



**THE COURT OF APPEAL
CIVIL**

Neutral Citation Number: [2019] IECA 332

Record No. 2017/000470

**Whelan J.
McGovern J.
Baker J.**

BETWEEN/

S.T.E., A.A. AND Z.N.T. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND S.T.E.)

RESPONDENTS

- AND-

THE MINISTER FOR JUSTICE AND EQUALITY, ATTORNEY GENERAL AND IRELAND

APPELLANTS

JUDGMENT of Mr. Justice McGovern delivered on the 18th day of December 2019

1. This is an appeal from the Order of Humphreys J. made on 3 October 2016 following delivery of written judgment on 24 June 2016, [2016] IEHC 379, in which he granted an order of certiorari quashing the first named appellant's decision of 23 February 2015 refusing to revoke the deportation order made in respect of the first named respondent. The High Court judge also ordered that the first named respondent's application pursuant to s.3(11) of the Immigration Act 1999 ("the 1999 Act") be remitted to the first named appellant for fresh consideration and the court ordered that an injunction restraining the deportation of the first named respondent continue until such time as the application pursuant to s.3(11) of the 1999 Act is lawfully determined in accordance with the judgment of the High Court.
2. The High Court judge gave leave to appeal pursuant to s.5 of the Illegal Immigrants (Trafficking) Act 2000 ("the 2000 Act"), not on the basis of issues proposed by the appellants, but rather on a question formulated by the judge himself.
3. The question upon which the High Court judge granted a certificate contains within it an assumption that each of the respondents is "...in an equally precarious position..." despite the fact that this was a matter which was very much in issue in the High Court.
4. Section 5(1) of the 2000 Act provides: -

 "(1) A person shall not question the validity of-

 ...

 (c) a deportation order under section 3(1) of the Immigration Act 1999,

 ...

 otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts ..."

5. Section 5(6)(a) of the 2000 Act, as amended by s. 34 of the Employment Permits (Amendment) Act 2014, provides: -

“The determination of the High Court of an application for leave to apply for judicial review to which this section applies, or of an application for such judicial review, shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case except with the leave of the High Court which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.”

Extent of jurisdiction of Court of Appeal following grant of certificate

6. The court has to consider whether it has jurisdiction in respect of all matters raised by the appellants (insofar as they were matters before the High Court) or whether it is confined to hearing the appeal within the limits of the issue formulated by the High Court judge in his judgment delivered on 3 October 2016, [2016] IEHC 544, following the application for leave to appeal. In para. 16 of that judgment Humphreys J. stated: -

“For the foregoing reasons, I will order: -

- (i) that leave to appeal be given pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000, permitting the respondent to appeal to the Court of Appeal, on the basis of the following question of exceptional public importance such that it is desirable in the public interest that an appeal be brought to the Court of Appeal, namely whether, in deciding on an application made by one member of a family (including parents and a child exercising family life under article 8 of the ECHR) each of which is originally in an equally precarious position (having no entitlement to be in the State save such discretionary permission if any as the Minister might grant), the Minister is required to take a holistic view of the collective fate of the family, and in particular is required not to direct one member of such a family group to leave the State while permitting another member to stay without compelling justification;
- (ii)”

7. At the hearing of the appeal neither party argued in oral or written submissions that the court should not deal with all matters arising out of a notice of appeal insofar as they were before the High Court judge. In *Balc v. Minister for Justice and Equality* [2018] IECA 76 Peart J. stated at para 6: -

“Once a point of exceptional public importance is certified for appeal pursuant to [s. 5(6)(a) of the Illegal Immigrants (Trafficking) Act 2000, as amended] the appellant is not confined to arguing only that point, as he would be for example on an appeal certified under s. 50A(7) of the Planning and Development Act 2000, as amended. In that regard s. 50(11) of the 2000 Act specifically provides that such appeal is confined to the certified point of law - see *e.g. People (Attorney General) v. Giles* [1974] I.R. 422 at 436 per Walsh J. This explains how it has come about that a

number of grounds of appeal are relied upon in the present appeal in addition to the single ground certified by the trial judge.”

8. In *People (Attorney General) v. Giles* [1974] I.R. 422 the appellant was refused leave to appeal by the Court of Criminal Appeal but was granted a certificate by the Attorney General under s. 29 of the Courts of Justice Act 1924 allowing the appellant to appeal to the Supreme Court.
9. In his notice of appeal, the appellant entered four grounds of appeal other than the point of law certified by the Attorney General. At pp. 427 to 428 Walsh J. commented:

“...It is important to note that the wording of s. 29 of the Act of 1924 refers to ‘the determination by the Court of Criminal Appeal’ and ‘the decision’. It speaks of ‘the determination’ by the Court of Criminal Appeal being final and conclusive unless a certificate is given which states that an appeal should lie. The appeal lies against the decision of the Court of Criminal Appeal and there is nothing in the Statute which confines it to the point of law certified, if any. The decision ‘involves’ a point of law but, according to the Act, it is against ‘the decision’ that the appeal lies. The ‘point of law’ is not the decision. The decision is the order made in respect of the conviction and/or sentence, as the case may be. If the Statute had wished to restrict the right of appeal to a particular point of law it would have said so as, for example, was done in s. 57(5) of the Trade Marks Act 1963, which states:-

‘By leave of the Court, an appeal from a decision of the Court under this section shall lie to the Supreme Court on a specified question of law.’

Once an appeal is brought to this Court in respect of a decision of another court which appeal lies to this Court only by virtue of the provisions of a statute, **the appeal shall be brought and conducted in the same way as any other appeal to this Court, save where otherwise directed by statute or the rules of court.** There are no rules of court which seek to differentiate between appeals brought to this Court upon certificates granted under s. 29 of the Act of 1924 and other appeals.

In my experience it has always been the practice when an appeal was brought to this Court, or to its predecessor, pursuant to a certificate granted under s. 29 of the Act of 1924, to serve a notice of appeal and to set out the grounds of appeal and these were not confined to the point mentioned in the certificate. Furthermore, there have been many cases in which points other than the one appearing in the certificate were argued before and considered by the Court. Until the present case, I have never heard it suggested that the appeal had to be restricted to the point of law specified.” [Emphasis added]

10. At pp. 436 to 437 Walsh J. further stated:-

“...Once the appellant has a right of appeal, he is *dominus litis* in the sense that he controls the scope of the appeal in respect of the decision from which the appeal is

taken...this Court cannot bind itself to deal with only [the conviction] or the [sentence] simply because the certificate, if it specifies a point of law at all (which, as I have pointed out, it frequently does not), relates only to one or other of them. To hold otherwise would put it out of the power of the Court to correct, for example, some glaring error. If a certificate giving leave to appeal to this Court specified a point of law relating to conviction only, and it appeared to this Court that the sentence imposed was one not permitted by law, this Court clearly must have the power to permit an amendment of the notice of appeal to enable the Court to deal with that matter and to change the sentence to one which is in accordance with law...Once an appeal has been brought to this Court pursuant to the provisions of s. 29 of the Act of 1924, this Court has all the powers of the Court of Criminal Appeal as was demonstrated in *The People (Attorney General) v. Quinn* [1965] I.R. 366."

See also *Scott v. An Bord Pleanála* [1995] 1 ILRM 424 and *MAU v. Minister for Justice* [2011] IEHC 95, [2011] 1 I.R. 749 at [12].

11. Order 86, r. 10 of the Rules of the Superior Courts gives the Court of Appeal an equivalent power to the Supreme Court to amend a notice of appeal or any other document used in an appeal. In the light of the matters referred to above I am satisfied that this Court should be entitled to hear the appeal as brought by the appellants and which includes inquiring into whether the certificate granted by the High Court judge (a) fairly reflects the issue sought to be certified by the appellants and (b) was based on underlying assumptions which are correct.
12. The question posed by the appellants in seeking a certificate was:-

"What criteria in law govern the consideration by the [appellants] of an application for the revocation of a deportation order made by a person whose immediate family members have already been granted permission to remain in the State prior to the application for revocation being made and where the relevant family relationship was founded at a time when one of the family members concerned had a settled legal entitlement to reside in the State?"
13. Before dealing with the grounds of appeal it is useful to set out some background facts. The first named respondent is a national of Cameroon and asserts that he fled Cameroon in 1997 and travelled to Zimbabwe. Facing deportation from that country in 2003 he travelled to Ireland. He failed in a claim for asylum and a deportation order was made on 5 July 2006. In 2008 he requested revocation of the deportation order and again in 2010 but both applications were refused. He commenced legal proceedings in 2010 challenging the refusal of refugee status on the basis that he was not afforded an effective remedy and challenging the subsidiary protection decision and the deportation order. In November 2014 he withdrew those proceedings.
14. In 2014 the first named respondent made a further application for revocation under s. 3(11) of the 1999 Act which was refused by a decision dated 3 February 2015 notified to

the first named respondent on 23 February 2015. The deportation order was reaffirmed. It is this decision which is challenged in these judicial review proceedings.

15. The second respondent is a national of Morocco who asserts that she arrived in the State on 6 September 2007. Her asylum claim was refused and she then applied for subsidiary protection but later withdrew her application. The third named respondent is the child of the first and second named respondents born in the State on 22 March 2013. On 21 August 2013 the second and third named respondents were granted leave to remain in the State for a two-year period and this was renewed. The second and third named respondents were legally residing in the State at the time of the High Court judgment but are not Irish citizens. They have a Stamp 4 permission which expired on 21 August 2019.
16. The first and second named respondents are not legally married, but assert that they entered into a religious ceremony in the mosque of the Islamic Foundation of Ireland on 23 August 2012. Since that date there is no evidence that they entered into a legal marriage. The first named respondent resides in Dublin having previously been accommodated in Cork. The second named respondent resides in Midleton, County Cork. She has been in receipt of a one-parent family payment from the Department of Employment and Social Protection since August 2013. The first named respondent has described himself as a single man with no family while he was accommodated at Glenvara House, Cork.

Grounds of challenge in High Court J.R. proceedings

17. In the High Court judicial review proceedings, the respondents made the following submissions in support of their case: -
 - (i) that the appellants failed to properly consider the respondents' article 8 ECHR rights in refusing to revoke the deportation order;
 - (ii) that the first named appellant erred in basing the decision on the failure, by the respondents, to demonstrate an insurmountable obstacle to the family unit residing elsewhere;
 - (iii) that the appellants failed to consider the best interests of the child;
 - (iv) that a "scheme" was in existence granting persons leave to remain after a period of time in the State and was not applied to the first named respondent and that this was discriminatory; and
 - (v) that the Oireachtas had failed to specify the principle and policy that should be applied in considering revocation applications.
18. The appellants complain that during the hearing the High Court judge intervened to raise the possibility of another form of discrimination which appeared to the judge, namely, granting one parent leave to remain and not the other and further that by effectively requiring the family to live apart under the Direct Provision scheme the State was acting in breach of family rights. The appellants argue that these matters had not been pleaded

as a ground by the respondents whereupon the court permitted counsel for the respondents to redraft the statement of grounds to encompass the following: -

“2A. In granting leave to remain in the State to one parent (the second named [respondent]) of the third named [respondent] but not to the other parent (the first named [respondent]), the Minister acted in an unreasonable and/or discriminatory manner and contrary to articles 8 and 14 of the European Convention on Human Rights insofar as she has discriminated between the parties and has failed to give any objective justification for doing so.

2B. In effectively requiring the first named [respondent] to live apart from the second and third named [respondents], following the grant of leave to remain to the second and third named [respondents], the Minister acted in breach of article 8 of the European Convention on Human Rights.”

19. But despite the objection of the appellants the High Court judge allowed the amendments and granted leave in respect of those additional grounds. Subsequently the respondents informed the court that they were not pursuing ground 2B and the judicial review proceeded on that basis.

20. In his judgment the High Court judge refused relief on a number of grounds but held that the first named appellant had acted irrationally and contrary to article 8 ECHR and Article 40.3 in granting leave to remain to one of the respondents while refusing to revoke the deportation order in respect of the first named respondent thereby breaking up the family unit.

21. Later in this judgment the Court will analyse the approach taken by the High Court judge in deciding to make an order certiorari quashing the decision of the appellants. But first it is necessary to set out in short form what are the issues arising on the appeal.

Issues on appeal

22. At the heart of this appeal is a consideration of what matters the appellants must take into account when considering an application for revocation of a deportation order in respect of an applicant where his partner and their child have permission to reside within the State. The appellants submit that the following questions arise as a result of the judgment delivered in the High Court: -

- (i) Where applications are made independently by applicants, who are not married and are at different stages of the asylum process, is the Minister to postpone consideration until all parties reach the same stage?
- (ii) Does an applicant who entered into a relationship at a time that he was residing in the State illegally (a deportation order having been made) have the right to have “significant weight attached to the desirability of keeping the family together”?

- (iii) Does the right extend to situations where both parties entering the relationship were in a precarious/illegal situation at the time of entering the relationship and at the time of having a child?
- (iv) Where the parties are not legally married and are not residing together as a family unit, what criteria are to be applied by the Minister in considering the family unit?
- (v) Whether the Minister is entitled to take account of the fact that a valid deportation order is in being against one party and take the view that the maintenance of borders and immigration control (together with the substantial grounds identified in the impugned decision) constitutes compelling justification for the differentiation in treatment of the respondents?
- (vi) Is the Minister obliged to effectively accept that persons in a relationship or who have a child together, whether legally or illegally in the State, should be treated in a like manner to the degree that this might involve rendering the whole unit unlawful to ensure "holistic" treatment?
- (vii) Is the Minister obliged to respect the choice of residence of a couple even where no impediments to them residing as a couple in other jurisdictions have been shown?

The High Court judgment

23. Although the High Court judge gave separate judgments on the judicial review and the application for leave to appeal, for the purposes of the following discussion the reference to the "judgment" will be to the substantive judgment delivered on 24 June 2016.
24. While the High Court judge found that the consideration of the first named respondent's employment prospects was irrational, he held that this alone was not sufficient to grant relief in the judicial review. The portion of the High Court judgment which is the focus of the appeal is to be found in paras. 39 to 48 wherein the judge held that the Minister had acted irrationally and contrary to article 8 ECHR and Article 40.3 of the Constitution in granting leave to remain to one of the respondents while refusing to revoke the deportation in relation to the first named respondent thereby breaking up the family unit. At para. 39 of his judgment the High Court judge stated: -

"In the present case, the Minister gave the mother permission to be in the State at a time when, immediately prior to such permission, both parties were present in the State on a precarious and, in fact, unlawful, basis. Furthermore, the Minister was aware that the parties constituted a family unit. Admittedly, the parents are not a 'family' in the limited sense in which that term was originally understood, a lifetime ago, at the time of enactment of the Constitution in 1937. But they are a family in the sense in which that term is used in modern Irish society. They certainly have family rights under article 8 of the ECHR; and the flexibility of living constitutional law should make one slow to accept the proposition that the Constitution should now be construed as less protective of the rights of the individual than international law."

25. The judge went on to consider the argument made by counsel for the Minister that both applicants were in a precarious or unlawful position during the time at which family life was engaged and that therefore their article 8 rights were at best minimal and the judge said he was prepared to accept that argument at a general level.

26. He went on to say at para. 41 that: -

“... In the present case, the Minister failed to treat the family unit as a collective entity, and made a decision giving the mother permission to remain, as if that were a unilateral and stand-alone matter, while requiring the father to be expelled from the State.

42. In short, the Minister has failed to rationally treat the family unit collectively. Even if their rights under article 8 of the ECHR (or Article 40.3 of the Constitution) are not terribly extensive, one thing they do extend to is the right to have significant weight to be attached to the desirability of keeping the family together.

43. In the present case, on the material before me, the Minister simply failed in that duty. A decision was made on permission for the mother in isolation from a decision on the father's situation. Unless there is significant reason to the contrary, the Minister is required to take a holistic view of the position of the family unit, and to decide on the fate of its members in a coherent and collective manner. If some compelling reason was presented as to why one of two equally unlawful parties to a relationship should be allowed stay and the other be required to leave, that would be one thing. Of course, here, no such reason has been put forward. And if one of the parties had a right to be present independently of the Minister's decision, that would also be a different thing. Again, here, neither party had such an entitlement. But to select between two equally precarious parties to a relationship and decide that one can stay and the other must leave, without compelling justification, is to actively break up the family by State action. Deporting the spouse or partner of a person with a right to remain independently of the Minister's decision (such as an Irish or EU citizen) does not pose such a problem because it is the nature of the situation and the illegality of the other party's presence rather than any ministerial decision as such that gives rise to a parting of the ways.”

27. Having referred to the fact that the Minister was aware that she was dealing with two parents and a child, the High Court judge stated at para. 45: -

“... Under those circumstances, it is simply not open to the Minister to make an atomised, blinkered decision in relation to one individual member of such a family group. While I would not suggest that there is an obligation to do so in relation to wider members of an extended family, the Minister must consider the position of an individual member of a nuclear family, married or not, in the context of a position of other members. To fail to do so is potentially irrational, in breach of the substantive rights of the family members concerned, and discriminatory.”

28. He went on to hold at para. 46 that the Minister was not obliged at all costs to facilitate the family remaining in Ireland and that where a person with no entitlement to be in the State (other than perhaps a precarious right) enters into a relationship with a citizen or person who has such an entitlement, it will usually be the case that there is no right to remain in the State by virtue of such relationship whether the parties are married or not.

29. The trial judge then made the following observations: -

“47. However, the present case presents a very different situation. Both parties were in a precarious or unlawful position. Had they both been deported, it seems to me at least reasonably possible that they could have continued family life together in Morocco (assuming that the father could have gained admission to that country). However, the State has now intervened by its own action to make this significantly less likely, by giving permission to the mother to stay, when there is no legal obligation to do so. That, coupled with the deportation of the first named applicant, will, it seems to me, be likely to have the practical effect of breaking up the family, even if the option of everyone moving to Morocco is still theoretically open.

48. In my view, it is both irrational and contrary to the substantive rights of the applicants individually and collectively under article 8 of the ECHR and Article 40.3 of the Constitution for the State to actively break up a family by giving permission to remain to one member of an illegal or precariously [sic] couple and refusing such permission to the other partner, without compelling justification. No clear objective justification, let alone a compelling justification, has been shown for so doing. Had both parties been deported, the issue of irrationality, discrimination, and substantive breach of rights would not have arisen. But for the reasons explained, I conclude that the manner in which the Minister approached this matter is fundamentally flawed for a range of separate but related reasons:

- (i) the Minister wrongly failed to consider the applicants holistically as a family unit in terms of their collective fate;
- (ii) the Minister failed to have due regard to the desirability of enabling the applicants to remain together;
- (iii) the Minister irrationally gave permission to one parent to be in the State while refusing it to the other parent;
- (iv) such unjustified discrimination as between the parents contravened article 14 of the ECHR (taken in conjunction with article 8) and Article 40.1 of the Constitution; and
- (v) the Minister's decision affirming the deportation order contravened the substantive rights of the applicants under article 8 of the ECHR and Articles 40.3 and 42A of the Constitution.”

Discussion

30. In this judicial review the validity of the deportation order is not in issue. The challenge is one to the exercise by the Minister of her power pursuant to s. 3(11) of the 1999 Act, as amended. Under s. 3(11) the Minister has to decide if there is sufficient reason to justify

the revocation of the deportation order. In *Dada v. Minister for Justice, Equality and Law Reform* [2006] IEHC 140 O'Neill J. in dealing with a challenge to a refusal of an application to revoke a deportation order stated: -

"It is clear that the nature and extent of the inquiry which is appropriate in this later phase of the process, thus described, is significantly more restricted than for example in the asylum phase. Likewise the extent of review of the later phase is undoubtedly more restrictive than in the earlier phase."

Where, as in the present case, there has been no challenge to the underlying deportation order the scope for review by the court is necessarily narrow.

31. In this appeal the appellants argue that the High Court judge failed to sufficiently take into account a number of matters. The first of these was that the first and second named respondents were not legally married and neither of them were EEA nationals. There was no prohibition on them marrying despite the averment of the second named respondent that "[they] were informed that because Serge has a deportation order we could not marry". The reality of the situation is to be found in para. 4 of the affidavit sworn on 4 March 2015 by the second named respondent in support of the judicial review application, where she said, "We never planned ahead too much because of [the first named respondent's] deportation order and I was unsure as to my fate".
32. The second point raised by the appellants is that at no stage did the respondents provide any good reasons as to why it was not possible for them to re-locate as a family to Cameroon or to Morocco. The appellants maintain that the State is not obliged to respect the choice of residence of a non-national couple whether married or otherwise and particularly not in the case of a person such as the first named respondent who is residing illegally in the State and where there is a valid deportation order in place. See *Abdulaziz, Cabales and Balkandali v United Kingdom* (App. Nos. 9214/80; 9473/81; 9474/81) (1985) 7 E.H.R.R. 471; *Nunez v. Norway* (App. No. 55597/09) (2011) 58 E.H.R.R. 17; *Gül v. Switzerland* (App. No. 23218/94) (1996) 22 E.H.R.R. 93; *Uner v. Netherlands* (App. No. 46410/99) (2007) 45 E.H.R.R. 14; *Cirpaci v. Minister for Justice, Equality and Law Reform* [2005] IESC 42 and *Agbonlahor v. Minister for Justice, Equality and Law Reform* [2007] IEHC 166, [2007] 4 IR 309. These proceedings do not involve a settled migrant family unit. The relationship that exists between the first and second named respondents was entered into at a time when they knew of the precarious nature of their immigration status and conceded by the second named respondent in para. 4 of her affidavit referred to above.
33. The respondents did not make coordinated applications to the appellants as a family unit nor did they seek residential accommodation within the State as a family unit. The first named respondent was at all times treated as a single male by the Reception and Integration Agency of the State. He was transferred to accommodation in Dublin after he had provided the agency with information in which he gave no indication that he wished to be housed or accommodated in Cork or nearer to the second and third named respondents. Not only did he have no complaint about being accommodated in Dublin, but

he wrote to the Reception and Integration Agency on 5 May 2016 informing them that he was happy with his accommodation.

34. The first named respondent has been present illegally in the State since the deportation order was made in 2006.

Legal principles applicable

35. The weighing of evidence and the making of decisions in matters concerning asylum and deportation are part of the executive functions of the Minister. Such decisions are amenable to judicial review and the role of the courts is limited to that extent. In *O.O.A. & Another v. Minister for Justice and Equality* [2016] IEHC 468 at para. 19 Humphreys J. referred to the difficult and painful issues that may arise in the event of the deportation of an individual who will thereby be separated from his or her spouse or child. At para. 19 he stated: -

“...It is one thing to acknowledge that but quite another thing to say that, because such a cry from the depths is made by a person who has no entitlement to be in the State, that there must be a judicial willingness to require the Minister to retain such a person within the State, at least *de facto*, by (repeatedly if necessary) quashing any refusal to give him permission to remain. The primary audience for the applicant's plea is the Minister. The court can only intervene if a clear illegality has been shown in the Minister's analysis. ...Many applicants whose presence in Ireland is wholly unlawful may have to find solutions to family contact in relocation as a group, or if that is not available, in telephones, skype, or periodic meetings in third countries, rather than assume that the court must usurp the executive function and fashion legal doctrines out of whole cloth to address their problems.

...

21. A ministerial decision that the interests of the immigration control system proportionately outweigh the private and family rights of an applicant under article 8 or Article 41, whether by reference to the relationship with a spouse, partner or child, is, like any immigration decision, a *prima facie* valid exercise of the executive power of the State, and should not be quashed in the absence of a clear illegality. ...”
36. See also *P.R. & ors v. Minister for Justice and Equality* [2015] IEHC 201, *D.S. & ors v. Minister for Justice and Equality* [2015] IEHC 643, *G.C. v. Minister for Justice and Equality* [2017] IEHC 215 and *Lingurar v. Minister for Justice, Equality and Law Reform* [2018] IEHC 96.
37. The State is entitled to have regard to the common good when considering the various rights and interests of the respondents and the necessity of implementing border policy and immigration control having regard to the demands that would otherwise be created on State health and social welfare services and the impact on the labour market. These are not matters for the courts but rather for the executive. In *Oguekwe v. Minister for*

Justice, Equality and Law Reform [2008] IESC 25, [2008] 3 I.R. 795 at para. 85 Denham J. said: -

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

38. Similar views were expressed by Hardiman J. in *A.O. & D.L. v. Minister for Justice* [2003] 1 I.R. 1 at p. 155. See also *Ofobuike (a minor) v. Minister for Justice, Equality and Law Reform* [2010] IEHC 89.

39. In *Igiba (a minor) v. Minister for Justice, Equality and Law Reform* [2009] IEHC 593 Clark J. held at para. 21 that it was open to the Minister to:

“...identify general reasons of immigration control associated with the common good as a "substantial reason" which required the deportation of [a person who was in the State illegally]. Provided that he engages in a fact-specific analysis and weighs the competing interests there is no obligation on the Minister to identify an applicant-specific reason.”

40. In many of the cases referred to above one or more family members were an Irish citizen and the proposed deportation was of a parent of that Irish citizen. But in the case before this court on this appeal there are no Irish citizens involved. Furthermore, the decision sought to be impugned sets out in great detail each and every basis on which the first named respondent claims that the deportation order should be revoked and it balances the rights (such as they exist) of the respondents against the interests of the State. Having dealt with all of these matters in great detail the decision states: -

“These therefore exist as substantial reasons associated with the common good which requires that the deportation order made in respect of [the first named respondent] is affirmed”.

The Minister's decision

41. An analysis of the Minister's decision shows that she weighed up all the various matters put before her before concluding that the deportation order in respect of the first named respondent should be affirmed. The first named respondent comes from Cameroon and the country of origin information was considered in some detail by the Minister. This information was assessed on the basis of various criteria from which the appellants concluded that the government in Cameroon are willing to address corruption and related issues in that country. Insofar as there was conflicting evidence, it cannot be said that the

decision of the Minister was irrational because there was undoubtedly evidence to show that the human rights situation and government corruption issues were improving.

42. The Minister then went on to consider rights under article 8 of the ECHR. Among the factors taken into account were that the first named respondent had not resided in Cameroon for almost eleven years and has not had any experience of society there for a long period. Regard was also had to the fact that the first named respondent was notified of the deportation order in September 2006 and that he had failed to leave the State as required and remained illegally in the State since then thereby showing a disregard for the laws of the State. In those circumstances the appellants did not accept that the decision to affirm the deportation order constituted a breach of the State's obligations to respect the private life of the first named respondent pursuant to article 8 of the ECHR. On the basis of the information before the Minister it is difficult to see how this decision could be deemed irrational or unsupported by evidence. The Minister's decision referred to the case of *R (Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840 where the Court of Appeal in England and Wales found inter alia that the removal or exclusion of one family member from a State where the other members of the family are lawfully resident, would not necessarily infringe article 8 provided that there are not insurmountable obstacles to the family living together in the country of origin of the family member excluded even where this involves a degree of hardship for some or all members of the family. The first named appellant considered the rights of the respondents to family life in the light of all the evidence. It was never suggested to the appellants that the respondents could not live in Morocco, the country of origin of the second named respondent. The decision recites "No obstacle to [the first named respondent, the second named respondent] and their son establishing family life in Morocco have been submitted".

43. The decision then went on to consider the rights of the State and then carried out a balancing of the rights of the respondents against the rights of the State. In balancing those rights the first named appellant noted that the courts have held

"...that knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates article 8. The issue of awareness, status or lack thereof on behalf of individuals was also highlighted by the court in [*R v Secretary of State for the Home Department, ex parte Isiko and Another* [2000] EWCA Civ 346].

In that case the court drew attention to the fact that each of the applicants knew at the time of their marriage that their husband's immigration position was precarious. In the case before this court the second respondent has admitted on affidavit that she knew of the precarious status of the first named respondent and that they had made no definite plans on that account.

44. To put the impugned decision in context it is worth quoting from a paragraph in the section entitled "Balancing Rights":-

"When [the first named respondent] entered into a relationship with [the second named respondent] a deportation order was already made in respect of him which states that he was required to leave the State and remain thereafter out of the State. Therefore, [the first named respondent] had no legal basis to be in the State following the making of a deportation order in respect of him and has failed to leave the State as is required of him according to his deportation order. Representations dated 31 March 2008 received on [the first named respondent's] behalf were considered under Section 3(11) of the Immigration Act, 1999 as amended and he was informed by correspondence dated 10 June 2008 and that the outcome was that the Minister's earlier decision to make a deportation order in respect of him remained unchanged. Representations dated 5 January 2010 were received on [the first named respondent's] behalf under Section 3(11) of the Immigration Act, 1999, as amended and he was informed by correspondence dated 31 March 2010 was (sic) that the Minister's earlier decision to make a deportation order in respect of him remained unchanged. [The first and second named respondents] must have known that [the first named respondent] had no legal basis for residing in the State and therefore may be required to leave the State. It should be borne in mind that [the second named respondent] undertook to accept as part of the conditions of her permission to remain, that the granting/renewal of her permission to remain does not confer any entitlement or legitimate expectation on any other person, whether related to her or not to enter or remain in the State."

45. Considered against the factual background it is difficult to see how the Minister was not entitled to make the decision refusing the revocation application submitted pursuant to s. 3(11) of the 1999 Act, as amended. Nor can it be said that there was anything irrational about the decision. The question of discrimination did not arise as the first and second named respondents clearly fell into different categories. See *G.A.G. v. Minister for Justice, Equality and Law Reform* [2003] IESC 49, [2003] 3 IR 442 where Murray J. said at p. 488:

"A question of unlawful or unconstitutional discrimination only arises for consideration when persons in the same or similar situation are treated differently, without objective justification."

In this case the High Court judge was in error in describing the family members as being "equally unlawful" and "equally precarious". The decision was one for the executive to make and in the absence of some irregularity or illegality the courts cannot interfere with it.

Decision

46. In para. 43 of his judgment the High Court judge was in error in holding that the first and second named respondents were in an equal position and had an equally precarious status. At the time when leave was granted to bring the application for judicial review the first named respondent was the subject of a deportation order and was in the State illegally whereas the second and third named respondents had the benefit of a Stamp 4 permission to remain in the State. In short their legal status was radically different. It

was this mischaracterisation of the status of the respondents which led the High Court judge to conclude that the Minister had acted in a way which was irrational, discriminatory and in breach of the respondents' article 8 ECHR and constitutional rights.

47. During the judicial review hearing the High Court judge accepted the submission of the appellants that, as the first and second named respondents were in a precarious or unlawful position during such time as they engaged in a family life, their article 8 rights were at best minimal. See *Dos Santos & ors v. Minister for Justice and Equality* [2013] IEHC 237. The High Court judge's decision that the family unit had to be treated holistically or collectively was based on an erroneous view that the first and second named respondents could not be treated differently. He expressed the view that the appellants had selected between two equally precarious parties to a relationship and decided that one could stay and the other must leave without compelling justification and then held that this involved the act of breaking up of the family by State action. In para. 45 of his judgment when he refers to making what he describes as an "atomised, blinkered decision in relation to one individual member of *such a family group...*" [emphasis added] he appears to be referring back to a family whose members enjoy an equally precarious status when that was not, in fact, the case. It was that error which led to his finding at para. 48 that:-

"... it is both irrational and contrary to the substantive rights of the [respondents] individually and collectively under article 8 of the ECHR and Article 40.3 of the Constitution for the State to actively break up a family by giving permission to remain to one member of an illegal or precariously (sic) couple and refusing such permission to the other partner, without compelling justification".

48. No legal authority was cited to the High Court judge to the effect that there was a requirement for a holistic treatment of a family in the circumstances in which the respondents found themselves. Having accepted that their article 8 ECHR rights were at best minimal (para. 40) and that their rights under article 8 of the ECHR (or Article 40.3 of the Constitution) are not terribly extensive (para. 42) he fell into error into making the determination set out in para. 48.
49. As the first and second named respondents had an entirely different legal status the question of discrimination did not arise. The appellants were entitled to treat them differently and did so for reasons stated in the decision.

Conclusion

50. In my view the High Court judge was in error in introducing into his judgment a requirement that the Minister must identify a "compelling reason" or "compelling circumstances" before the State's rights could outweigh those of the respondents. This has never been the test applicable and no submission was made on this point in the High Court.
51. There was no basis for the findings of the trial judge that the decision of the first named appellant was either irrational or contrary to the substantive rights of the respondents

individually and/or collectively under article 8 of the ECHR or Article 40.3 of the Constitution.

52. The finding of the High Court judge that there was no objective justification for the first named appellant's decision was entirely against the weight of the evidence. The decision of the first named appellant had set out in detail all the relevant facts and balanced the interests of the respondents against the interests of the State in accordance with established legal principles.
53. I would allow the appeal.