciable and, as such, its effect in law is greater than the retroactive entitlement accorded to the child en ventre sa mère by the principle of common law. But if that proposition is valid, it is on the basis of the specific protection enshrined in the Constitution by the Amendments, as an integral facet of the right to be born rather than as a distinct personal right derived from paras. 1 and 2 of Article 40.3.

66. Subject to that possible interpretation, however, the court considers that the objective and effect of the Eighth Amendment was to deal specifically in Article 40.3.3 by way of variation and addition with the full extent of the constitutional protection to be accorded to the unborn child.

67. It follows, in the court's view, that Article 40.3 in its subsections 1 and 2 cannot be looked to as a source of further or different rights on the part of the unborn to be protected by the Constitution. Since the incorporation of the Eight Amendment and in the absence of any prior definitive interpretation of Article 40.3 in advance of that amendment, the principle *generalibus specialia derogant* applies.

68. That the Constitution does not now accord to the unborn all of the unspecified personal rights enjoyed by the born citizen child is the evident result. This judgment has already outlined above the rights attributed to the Irish citizen child in these circumstances by the case law and the exercise which the Minister is, as a consequence, required to carry out when considering the possible deportation of a child's non-national parent.

69. Clearly, however, no comparable exercise can be carried out where the child has not yet been born. The personal rights of the

child in relation to its own position in society, its progress in life and in education, its attachment to any community remain purely prospective and inchoate until it is born. As such, in the court's judgment, those rights do not attain any justiciable status such as would attract the obligation of respect and vindication by the State under the Constitution or that of respect under the Convention until the point at which that child acquires an existence in its own right independent of its mother.

70. That the Constitution does not now accord to the unborn all of the unspecified personal rights enjoyed by the born citizen child is also clear from the practical consequence of the Thirteenth Amendment which inserted the second subsection of Article 40.3.3 on the non-limitation of freedom of travel. (See para. 33 above.) One of the particular rights identified in the case of the Irish citizen child by the case law is the right to reside in the State. Precisely because the unborn has no existence independent of its mother, it cannot enjoy an individual choice of residence in its own right. It cannot be suggested, in the court's view, that a right of the unborn based upon those of the born child derived from Article 40.3.2 to a residence in Ireland could prevail over the explicit right accorded to the mother under Article 40.3.3 to leave the State and, as a result, to give birth to the child elsewhere with the possible consequence of the child acquiring a different nationality under the law of the State in which it is born.

71. Furthermore, the proposition that the right of the unborn to life is simultaneously specifically protected both by Article 40.3.3 and as one of the unspecified personal rights of the citizen under Article 40.3.1 or 2 is incompatible with a harmonious interpretation of the Constitution as it now reads and inconsistent with the apparent intention to remove uncertainties as to the existence, status and scope of the right to life of the unborn in the adoption by the people of the Amendments.

72. As already mentioned, the clear effect of the Thirteenth amendment is to confirm that the right to life of the unborn is subordinated to the freedom to travel from the State and in particular, it must be supposed, the freedom of the pregnant mother to do so. Insofar as that freedom is based on a Constitutional right it derives from the personal right of the mother to that effect as one of the unspecified rights of the citizen under Article 40.3.1. (See *Ryan v AG.* [1965] I.R. 294.) But if the unborn continues to be entitled to assert the same unspecified personal rights as the citizen child identified in the case law referred to above (see para.18,) in addition to the specific protection afforded by Article 40.3.3, then the uncertainty as to the possible conflict with other personal rights of the mother has not been removed including, notably, that of the mother's right to individual privacy.

73. As already indicated, it was made clear on behalf of the applicants that reliance was placed exclusively upon the rights of the unborn child derived from Article 40.3.1 and 40.3.2 and not upon the subsections of Article 40.3.3. It follows from the reasons set out above that the court does not consider that the rights asserted on behalf of the applicants in this case can be grounded upon Article 40.3.1 or 40.3.2. As indicated, the only right which accrues under the Constitution to the unborn is the right to life as articulated, with its limitations, by Article 40.3.3.

74. In the court's judgment, accordingly, the only right of the unborn child as the Constitution now stands which attracts the entitlement to protection and vindication is that enshrined by the Amendments in Article 40.3.3 namely, the right to life or, in other words, the right to be born and, possibly, (and this is a matter for future decision) allied rights such as the right to bodily integrity which are inherent in and inseparable from the right to life itself. The deportation of a non-national parent cannot, in the court's judgment, be said to be in any sense an interference with that right.

75. It follows that the Minister was under no obligation to consider for the purpose of the contested decision, the possible implications of the impact of the decision on the alleged rights. The Minister has not, accordingly, made any error of law.

76. The application must therefore be refused.