THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 284

[2016 No. 377]

Ryan P.
Irvine J.
Hedigan J.
BETWEEN

K.R.A. AND B.M.A. (A MINOR)

APPELLANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Ms. Justice Irvine delivered on the 27th day of October 2017

1. I have had the opportunity of reading the judgment of Ryan P. in relation to the substantive issues raised for this Court on the appeal and for the reasons which he has expressed I too agree that the appeal must be dismissed. I am also satisfied, for the reasons later stated in this judgment, that whilst technically moot in light of the determination of the substantive appeal, the appeal against the refusal of the injunction sought in the High Court should also be refused. It is to that appeal that this judgment is solely directed.

2. In circumstances where I find myself in modest disagreement with one particular aspect of the judgment of Humphreys J. in the High Court, that which concerns the principles to be applied by a court when faced with an application for a stay or an injunction to restrain deportation by members of a family, I have decided to address the matters material thereto in the course of this judgment. With that purpose in mind, I gratefully adopt the background facts to these proceedings which are set out by the President in the opening paragraph of his judgment and which, for the reader's convenience, I will now repeat.

3. Ms. K.R.A., the first named applicant, was born in Nigeria in 1975. She married there and had three children. In early 2008, she came alone to Ireland while pregnant and sought asylum on the 10th March of the same year. Her baby, the second named applicant, B.M.A., was born four days later on the 14th March, 2008. The child is now 9 years of age, albeit that she is not an Irish citizen. Their asylum application was rejected and in March 2009, Ms. K.R.A. was notified by the Minister of an intention to make deportation orders. Solicitors on her behalf applied for subsidiary protection, but on the 9th November, 2009 that also was rejected. On the 18th November, 2009, the Minister made deportation orders in respect of both applicants and Ms. K.R.A. was required to present herself to the Garda National Immigration Bureau on the 8th December, 2009. She did not do so, but instead went into hiding from the authorities and remained underground for almost five years. Ultimately, she went to solicitors and through them, on the 23rd October, 2014, she made an application for revocation of the deportation orders pursuant to s. 3(11) of the Immigration Act 1999. That gave rise to an arrest and an application to the High Court under Article 40 with which we are not concerned. On the 18th May, 2015, the Minister refused to revoke the deportation order. On the 3rd June, 2015, the High Court (Faherty J.) granted leave to the applicants to bring these judicial review proceedings in respect of that refusal.

4. Humphreys J. refused to grant the applicants an injunction restraining their deportation pending the hearing of their appeal to this Court on the substantive issues as is set out in his judgment dated 28th November, 2016. That refusal has been appealed to this Court which has been asked to furnish its decision in respect of that refusal notwithstanding the fact that the injunction is technically moot in circumstances where this Court did not actually hear the appeal against the refusal of the injunction in advance of the substantive appeal.

The Test for an Injunction/Stay on Deportation in Asylum /Immigration Cases

5. The test to be applied on the appellants' application for an injunction to restrain their deportation is that which is set out in the decision of Clarke J. in *Okunade v. The Minister for Justice* [2012] 3 I.R. 152. As is clear from his even more recent decision in Charles v. Minister for Justice [2016] IESC 48, the test to be applied is the same, irrespective of whether the application is for an injunction restraining deportation pending trial or for a stay on deportation pending appeal. In a number of the decisions to which I intend to refer, the application made was for an injunction in circumstances where the more appropriate application would have been for a stay to restrain the implementation of a legally binding measure. To avoid any confusion, I will simply adopt the terminology used in the decisions concerned.

6. *Okunade* provides a clear step-by-step guide for a court faced with an application for a stay or an injunction to restrain deportation. That guide is helpfully summarised in the following manner at paras. 4 to 6 of the head note to the judgment:-

> "4. That, in considering whether to grant a stay or an interlocutory injunction in the context of judicial review proceedings, the court should apply the following considerations:-
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> (a) the court should first determine whether the applicant had established an arguable case; if not the application must be refused, but if so, then;
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> (b) the court should consider where the greatest risk of injustice would lie. In doing so the court should:-
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> (i) give all appropriate weight to the orderly implementation of measures which were *prima facie* valid;
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> (ii) give such weight as was appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and,
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> (iii) give appropriate weight (if any) to any additional factors which arose on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not

being implemented pending resolution of the proceedings; but also,

(iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful;

(c) the court should, in those limited cases where it was relevant, have regard to whether damages were available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and,

(d) subject to the issues arising in the judicial review not involving detailed investigation of fact or complex questions of law, the court could place all due weight on the strength or weakness of the applicant's case."

"5. That significant weight needed to be attached to the implementation of decisions made in the immigration process which were prima facie valid. There was importance to the exercise by the State of its right to control its borders and implement an orderly immigration policy. *Meadows v. Minister for Justice* [2010] IESC 3,[2010] 2 I.R. 701 considered."

"6. That the disruption of family life which had been established in Ireland for a significant period of time was a material consideration for the court in deciding whether to grant a stay or an injunction restraining deportation pending the hearing of leave to seek judicial review. All due weight needed to be attached to the undesirability of disrupting family life involving children in circumstances where, after a successful conclusion of the proceedings or any other process, the children concerned might be allowed to remain in or return to Ireland. On the facts, the trial judge erred in failing to afford sufficient weight to that factor."

7. In addition to the aforementioned factors, Clarke J. mentioned two further matters to be considered when addressing the balance of justice. First, whether it could credibly be suggested that the applicant would be materially prejudiced in the presentation of their claim if they were to be deported pending trial. Second, whether the applicants, if successful in their substantive proceedings, would be entitled as of right to remain in this jurisdiction as opposed to nothing more than having a re-hearing or a reconsideration of a decision earlier made.

8. It is important also to note the emphasis which Clarke J. placed upon the distinction between the matters which are appropriate for a court's consideration when deciding whether or not to grant a stay or interlocutory injunction and those which are to be applied when determining the substantive rights of the parties, a matter to which I will later return.

9. What Clarke J. makes very clear in the course of his judgment in Okunade is that the court must recognise when making its decision on an application for a stay or an injunction that the risk of injustice is an inevitability. That being so, the court must seek to put in place, pending the hearing of the relevant proceedings or appeal, a regime which will minimise the overall risk of injustice.

10. Finally, of particular importance, in my view, is the statement made by Clarke J. at para. 94 of his judgment to the effect that the weight to be attached to the considerations therein identified will vary both from type of case to type of case and by reference to the individual facts of the case in question. In other words, there can be no "one size fits all" approach to applications for an injunction or a stay.

Judgment of Humphreys J.

11. The first issue addressed by the trial judge as required by *Okunade* was to decide if the applicants could establish the existence of arguable grounds of appeal. That he resolved this issue in their favour is perhaps not surprising in circumstances where he had granted them leave to appeal his decision on two grounds. It is relevant to note that later in his judgment, when considering the likely strength of the grounds of their appeal, he considered their prospects of success to be no more than modest.

12. Humphreys J. then dealt sequentially with the guidance given in *Okunade* and as summarised at para. 4(b)(i), (ii) and (iv) of the headnote to the judgment. In doing so, he concluded that the orderly implementation of measures which are *prima facie* valid, in this case the deportation orders, militated against granting the relief sought. Likewise, he considered that the public interest in the orderly operation of the immigration regime militated in favour of refusing the stay. Further, correctly in my view, he referred to the "measure" under challenge by the applicants for the purposes of highlighting that there was no challenge to the protection process itself, or indeed to the deportation order. Their challenge was confined to the refusal of the Minister to revoke the deportation order, a fact that militated strongly against granting the injunction sought.

13. Such reservations as I have with the judgment of Humphreys J. concern that part of his judgment which appears below a heading entitled 'Evasion or Misconduct by the Parent and whether this can be held against the Child' and which commences with the following statement:-

"11. A further factor is the applicants' conduct in evading the GNIB, which strongly militates in favour of refusing an injunction, unquestionably so as regards the first named applicant."

The trial judge then proceeds to consider the implications of the mother's conduct on her child in the context of their application for an injunction to restrain their deportation pending appeal.

14. In a lengthy discussion, which focuses upon the decision of this Court in *Chigaru v. Minister for Justice and Equality* [2015] IECA 167, the judgment of the European Court of Human Rights in *Butt v. Norway* (Application no. 47017/09, ECHR, 4th December, 2013) and that of the Supreme Court in P.O. v. Minister for Justice and Equality [2015] IESC 64, [2015] 3 I.R. 164 the trial judge proceeds to explain how, in his view, when deciding whether to grant a stay or an injunction restraining deportation, the court should, in general, identify children with the wrongdoing of their parents for their failure to comply with such an order, or to, as in the present case, report to the GNIB. He concluded that the decision of the Supreme Court in *P.O.* and that of the European Court of Human Rights in *Butt* were authority to support his conclusion that it was not unjust to generally identify children with their parent's misconduct when considering, in the context of an application for an injunction or a stay on deportation, whether the balance of justice favoured the child applicant remaining in the State. In so deciding, he considered himself free to depart from the decision of this Court *in Chigaru*.

15. In circumstances where I am not satisfied that the aforementioned decisions are authority for the proposition in respect of which they are cited, and the fact that unless displaced by a judgment of the Supreme Court, I believe it would be inappropriate to depart

from the view of Hogan J. in *Chigaru* with which I agreed and it is necessary, in my view, to consider in some greater detail the aforementioned decisions.

16. In *Chigaru* the first and second named applicants were nationals of Malawi and were the father and mother of the third and fourth named applicants. The third named applicant was born in Malawi in 2007 and came to Ireland with her mother in 2008. The fourth named applicant was born in Ireland in July 2008. The applicants' asylum applications were rejected by the Refugee Appeals Tribunal in November 2009. Thereafter, deportation orders were made under s. 3 of the Immigration Act 1999 in respect of all four applicants in August 2011. They then unsuccessfully applied for subsidiary protection after which they sought leave of the High Court to challenge the validity of the deportation orders and the orders refusing subsidiary protection. Those applications were dismissed by the High Court (Cooke J.) in a decision dated the 19th April, 2012.

17. By notice of appeal dated the 9th May, 2012, the applicants then appealed the aforementioned High Court decision to the Supreme Court. That appeal was subsequently transferred to this Court pursuant to Article 64 of the Constitution by order of the Chief Justice dated the 29th October, 2014. While that appeal was pending and as a result of correspondence which emanated from the applicants' solicitors, the respondents became aware of the whereabouts of the applicants with the result that the Minister sought to give effect to the earlier deportation orders. It was in such circumstances that an application was made to this Court for an interlocutory injunction restraining their deportation pending the outcome of the appeal. At the time of that application, the third and fourth named applicants were, respectively, seven and eight years of age.

18. Whilst it is true, as was stated by Hogan J. in the course of his judgment, that the applicants managed to stay in the country through "subterfuge", it was common case that their appeal had been pending since early 2012 and was still awaiting a hearing date when the injunction application was heard by this Court. During all of those years, the applicants had carried on a normal family life in Ireland and their children were both enrolled and fully participating in primary education. Their presence in Ireland was not in any true sense covert, unlike the position of the applicants in the present proceedings. It is to be noted that Clarke J. in the course of the appeal from the decision of this Court in *Chigaru (Charles v. Minister for Justice Equality and Law Reform* [2016] IESC 48) observed that the family had likely remained in communication with other State agencies for the purposes of PRSI and Social Welfare. Their solicitors had remained in communication with the respondents concerning their long awaited appeal which, somewhat akin to what had occurred in *Okunade*, had been hopelessly delayed without fault on their part. That is not to ignore the fact that there were valid orders in being concerning their deportation and they had not reported as required to the GNIB.

19. Hogan J. in the course of his judgment in *Chigaru* first considered whether the applicants had made out an arguable case as per the guidance provided by *Okunade*. He compared the facts of the case before him to those in *M.M. v. Minister for Justice* [2012] E.C.R. I-000 (Case C-277/11) where the Minister, in rejecting an application for subsidiary protection, had relied to a large extent on adverse credibility findings contained in the earlier asylum decision made by the Refugee Appeals Tribunal. In *M.M.*, the Court of Justice had been asked to rule upon a question referred by Hogan J. sitting as the High Court judge and later on a second question referred by the Supreme Court when hearing the Minister's appeal from Hogan J.'s decision.

20. The Court of Justice ruled that where a Member State had chosen to establish two separate procedures, one following upon the other, for the purposes of examining asylum applications and applications for subsidiary protection, it was important that the applicant's right to be heard was fully guaranteed by both procedures. It was, it stated, for the national court to ensure the observance in each of those procedures of the applicant's fundamental rights, and more particularly, their right to be heard, in the sense that they had to be afforded the opportunity to make known their views before the adoption of any decision to refuse the protection requested. Based upon that ruling, Hogan J. in *M.M. v. Minister for Justice and Law Reform (No. 3)* [2013] IEHC 9, [2013] 1 I.R. 147 quashed the decision to refuse subsidiary protection on the basis that the Minister had relied upon adverse credibility findings contained in the earlier asylum application with the result that the applicants' right to be heard had not been protected.

21. In *Chigaru*, relying on the last mentioned decision, Hogan J. concluded that on the facts before him there was much to suggest that the subsidiary protection decisions which were under challenge had relied heavily on the credibility analysis that had been conducted at the earlier asylum application and that such credibility findings had infected the subsidiary protection decision itself. Indeed, he went so far as to set out in his judgment the facts upon which he relied to support such likely infectivity. It was for these reasons that he concluded, for the purposes of the injunction application, that the applicants had established a fair case to be tried.

22. Having so concluded, Hogan J. then turned to consider what he referred to as the "balance of convenience" which the High Court judge quite correctly, in my view, observed should have been termed the "balance of justice". Nothing at all turns upon the conflation of these terms as it is clear that what Hogan J. was assessing was where the balance of justice was to be found in the context of the interlocutory application under consideration. In this regard, Hogan J. once again referred to the decision of Clarke J. in *Okunade* and in particular to that section of his judgment where he stated:-

> "[119] However, 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.
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> [120] On the facts of this case, I have come to the view that the trial judge was wrong in failing to afford sufficient weight to that factor and was, therefore, wrong in failing to grant an injunction restraining deportation until the hearing of the application for leave."

23. In considering where the balance of justice was to be found, Hogan J. relied strongly upon the fact that the third and fourth named applicants, being the children of the first and second named applicants, had been the innocent victims of their parents' wrongdoing, which consisted of their deliberate failure to comply with their reporting obligations with the Garda National Immigration Bureau (GNIB). He was satisfied that it would be entirely unjust to visit the children with the consequences of such wrongdoing. Further, having regard to their age, the fact that they knew nothing of any country other than Ireland and were well established in their school and community, Hogan J. concluded that the balance of convenience favoured granting them a stay on their deportation pending the hearing of their appeal. At para. 37 of his judgment concerning the children, he said as follows:–

> "They have lived all (or, in the case of the daughter, effectively all) of their lives in this State. The deportation of these children to Malawi would be massively disruptive for them, as it would have huge implications for their schooling, friendships and family structures. In the light of the Supreme Court's decision in *Okunade* this is a factor which weighs heavily when determining where the balance of convenience lies."

24. Hogan J. went on to conclude that granting the children the injunction to which they were entitled was of little use to them if they were not to have the care and company of their parents, which he described as a core constitutional value inherent in Articles 41, 42 and 42A of the Constitution. Whilst not specifically so stated, it is to be inferred from his judgment that he recognised that the children would have to leave the jurisdiction to remain with their parents if the injunction sought was not granted. As for the parents' rights to an injunction, he concluded that viewed in isolation their applications had little to commend them. However, given that the children had a compelling interest in having their parents look after them, it followed that it was necessary to grant an interlocutory injunction restraining their deportation as otherwise, the children's constitutional rights to the care and company of their parents would be compromised.

***Chigaru* in the Context of the Within Proceedings**

25. It is clear from the judgment of Humphreys J. in the present proceedings that he rejected the submission made by counsel for the applicants that the decision in *Chigaru* had, in some way simplified the test for an injunction restraining deportation, as set out in Okunade. In doing so, he observed that only the Supreme Court could modify the law as laid down in that decision. Further, concerning the decision in *Chigaru* at para. 4 of his judgment, he noted that the Court of Appeal had not purported to interfere with the test as advised in *Okunade* and indeed had expressly stated that it was applying *Okunade* to the facts of that case.

26. However, Humphreys J. expressed concern that Hogan J. had inadvertently overlooked the decision of the European Court of Human Rights in *Butt v. Norway* (Application No. 47017/09, ECHR, 4th December, 2012) which he considered crucial to the issues under consideration in *Chigaru* and, I infer from his judgment that he was of the opinion that had it been considered, the injunction might or ought not to have been granted. It is accordingly necessary to consider briefly the decision in *Butt*.

27. The essential facts of *Butt* are as follows. The applicants were brother and sister born in Pakistan in 1985 and 1986, respectively. They first arrived in Norway with their mother in 1989 and were granted residence permits and then in 1995, settlement permits. An investigation by the Norwegian authorities revealed that they had been living in Pakistan for much of the period between 1992 and 1996. This resulted in a decision in 1999 to withdraw their settlement permits on the basis that they had provided false information. The children were apprehended in 2001 with a view to deporting them. However, not wishing to deport them unaccompanied, the authorities allowed the children to remain in Norway as they were unable to locate the mother until 2005 when she was deported to Pakistan where she died in 2007. The children lived with an aunt and uncle in Oslo during this time. The brother was convicted of aggravated assault and a number of other offences which led to a decision to expel him indefinitely in 2005. A lengthy court process ensued with several appeals culminating in 2008 where the Bogarting High Court found against the applicants, upholding the decisions to deport them on the basis that they could not rely upon the family life protections provided for in Article 8 of the ECHR in circumstances where that family life had been established while one or more of them did not have permission to remain in Norway.

28. The European Court of Human Rights, when it came to consider the decision made by the Norwegian Court, held that the applicants had established substantial family and private life links with Norway and that to remove them would be a breach of their rights under Article 8 of the ECHR. It concluded that the Norwegian authorities had not acted within the permitted margin of appreciation when they had sought to strike a fair balance between the public interest in ensuring efficient immigration control and the applicants' interests in remaining in Norway in order to pursue their private and family life.

29. What is important in the context of both the decision of the High Court in these proceedings and that of this Court in Chigaru is the fact that in *Butt*, the European Court of Human Rights did not fault Norway's strong immigration policy considerations which militated in favour of identifying children with the conduct of their parents, stating that to do otherwise might encourage parents to exploit the situation of their children in order to secure a residence permit for themselves.

30. Humphreys J. was clearly correct as a matter of law when he stated that the ECtHR in Butt had accepted Norway's argument that a child should generally be identified with the conduct of its parents and that when considering the fair balance to be struck between the public interest and the family rights of the individual, an important factor was whether the family life relied upon had been established at a time when the immigration status of one of them was precarious.

31. All that said, it is important when it comes to considering the import of the decision in *Butt* to reflect upon the specific circumstances in which it was made. First, the decision was made by the European Court of Human Rights in the context of the *substantive* proceedings in which the Bogarting High Court had considered the right of the applicants to reside in Norway on a *permanent basis* based upon the family life which they had enjoyed there over the relevant period. Thus, the statements of principle espoused in that judgment must be seen in that context. The court was not engaged upon a consideration of Article 8 family life protections in the context of an application for a stay on deportation pending the determination of an appeal within its international protection process and which was considered to have a reasonable prospect of success, as was the case in *Chigaru*. Indeed, it is perhaps relevant to note that the Immigration Appeals Board in *Butt* had decided to stay the implementation of the applicants' deportation to Pakistan until the conclusion of their substantive proceedings.

32. It is also clear that in *Butt*, the decision of the Norwegian court under review was one which had been made absent any regard for the considerations set out in *Okunade* and which bind this court when dealing with an application for an injunction or a stay on a deportation order. The decision of the Court in this jurisdiction in such circumstances must be made so as minimise the risk of injustice, and in making its evaluation, the court must attach all due weight to the undesirability of disrupting family life involving children in circumstances where, at the conclusion of the proceedings or some other process, the children concerned might be allowed to remain in or return to the State.

33. I find it difficult to see how a court, if satisfied that children who had applied for an injunction or a stay on their deportation might be allowed to remain in Ireland following the hearing of their appeal and a renewed application for subsidiary protection, could identify those children with the wrongdoing of their parents in their failure to comply with deportation orders whilst meeting its obligations, first, to attach all due weight to the undesirability of disrupting family life involving children, and second, to act so as to minimise the risk of injustice. By identifying children at that stage of the legal process with the wrongdoing of their parents, the court would likely be drawn into refusing the stay or injunction sought, which order would have the effect of bringing about a fatal disruption of family life as it was known at that time. I should say that when I refer to misconduct in this context, I confine my observations to misconduct of the type under discussion in *Chigaru* where the parents had failed to report to the GNIB, rather than misconduct of a criminal nature which poses a risk to the public at large and which might warrant identifying the children with their parents' misconduct in the public interest.

34. I consider it relevant that in *Okunade*, when dealing with the disruption of family life, what Clarke J. concentrates on is the effect that a successful conclusion to the proceedings or some other process would likely have on the children when it comes to their entitlement to remain in or return to Ireland. In this regard, I assume his reference to "some other process" was intended to capture an application for subsidiary protection given that it is such a crucial part of the international protection process. Thus, it appears to

me that Clarke J. invites the court to weigh in its consideration the children's rights not to be disrupted in their family life separate from any consideration of the rights of their parents. If the court were to align children with their parents' misconduct as a matter of general principle when assessing where the balance of justice lies, there would seem to be little point in emphasising and identifying this specific category of applicant, **i.e.**, the child who might ultimately establish a right to remain in or return to Ireland, and more particularly, their right not to have their family life unnecessarily disrupted at that point in the legal process. In this regard, it is relevant to note that the threshold at which this consideration is relevant would appear to be relatively low. It is said to apply when a child can demonstrate that they "*might*" be entitled to remain in Ireland. Further when it comes to a consideration of that issue, the applicant does not have to establish that this entitlement will necessarily be established within the proceedings then pending before the court but might arise as a result of some "*other process*" (emphasis added).

35. I have no difficulty with the proposition that in certain circumstances it may be appropriate or, indeed, necessary for a State, subject to its treaty obligations, to seek to control the entry of aliens into its territory and their residence there and to identify children with the conduct of their parents for such purpose. If a State were to do otherwise, parents might exploit the situation of their children in order to secure a residence permit for themselves. However, I consider any such principle is of limited application or significance on an application for a stay or injunction made by members of a family seeking to restrain deportation pending an awaited substantive determination within the immigration litigation process, and where the children within that family can demonstrate that at the end of the asylum or immigration process they might be permitted to remain in or return to the State. I say that recognising that every case must turn on its own specific facts as was made clear by Clarke J. in *Okunade* and that there can be no absolute rule for all cases.

36. It is also relevant to reflect upon the fact that when applicants who are members of the same family apply for a stay or an injunction to restrain their deportation, in many instances they will have been in breach of a deportation order at the time of their application. It follows that the disruption of family life upon which they might seek to rely for the purposes of that application will have been established, at least in part, at a time when their immigration status was precarious. I use the word "precarious" in the sense in which it was used in *Butt* to identify a period during which the applicants were in the jurisdiction when there was in force a legally binding measure requiring their deportation. However, that fact notwithstanding, the court in *Okunade* has made clear that in reaching its decision "all due weight" should be paid to the undesirability of disrupting family life involving children where there is a prospect that after their appeal or some other process they might be allowed to remain in Ireland. It was that direction that was followed by Hogan J. in *Chigaru* when, regardless of the fact that the parents had not complied with the deportation order made against them, he was not prepared to visit such wrongdoing on their children and thereby deny them the injunction to which he felt they would otherwise be entitled.

37. If the court on an application for a stay or interlocutory injunction, as opposed to on the hearing of any substantive proceeding within the immigration process, was to proceed on the basis of the principles as they emerge from the decision made on the hearing of the substantive rights of the parties in *Butt*, it seems to me that it would have to ignore the guidance prescribed in *Okunade*. Thus, for my part, I find it difficult to align the decision in *Okunade* with the principle that children in general should be visited with their parents' wrongdoing at an interlocutory stage of the asylum process if they fall into the category of applicants which the court is satisfied might be permitted to remain in Ireland after the end of the process particularly in light of the stated requirement that the court should pay all due weight to the undesirability of disrupting family life.

38. That different considerations arise for a court depending upon whether it is dealing with an interlocutory application or a substantive hearing is emphasised by Clarke J. at paras. 111 to 114 of his judgment in Okunade. There, he refers to the fact that if applicants can demonstrate that deportation, even on a temporary basis, would cause more than one might describe as ordinary disruption, that fact could tilt the balance in their favour. He further indicates that material to the court's consideration as to what is to happen to the family on a temporary basis pending trial or a leave application is the disruption to family life which has been established in Ireland for a significant period. In this regard, it is noteworthy that Clarke J. gives no specific direction as to whether, in that context, it is material to the balance of justice as to whether the applicants, during that period, may have been living in precarious circumstances by reason of being in breach of deportation orders. It is, however, to be inferred from his judgment that in certain circumstances the court would not weigh in the balance against applicants for an injunction restraining deportation the fact that they had been guilty of living in this jurisdiction in breach of a deportation order whilst their proceedings seeking to challenge such an order had been delayed, not through any fault on their part, but by reason of the complexity of the legal process itself, as was the case in *Chigaru*.

39. Finally, as to the different considerations that arise for a court depending upon whether it is dealing with an interlocutory application or a substantive hearing, the following brief extract from the judgment of Clarke J. in *Okunade*, where he considers the undesirability of disrupting family life involving children in circumstances where they might, following the hearing of their proceedings or some other process, be allowed remain in or return to Ireland, is of particular relevance:-

> "[114] In that context, it is important to emphasise the distinction between, on the one hand, the considerations which are appropriate for a court considering whether to grant a stay or an interlocutory injunction, and on the other hand, the considerations which apply in determining the substantive rights of the parties".

40. I also have considerable reservation about the advisability of taking a principle such as that which emerges from the decision of the ECtHR in *Butt* and treating it as the standard by which family life protections are to be measured or protected in this jurisdiction. While Article 8 ECHR is clearly engaged in proceedings of the nature under consideration here, it has to be remembered that the ECHR does no more than set down minimum standards which must not be breached by a Contracting State. That Norway as a State deciding to control the entry of aliens into its territory and their right to reside there by applying the most restrictive policy was consistent with its Article 8 treaty obligations does not mean that this is the standard of family rights and protections that ought to be applied by the courts of this country, particularly on an application for a stay or injunction restraining deportation, where the applicants can demonstrate that at the end of the legal process they may well be entitled to remain in Ireland.

41. Even in the context of decisions concerning the substantive rights of parties, it must be remembered that the decision in *Butt* was made in the context of a regime where the constitutional considerations which would require this Court's consideration are unknown. The fact that the ECtHR has not sought to interfere with the manner in which Norway has chosen to operate its immigration policy when it comes to identifying children with the conduct of their parents, does not mean that the Irish courts should ignore the fundamental values associated with family life which are protected by Article 41 of the Constitution and that they should not strive to ensure that the Convention is not used to reduce the level of protection of those rights. After all, the institution of marriage is stated to enjoy "imprescriptible rights, antecedent and superior to all positive law". Even where applicants are non nationals, the Irish State promises to recognise their family rights and to protect them given that these rights derive not from citizenship but from their nature as human beings.

42. In my view it is also quite wrong, as a matter of principle, to treat judgments of the European Court of Human Rights as if they automatically enjoy superior binding status in the legal hierarchy, akin to those of the Supreme Court or the Court of Justice. The judgments of the Court of Justice enjoy that status by virtue of the specific provisions of the Treaty on the Functioning of the European Union and, most especially, by reason of the consequence of Article 29.4.6 of the Constitution. It is true that the European Convention of Human Rights Act 2003 ("the 2003 Act") gives particular effect "subject to the Constitution" to the Convention within our legal system, but even then, the incorporation of the Convention is subject to important qualifications.

43. The Supreme Court has made it quite clear that the Convention does not have direct effect in Irish domestic law: see, *e.g.*, *McD v. L.* [2009] IESC 81, [2010] 2 I.R. 199, *MD v. Ireland* [2012] IESC 10, [2012] 1 I.R. 167. Section 4 of the 2003 Act requires the courts to take "due account of the principles laid down by these….judgments" of the European Court of Human Rights. It does not state that these judgments *automatically* bind domestic courts.

44. In reaching my conclusions I have taken into account the decision in *Butt*, namely that the ECtHR considered that the specific approach of the Norwegian State, in terms of its law and practice in relation to applications for permanent residence, was not a violation of the minimum standards prescribed by Article 8 ECHR. But this does not mean that an Irish court, bound as it is by considerations based on both *Okunade* on the one hand and Article 41 of the Constitution on the other, must abandon that jurisprudence simply by reason of the decision of the ECtHR in *Butt*.

45. It is, perhaps, unfortunate that when the Supreme Court came to consider the decision in *Chigaru* (under the title *Charles v. Minister for Justice and Equality* [2016] IESC 48), that because of the limited nature of the appeal, the court was not called upon to consider whether the approach adopted by Hogan J. was correct as a matter of law in this jurisdiction having regard to the provisions of the Constitution and the decision in *Butt v. Norway*. That being so, regardless of the views expressed by Humphreys J. in the High Court in the present proceedings, I would not be prepared to depart in any respect from the views expressed by Hogan J. in *Chigaru* with which I agreed.

46. Neither would I be prepared to resile from the judgment in *Chigaru* based upon the judgments of MacMenamin and Charleton JJ. in *P.O. v. Minister for Justice and Equality* [2015] IESC 64 which were delivered after this Court had heard the appeal in *Chigaru* but before it delivered judgement. I say this because I am not satisfied that the decisions are in any respect inconsistent with *Chigaru*. Neither do I consider them authority for the proposition that in general children should be associated with the wrongdoing of their parents for the purposes of considering their entitlement to an injunction or a stay on deportation.

47. The facts in *P.O.* to which I will now refer were admittedly removed from those in *Chigaru*, but they are nonetheless not too dissimilar from those which arise for consideration in these proceedings. The applicants, a mother and son, had sought an order quashing the respondent's refusal to revoke a deportation order made against them. They also sought an injunction restraining their deportation pending their appeal to the Supreme Court in circumstances where there was in existence a valid and unchallenged deportation order similar to the instant case. The mother arrived in Ireland in September 2006. Her son was born here the following month and was eight years of age at the time of the High Court hearing. Her husband and his family remained in Nigeria, albeit that they were not estranged or divorced. Any family reunification could only happen in Nigeria. The mother's siblings and parents were all living in Nigeria.

48. The applicants' application to the Refugee Applications Commissioner for a recommendation that they be granted refugee status was refused. They did not appeal to the Refugee Appeals Tribunal. The applicants commenced judicial review proceedings which three years later they discontinued at which stage they were in Ireland illegally. They then received what is commonly referred to as the "three options letter". As a result of alleged inadvertence, no application was made for subsidiary protection or leave to remain. On 17th May, 2012, the applicants received a letter from the Minister indicating that he had decided to deport them and advising that they were required to leave by the 3rd June, 2012. The Minister is, of course, entitled to revoke such an order under s. 3(11) of the 1999 Act and the applicants availed of the option to request same. However, their application was rejected and the deportation order was affirmed on the 25th February, 2013.

49. Judicial review proceedings were commenced in April 2013. In March 2014, McDermott J. in the High Court refused an order of judicial review quashing the respondent's refusal to revoke the deportation order made by the Minister. On lodging a notice of appeal, the appellants applied for an injunction restraining deportation pending the determination of the appeal. As a result of complexities that do not need to be recorded here the Supreme Court only ended up hearing the applicants' application for an injunction restraining their deportation at the time it came to hear the substantive appeal and to that extent the court's decision on the injunction application at that stage was technically moot. However, material to the present proceedings is the fact that for the purposes of the injunction application, the appellants relied upon the effect that refusing the injunction would have on them in terms of the disruption to family life.

50. In the course of deciding the substantive appeal, MacMenamin J. concluded that the appellants had no legal entitlement to remain in the State after 2010. Consequently, Article 8(2) ECHR considerations of national security and public safety weighed in favour of their exclusion. He laid emphasis on the fact that the first named appellant must have been aware that her immigration status was precarious since 2010 that being the point at which the initial judicial review proceedings had been withdrawn leaving in place the un-appealed decision of the Refugee Applications Commissioner. Further, the deportation order on its face was valid and had not been challenged. It was in these circumstances that MacMenamin J. observed that an injunction could only be granted in exceptional circumstances, a statement of law clearly relevant to the facts in the instant case but not relevant on the facts in *Chigaru*.

51. It is also important to state that the decision of MacMenamin J. does not concern itself with family life considerations and the extent to which a child should be associated with their parents' wrongdoing for the purpose of considering an application for an injunction restraining deportation pending an appeal. His sole consideration of the decision in *Butt v. Norway* was in the context of the substantive appeal and the appellants' legal entitlement to remain in the State after the year 2010 following the discontinuance of their judicial review proceedings.

52. Charleton J., in the course of a lengthy judgment also considered, as the court had been requested so to do, the merits of the appellant's application for an injunction to restrain deportation pending the outcome of the appeal. However, it is relevant to note that the only context in which Charleton J. considered the general principle that children should be identified with the wrongdoing of their parents as stated in *Butt* was in the context of his consideration as to whether the appellants had established an arguable ground of appeal. In this regard, at para. 32 of his judgment, Charleton J. refers to the fact that it was the appellants' contention on the substantive appeal that the official of the Minister, when deciding on their application under s. 3(11) of the Act of 1999, had ignored their rights under Article 8 of the Convention to private and family life. It was in this context that he referred to the fact that the appellants' situation in this country had always been precarious as a result of choices made by the first named appellant which included the discontinuance of the judicial review proceedings seeking to challenge the determination of the Refugee Appeals Tribunal,

the fact that she had not applied for subsidiary protection or sought leave to remain in the State under s. 3 of the Act of 1999. He refers, to the fact that if children were not to be associated in general with the wrongdoing of their parents, they might exploit their children in order to secure a residence permit. However, his reference to the right to a residence permit makes clear that the conduct he is considering at this point in his judgment is material only in the context of the substantial rights contended for by the appellants. What follows is, in my mind, the only other material reference made by Charleton J. to the decision in *Butt v. Norway*:-

> "35. . . The choices made on behalf of the first named applicant/appellant by his mother and next friend, and the second named applicant/appellant were a choice exercised on behalf of them both. In *Butt v Norway* (No. 47017/09), judgment of March 4th, 2013, of the European Court of Human Rights reiterated that a State party to the Convention is entitled to control the entry of non-citizens into its territory and their residence there, and accepted that immigration policy considerations would be undermined unless children were generally identified with the conduct of their parents."

53. Having concluded that no arguable case sufficient for the grant of an interlocutory injunction had been made out, there was no need to consider the matter further. It should nonetheless be stated that in the course of his judgment, Charleton J. contrasted the facts in *P.O.* with those in *Okunade* and reaffirmed that the significant disruption of family life was a countervailing factor which could tip the balance in favour of granting a stay or injunction restraining deportation. However, on the facts under consideration the disruption to family life would, he was satisfied, be made up for by the prospect of the re-establishment of family life in Nigeria if the injunction were refused. Accordingly, I cannot read *P.O.* as authority for the proposition that *Chigaru* was possibly wrongly decided.

54. What emerges from the decision in *P.O.* is that whilst MacMenamin and Charleton JJ. both make reference to the decision in *Butt v. Norway*, neither do so in the context of an application for a stay or injunction restraining deportation. They do so only in the context of the substantive rights of the parties. Further, both judgments approve of the test advised in *Okunade* which emphasises the obligation of the court to make its decision with a view to causing the least possible disruption to family life if it is of the belief that at the end of the legal proceedings or other process, the child or children concerned may establish an entitlement to remain in or return to Ireland.

55. It is for the aforementioned reasons that I have come to the conclusion that the principle that children ought in general to be identified with the wrongdoing of their parents, certainly insofar as that wrongdoing relates to their failure to comply with a deportation order, is not a principle that should in general weigh against them in the court's assessment of where the balance of justice lies when considering their application for a stay or injunction restraining their deportation once satisfied that they may ultimately establish an entitlement to remain in Ireland, and that the disruption to their family life, having regard to the period of time they have spent in Ireland would warrant such an approach.

56. For my part, I consider the principle which emerges from *Butt v. Norway* to be one which is of relevance principally, if not solely to the decision of the court concerning the substantive rights of the parties to remain in the State, even if it be the case that at that stage the principle may of necessity have to give way to the values guaranteed to the family in Article 41 of the Constitution. It is for these reasons that I cannot fully agree with the judgment of Humphreys J. from which I infer he considers the decision in P.O. supportive of the general proposition that for all purposes, including an application for a stay or injunction restraining deportation, children should be identified with the wrongdoing of their parents.

57. Further, for the reasons already referred to, I also cannot agree with Humphreys J. that it is not unjust generally to identify children with their parents' misconduct, and in particular, their evasion of immigration measures when it comes to a consideration of the balance of justice on an application for a stay or injunction to prevent deportation. It seems to me that *Okunade* requires that the merits of the children's likely success in their substantive claim be considered separately from that of their parents, and that they are to be afforded special protection from the disruption of their family life if it be the case that at the conclusion of the proceedings or some other process they might be entitled to remain in Ireland. It is to be remembered that the court, on the hearing of an application for a stay or injunction restraining deportation, is mandated to make its decision so as to avoid the greatest risk of injustice. I venture to suggest that a serious injustice would be perpetrated if, in circumstances such as presented in *Chigaru*, the Court had refused the injunction sought and the applicants succeeded both on their appeal and their subsequent application for subsidiary protection only to have been deported in the meantime to a country which the Minister ultimately concluded would expose them to a real risk of serious harm and from which they could not then return. However, any such concerns are now principally of historic interest by reason of the fact that pursuant to the European Union (Subsidiary Protection) (Amendment) Regulations 2015 (S.I. No 137 of 2015) an applicant for subsidiary protection now has a right to remain in the State until such time as their application has been determined and to this end are granted a temporary residence certificate. I should say that I assume that a court would consider that an application for subsidiary protection had not been determined if the validity of any such decision remained under challenge in judicial review proceedings.

58. For the purposes of considering what order would likely minimise the risk of injustice on an application for a stay to restrain deportation, I think there is little basis for drawing any real distinction between those applicants who are within the asylum process and those within the immigration process when it comes to considering the disruption to the children and family life should the application be refused. Clarke J. does not make such a distinction. To the contrary, when he refers to the possibility that the children might be entitled to remain in or return to Ireland he refers to that right arising either as a result of the proceedings or "any other process". Where the distinction should in my view be drawn is where an applicant, as was the case in the present proceedings and in P.O., does not challenge the validity of a deportation order, and either makes no application for subsidiary protection or fails to challenge the refusal of such protection.

59. Neither do I agree with the statement made by Humphreys J. in the course of his judgment that the decision in *Chigaru* is to be read as condemning as unjust the strong immigration policy considerations of the Norwegian State which were considered permissible by the European Court of Human Rights in *Butt*. Hogan J. takes the view in *Chigaru* that *Okunade* affords children greater protection in respect of their family rights when it comes to a consideration of the balance of justice on an application to stay deportation pending appeal even if it is implicit in his reasoning that this standard is higher than those standards set by the Norwegian State which happened to meet the minimum standard required by the Convention. Neither do I accept as valid Humphreys J.'s overall criticism of the judgment in *Chigaru*. It is to be inferred from the judgment of Hogan J., even though it is not expressly so stated, that he was satisfied that the applicants might ultimately succeed on their application for subsidiary protection lawfully considered and for that reason the minor applicants fell into the category of claimant intended to be protected from the disruption of family life unless same could not be avoided.

60. The only method of ensuring that the children in *Chigaru* could benefit from the protection specifically provided for them by the decision in *Okunade* was for Hogan J. to consider their entitlement to an injunction separately from that of their parents and then to grant the parents an injunction so as to ensure the children would benefit from the injunction to which they were lawfully entitled. He was, I am satisfied, fully entitled to rely upon the children's rights to the care and company of their parents for this purpose, absent

which their entitlement to an injunction and the special consideration and protection to which they were entitled under *Okunade* would be negated.

61. The only other matter of some significance which emerges from the decision in *P.O.* in the context of the within appeal, and to which I have earlier made a brief reference, is the emphasis placed by Charleton J. on the fact that the deportation order had not been challenged and the challenge to the decision not to revoke the deportation order under s. 3(11) of the Act of 1999 had been dismissed by the High Court. Therefore, on the injunction application, the observations of McCracken J. in *L.C. v. Minister for Justice, Equality and Law Reform* [2007] 2 I.R. 133 at p. 155 applied:-

> "In this case the "decision being appealed from" is a decision of the respondent made under s. 3(11) not to revoke a deportation order against the applicant. There is no appeal and can be no appeal from the decision of the High Court Judge refusing relief in relation to the deportation order itself. It has been held by the High Court that the deportation order is valid, and that finding cannot be challenged before this court. If the court were to grant an injunction such as is being sought by the applicant, the effect would be to thwart the operation of the perfectly valid deportation order and would, at least to some degree, prevent the operation of a perfectly valid and un-appealable High Court order.
>
> There might indeed be circumstances, although it is hard to envisage them, where the Supreme Court might exercise its inherent jurisdiction to grant an injunction which could have this effect, for example it might conceivably be exercised when a previously unknown fact comes to light, being a fact which was unknown at the time of making of the deportation order, and which is one of such gravity as might stay implementation of the deportation order. No such case has been made out before us."

62. Given that there had been no challenge to the deportation order or to the refusal of the application made for subsidiary protection in *P.O.*, Charleton J. concluded that an injunction to restrain a deportation order could only be granted in exceptional circumstances. This precise point was made by Humphreys J. at para. 41 of his judgment in the present proceedings. However, an application for an injunction or stay on a deportation order in cases where there is a challenge to the deportation order or a challenge to a refusal of an application for subsidiary protection does not require the applicant to establish "exceptional circumstances". I am satisfied that such applications are to be determined solely by reference to the principles outlined by Clarke J. in *Okunade.*

Application of the principles to the facts of the present case

63. Returning to a consideration of whether this Court, if it had been dealing only with the application for an injunction in advance of the hearing of the substantive appeal, would have been obliged to resolve that application in favour of the applicants, for my part, I am fully satisfied that it would not.

64. Strongly militating against the applicants would have been the fact that they fall within the category of applicant that must establish "exceptional circumstances" to obtain an injunction or stay restraining their deportation, as was correctly stated by Humphreys J. in that part of his judgment where he refers to the decision of McCracken J. *in L.C. v. Minister for Justice, Equality and Law Reform*. The applicants did not challenge the validity of the deportation orders or the refusal of the Minister to grant them subsidiary protection. Accordingly, even if successful on their appeal, the orders for their deportation would remain valid with the best they could hope for being a more sympathetic consideration by the Minister that he might revoke the deportation orders. This is a critical distinction from the facts presented in *Chigaru* where the applicants had advanced significant grounds of challenge to the validity of the subsidiary protection decision based on the judgment of the Court of Justice in *MM*.

65. Having considered the circumstances of the applicants as outlined in the affidavit of the first named applicant dated the 13th December, 2016, I cannot identify any exceptional circumstances such as would meet the requirement identified in L.C. Whilst not wishing in any way to minimise the very significant consequences for mother and child if returned to Nigeria, the matters to which she refers are not exceptional in the context of what is to be expected as a result of deportation. She refers, *inter alia*, to the disruption that deportation would have on their present lives and to the fact that the education system in Nigeria will afford her daughter less educational opportunities than she would have if permitted to remain in Ireland. She also claims that, if returned to Nigeria, her daughter will be exposed to a range of risks, including sexual molestation, oppression, child abuse, child mutilation and ill health, which would be avoided if permitted to stay in this country. Whilst sympathetic to these asserted risks, which, if true, would clearly cause great worry to any parent facing a return to Nigeria, these are concerns which are not specific to these applicants. These risks cannot be avoided unless the Minister were to take the view that all deportations to Nigeria should cease even in respect of persons who failed to establish asylum status or an entitlement to subsidiary protection. Any such decision would, of course, be for the executive.

66. However, even if the applicants were in a position to demonstrate the existence of exceptional circumstances and their application for an injunction to restrain their deportation was to be decided on *Okunade* principles, I am satisfied that the application would have to fail.

67. It is accepted that the appellants would have been in a position to demonstrate arguable grounds of appeal, as they had been granted leave to appeal the decision of the High Court, albeit confined to two legal issues. That being so, the question for this Court as per the decision in *Okunade*, would have been whether the greatest risk of injustice favoured the granting or refusal of the injunction sought.

68. As was stated by Humphreys J. in his judgment refusing the relief sought, the court must give all appropriate weight to the orderly implementation of immigration measures which are *prima facie* valid. That being so, of significant importance in the context of the present proceedings is the fact that the orders concerned are in fact valid as opposed to only *prima facie* valid as they were never challenged by the applicants. For that reason they should, in my view, carry much greater weight in the court's assessment of where the balance of justice lies, than might otherwise be the case. Again, to repeat, their failure to challenge the validity of these decisions is in contrast to the position which obtained in *Chigaru*.

69. Also of importance is the fact that the applicants are not persons who, if their substantive proceedings were to prove successful, would be entitled as of right to remain in this jurisdiction. The deportation orders would remain valid. They would enjoy nothing more than the right to have the Minister reconsider his decision earlier made that they should be deported and it is difficult to see any reason why he would change his mind although that would be within his discretion.

70. Whilst it is perhaps to state the obvious, the applicants have failed at all stages of the protection process. They were refused asylum status and they failed in their applications for subsidiary protection and their failure to challenge these decisions in judicial review proceedings means that these decisions must be taken to be valid. Hence, it must be assumed that, unlike many other applicants whose applications for asylum or subsidiary protection are not at an end when they apply to restrain their deportation, the

applicants would not be at any real risk in terms of their personal safety if returned to Nigeria even if it be the case that they seek to have the Minister exercise his discretion to permit them remain in this country for humanitarian reasons.

71. In such circumstances, I am not satisfied that the second named applicant is necessarily entitled to the same protection from the potential disruption to her family life, as per *Okunade*, as would be the case if she was still engaged in the protection process at the time of the injunction application as was the case in *Chigaru*. Further, given that the first named applicant was not in a position to demonstrate any realistic basis upon which the Minister, if obliged to reconsider afresh the request that he revoke the deportation orders already made, might do so, the second named applicant cannot be said to be a child who at the end of the process might be permitted to remain in Ireland so as to avail of the special protection against the disruption to her family life that would otherwise apply.

72. A number of other somewhat lesser factors would also have to be weighed in the balance by the court on the injunction application. The first of these is that, consistent with Okunade, weight must be attached to the public interest in the orderly operation of the asylum process, a factor favouring the refusing of the injunction. Second, the High Court judge considered the applicants' prospect of success on their substantive appeal to be no better than modest, an assessment that I would have endorsed if considering the injunction application in advance of the substantive appeal.

73. Finally, the manner in which the first named applicant has dealt with her immigration status in this country would be material to the balance of justice in respect of her application insofar as it is material to the State's right to control its borders and its ability to implement an orderly immigration policy. Her delay in applying to the Minister to set aside the deportation orders made is in stark contrast to cases such as *Okunade* and *Chigaru* where the applicants were at all times engaged in the prescribed process in their efforts to secure their claimed right and entitlement to remain in this jurisdiction. The applicants in those cases had not been responsible for any delay in their efforts to regularise their status at the time they sought to enjoin their deportation pending their appeal. The same cannot be said of the applicants here. Their asylum applications were rejected in March 2009 as was their application for subsidiary protection on the 9th November 2009, after which deportation orders were made on the 18th November 2009. It was not until 2014, following a period of five years, that the applicants than applied to the Minister to revoke the deportation orders made. This is a fact which I consider would have to be weighed against the first named applicant's right to the relief sought.

74. For the aforementioned reasons, I am satisfied that the balance of justice would have favoured refusing the injunction sought, notwithstanding the outstanding substantive appeal.

Conclusion on the injunction appeal
70. The principles to be applied on an application for an injunction or a stay to restrain deportation are as set out by Clarke J. in his judgment in *Okunade*. However, as he makes clear, every application must be assessed on its own specific facts.

72. For the reasons discussed in some detail earlier in this judgment, I am satisfied that the trial judge was incorrect as a matter of law when he concluded that *Chigaru* was incorrectly decided by this court. I am also satisfied that the decisions in *Butt v. Norway* and *P.O.* are not good authority for the proposition that it is not unjust generally for the court to identify children with their parent's misconduct when, in the context of an application for an injunction or a stay on deportation, it comes to consider where the balance of justice lies. To do so would, in very many cases, have the effect of totally undermining the principle which emerges from *Okunade* that requires the court to assess whether the child applicant has established that they might at the end of the proceedings or some other process be allowed to remain in or return to Ireland and if so, to attach all due weight to the undesirability of disrupting family life while those proceedings or that process is not at an end. In other words, while it might be both reasonable and just to associate children with the wrongdoing of their parents for the purpose of reaching a decision on the substantive rights of the parties, and there may even be cases where, at an interlocutory stage, this would be appropriate in seeking to establish where the balance of justice is to be found, *generally* children should not be associated with the wrongdoing of their parents on an application for an injunction or stay on deportation.

73. Notwithstanding my conclusions set out in the last preceding paragraph, applying the *Okunade* principles to the facts of the present case, I am satisfied that the trial judge was correct as a matter of law when he declined the application for the injunction sought.