AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2019:000064

[2022] IESC 000

O'Donnell CJ
MacMenamin J
O'Malley J
Baker J
Hogan J

BETWEEN/

MK (ALBANIA)

Appellant

- and -

MINISTER FOR JUSTICE AND EQUALITY

Respondent

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 24th day of November, 2022

1. The applicant is an Albanian national who arrived in the State in September 2016 as an unaccompanied minor. At that time he was then aged 16 years of age. He has now remained in the State for just over six years. During this period, he has attained his majority, gone to school, stayed with a foster family, has been given permission to enter the labour market and has generally lived an unblemished life. His applications for

asylum and international protection having, however, been refused, the Minister for Justice subsequently made orders under s. 49 of the International Protection Act 2015 ("the 2015 Act") refusing him leave to remain in the State (on 4th December 2019) and providing for his deportation (on 17th February 2020). It is these orders which are the subject of the present judicial review proceedings.

2. The essential question presented in the appeal in the present case is whether the making of these orders had the effect of infringing his constitutional rights or were incompatible with his right to a private life under Article 8 ECHR. These arguments were rejected by Tara Burns J. in the High Court in a very careful judgment which she delivered on 6th April 2021: see *MK v. Minister for Justice and Equality* [2021] IEHC 275. By a determination dated 15th October 2021, we granted the applicant leave to bring a direct appeal to this Court pursuant to Article 34.5.4 of the Constitution: see [2021] IESCDET 116.

The Article 8 ECHR argument

3. I may say immediately that, together with all other members of the Court, I entirely agree with the judgment of MacMenamin J. so far as his treatment of the Article 8(1) ECHR issue is concerned and, specifically, the extent to which it can be said that these rights are engaged by the Minister's decision to refuse him leave to remain and to deport him. In his judgment, MacMenamin J. has helpfully set out the facts of the present case and has dealt comprehensively with the right to private life issue under Article 8 ECHR as it arises in the present case. Thus, for example, in the course of the s. 49(7) assessment, the Minister concluded that "it is not accepted that such potential interference will have consequences of such gravity as potentially to engage the operation of Article 8(1) ECHR."

4. While I agree that the Minister misapplied Article 8 ECHR insofar as she reached this conclusion on the engagement question, I find myself in respectful disagreement with MacMenamin J. on the ultimate issue of whether her decision must be quashed. For my part, I consider that, these legal errors notwithstanding, the Minister did in substance conduct the requisite proportionality test for the purposes of Article 8(2) ECHR. I shall be returning to this point later in this judgment.

5. So far as the Article 8(1) ECHR engagement issue is concerned, I also agree with MacMenamin J. that the Minister's reliance in this appeal on the test articulated by Lord Bingham in *R. (Razgar) v. Home Secretary* [2004] UKHL 27, [2004] 2 AC 368 was misplaced. It is, of course, clear from the jurisprudence of the European Court of Human Rights is that the Convention is engaged only where the interference with these rights attains a sufficient seriousness (see, *e.g., Costello-Roberts v. United Kingdom* (1993) 19 EHRR 112). My difficulty with *Razgar* (or, possibly more accurately, at least as this decision has been interpreted by the Court of Appeal in *CI v. Minister for Justice and Equality* [2015] IECA 192, [2015] 3 IR 185) is that it seems to pitch the minimum gravity test at too elevated a level. In this regard, I, like O'Donnell C.J., consider that MacEochaidh J. was entirely correct in his judgment in the High Court in *CI* when he said that that if "one has any sort of private life…then it is impossible to imagine how removal from the State will not interfere with that private life": *CI v. Minister for Justice and Equality* [2014] IEHC 447 at [26].

6. As MacMenamin J. observes in his judgment, it is *not* the case that the right to private life as guaranteed by Article 8(1) ECHR is engaged *only* in exceptional cases when (as here) the applicant is not a settled migrant and is rather one who has unsuccessfully sought asylum. Yet while this right is generally engaged by a proposed deportation decision, the case law of the European Court of Human Rights in decisions such as *Butt*

v. Norway [2012] ECHR 1905 onwards (if not earlier) also makes it clear that once the necessary proportionality analysis is conducted under Article 8(2) ECHR, the right to private life of such an applicant of such an unsettled migrant will but rarely prevail as against the interests of the Contracting State which, in cases of this kind, are normally regarded by the European Court of Human Rights as compelling.

7. It is in this sense – and in this sense only – that it can be said that it is only in exceptional circumstances that an unsettled migrant with a precarious right to remain in the State will prevail in an Article 8 ECHR private life case. Insofar, however, as the Court of Appeal in *CI* held that an unsettled migrant must demonstrate the existence of exceptional circumstances *before* Article 8(1) ECHR could even be engaged, I respectfully disagree for all the reasons set out in the judgment of MacMenamin J.

8. In effect, therefore, an unsettled migrant in the position of the applicant in the present case with a precarious entitlement to be in the State is generally entitled to an Article 8(2) ECHR proportionality analysis in respect of the private life implications of his removal from the State prior to the making of any deportation by virtue of Minister's obligations to respect the ECHR under s. 3(1) of the European Convention of Human Rights Act 2003. Yet for all the reasons I have all too briefly sketched out, it is only in exceptional or rare cases that a proportionality analysis of the circumstances of the private and family life of an unsettled migrant seeking leave to remain will have the result that the applicant will prevail given the State's interest in controlling immigration and maintaining the integrity of the asylum system. (I will be returning presently to this issue when dealing with the constitutional question).

9. In these circumstances I can now proceed directly to consider the first issue actually raised by the appellant in this appeal, namely, the contention that he has a constitutional right to private life and that such has been infringed by the Minister's orders.

Is there a constitutional right to a private life corresponding to Article 8(1) ECHR?

10. Perhaps the first question to be considered is whether there is, in fact, a constitutional right to a private life in the sense broadly corresponding to that envisaged by Article 8(1) ECHR. It is important to be clear about this. While Article 8 ECHR also clearly protects the right to privacy in a variety of different settings, the issue of the existence of a constitutional right to private life which is raised in the present case is a different one from that which has heretofore normally been raised to date in constitutional cases. Disputes regarding the scope of such a constitutional right have previously arisen in particular contexts, such as marital privacy (*McGee v. Attorney General* [1974] IR 287) or privacy generally (*Norris v. Attorney General* [1984] IR 36) or privacy of communications (*Kennedy v. Ireland* [1987] IR 587).

11. The right to private life which is at issue here can also be regarded in some instances, at least, as, in essence, an aspect of the right to form associations in Article 40.6.1.iii of the Constitution: the right to make friends, to pursue a course of education, to advance one's career and to engage in a variety of recreational and sporting occupations. Viewed in that sense, it embraces virtually all normal life outside of the special context of marriage, children and family.

12. It is striking that, outside of the special context of immigration, there have been very few cases in this jurisdiction on this topic. This is perhaps because up to now these rights have been taken for granted by Irish citizens. Both the Constitution and the common

law rather assume – and, indeed, in some respects are even predicated upon – their existence. One may certainly observe that the exercise of such rights has been essentially unproblematic in the eighty-five years of the operation of the Constitution to date. The right, however, to have a private life in this particular sense seems to be enjoyed by virtually every citizen, almost without any let or hindrance.

13. To some extent, therefore, this aspect of the right to a private life is diffused throughout the Constitution and does not find expression in a single, convenient, omnibus clause such as Article 8 ECHR. It was, I think, in that particular sense that Henchy J. said in *Norris v. Attorney General* [1984] IR 36 at 69 that Article 8 ECHR "has no counterpart in our Constitution." As I have already hinted, one can, however, find aspects of this wider right in different parts of the Constitution. The right, for example, to invite guests and to entertain them in one's home may be regarded as part of the "inviolability" of the dwelling for the purposes of Article 40.5, for the essence of that guarantee is to provide a degree of privacy and autonomy for the occupier. The freedom to follow a particular vocation, belief or way of life can be said to be embraced by the guarantee of freedom of conscience in Article 44.2.1. One need only go back as far as *McGee* to see how the right to privacy in Article 40.3.1 and Article 40.3.2 has long been recognised as what we would now term as a derivative right stemming from the "personal" rights of the citizen in Article 40.3.1 and the protection of the "person" in Article 40.3.2. The specific feature of marital privacy recognised in *McGee* also branches out to embrace other forms of privacy and private friendships divorced from the intimate settings of marriage and similar co-habiting relationships.

14. The right to a private life in this sense is also associational in nature, a point which even the majority in *Norris* appeared to recognise: see [1984] IR 36, at 60 per O'Higgins C.J. The language of Article 8 ECHR thus reflects the fact that humans are essentially

sociable creatures who desire and need the company of others. This is particularly true in respect of marriage, courtship, family and similar forms of close and intimate relationships. Yet over and above this the friendship of others is part of the general *joie de vivre* without which life would lose much of its gaiety, fun and interest.

15. All of this finds also expression in the case-law to date regarding the scope the freedom of association guarantee contained in Article 40.6.1.iii. As Murnaghan J. observed in *National Union of Railwaymen v. Sullivan* [1947] IR 77 at 101, the effect of this provision is such that: "Each citizen is free to associate with others of his choice for any object agreed upon by him and them." In *Equality Authority v. Portmarnock Golf Club* [2009] IESC 93, [2010] 1 IR 671 Hardiman J. spoke to similar effect when he observed (at 724) that:

> "The right to freedom of association is a pre-existing natural right, inhering in human kind by virtue of its rational and social being and is essential to the exercise of various other rights such as the right to engage effectively in political speech, to organise for industrial purposes or otherwise, to take part in elections, to participate in sporting or cultural events, and many more."

16. In passing, it may be noted that in *Portmarnock Golf Club* this Court held that the right to form and to join a sporting club or other recreational outlet was an aspect of the more general right of association expressed in Article 40.6.1. This is also reflected in another decision of this Court concerning the affairs of another unincorporated association (and, as it happens, another private golf club): see *Dunne v. Mahon* [2014] IESC 24.

17. It is, perhaps, unnecessary in this context to determine the precise limits of the right of association in Article 40.6.1.iii. Admittedly, the context of this provision ("…to form associations and unions") ("…comhlachais agus cumainn do bhunú…") may tend on

one view to suggest more formal associations (such as unions, clubs, political parties and so forth) rather than purely informal friendships as such. Yet I do not think that the Article 40.6.1.iii right can be quite so circumscribed and, for my part, I agree with all that O'Donnell C.J. has said on this issue

18. It suffices, however, for present purposes to say that in the present context the privacy rights protected by Article 40.3 take over where the right of freedom of association in Article 40.6.iii ceases and it is at that point that one right shades into the other. It is, accordingly, unnecessary to define the exact parameter of these rights or to state precisely how these rights inter-act with each other, as much may depend on the precise facts of any particular case. If, for example, A joins a sport club that right is clearly within the ambit of Article 40.6.1.iii as part of the right of association. Let us suppose that A invites B (who happens to be a friend of A but who is not a member of the club) to train with her or to play with her at the club, that zone of friendship possibly more naturally comes within the scope of the privacy guarantee as a derivative right from Article 40.3, although the right is also closely linked on these facts to a core associational right. If, thereafter, A invites B for dinner in her house, that probably come within the scope of Article 40.5 as part of the zone of protection expressed or implied by that provision's guarantee in respect of the inviolability of the dwelling. To repeat, therefore, Article 40.6.1.iii (and, in some instances, Article 40.5) will take over where the privacy guarantee of Article 40.3 in strictness ends.

19. Summing up, therefore, on this issue one may say that the essence of the Article 8 ECHR right to private life is the privacy and associational dimensions of that right. In a constitutional context this right principally finds expression in the right to privacy derived from Article 40.3.1 and Article 40.3.2 and, to date at least, also in the case-law dealing with the freedom of association contained in Article 40.6.1.iii. There are clearly

other types of circumstances where other provisions of the Constitution — such as, as I have just mentioned, the inviolability of the dwelling in Article 40.5 or freedom of conscience in Article 44.2.1 – can, depending on the precise circumstances of the claim, also potentially come into play.

20. It follows, therefore, that the aspects of private life relied on by Mr. K. in the present case – such as, for example, the fact that he has participated in a variety of social activities or that he has made many friends in the State – are indeed generally protected as aspects of the right to privacy in Article 40.3 and (depending possibly on the circumstances) of the freedom of association protected by Article 40.6.1.iii.

Whether a non-citizen can invoke these Article 40.3 privacy and Article 40.6 associational rights?

21. It is next necessary to consider whether the applicant can invoke this right in the present circumstances. It is true that in her judgment in *Dos Santos v. Minister for Justice and Equality* [2015] IECA 210, [2015] 3 IR 411, at 416, Finlay Geoghegan J. held that a non-citizen had no such constitutional right "within the meaning of Article 40.3 to remain in the State and/or participate in community life in the State." For my part, however, I think that this is, with respect, too absolutist a position. I consider that counsel for the applicant, Mr. Conlon SC, was correct to point out that this particular decision ante-dated the subsequent decision of this Court in *NHV v. Minister for Justice and Equality* [2017] IESC 35, [2018] 1 IR 246.

22. In *NHV* the applicant was a non-national whose application for refugee status had been beset by numerous and lengthy delays. During that period he was excluded by statute from participating in the labour market. In his judgment for this Court, O'Donnell J. held that this blanket form of statutory exclusion was unconstitutional. The importance

of this case for our purposes is that in his judgment O'Donnell J. addressed the difficult and troubling question of whether non-citizens can properly invoke constitutional rights of this nature by observing ([2018] 1 IR 246 at 312-313):

> "……I merely repeat the suggestion made in *Nottinghamshire County Council v. KB* [2013] 4 I.R. 662 that Article 40.1 may provide a useful insight and approach to this question. For present purposes, I would be prepared to hold that the obligation to hold persons equal before the law "as human persons" means that non-citizens may rely on the constitutional rights, where those rights and questions are ones which relate to their status as human persons, but that differentiation may legitimately be made under Article 40.1 having regard to the differences between citizens and non-citizens, if such differentiation is justified by that difference in status. In principle, therefore, I consider that a non-citizen, including an asylum seeker, may be entitled to invoke the unenumerated personal right including possibly the right to work which has been held guaranteed by Article 40.3 if it can be established that to do otherwise would fail to hold such a person equal as a human person. However, it is necessary to consider first what exactly is guaranteed by that right to citizens; second whether the essence of the guarantee relates to the essence of human personality and thus must be accorded to some or all non-citizens who in that regard are entitled to be held equal before the law; third, whether even so a justifiable distinction may be made under Article 40.1 between citizens and lawful residents, and non-citizens and in particular asylum seekers: and finally, whether if any such distinction can be made, such differentiation may extend to encompass the complete ban on employment of asylum seekers contained in s.9(4) [of the Refugee Act 1996]."

23. If one applies this reasoning to the present case, we can see that so far as the first issue is concerned, the right in question as enjoyed by Irish citizens is substantially a feature of the right to privacy in Article 40.3 and the right to associate in Article 40.6.1.iii (again, the precise nature of the particular right at issue depends on the particular circumstances of each case).

24. Turning to the second question, it may be said that this right is indeed an aspect of human personality. As I have already stated, humans are by nature social creatures: indeed, we know from our own individual experience and, for that matter, from a variety of prison cases (see, e.g., *Kinsella v. Governor of Mountjoy Prison* [2011] IEHC 235, [2012] 1 IR 467) that the extended deprivation of human contact may present acute psychological anguish.

25. Third, there is *in principle* no difference based on citizenship so far as the exercise of the right is concerned. Quite obviously as befits any free and democratic state non-citizens — as much as citizens — should be (and are) free to exercise these privacy and associational rights in any variety of ways: all residents of the State are free, for example, to make friends, engage in leisure and sporting activities and to pursue the wide variety of cultural, educational and recreational opportunities which are open to all.

26. It follows, therefore, that, based on the *NHV* analysis, non-nationals enjoy the protections afforded by Article 40.3 and Article 40.6.1.iii (and the other relevant constitutional provisions) in respect of these privacy and associational rights. To that extent, therefore, non-nationals enjoy (in principle, at any rate) a combination of privacy, associational and autonomy-style constitutional rights which correspond to the omnibus description of the right to a private life contained in Article 8 ECHR.

Whether the Minister was obliged to conduct a proportionality analysis prior to making decisions regarding the leave to remain and deportation issues?

27. This conclusion means, of course, that the Minister ought to have conducted a proportionality analysis in respect of the potential impact in respect of these constitutional rights prior to making the s. 49 decisions regarding the issue of leave to remain and the subsequent making of a deportation order: see generally the decision of this Court in *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 IR 510. These rights would be engaged by the deportation of the present applicant in the present case, not least by reason of his lengthy stay in this State. I would nonetheless qualify this observation by the following remarks.

28. First, I do not think that there is any real difference of substance between the ambit of the various constitutional rights which are engaged here and the scope of Article 8 ECHR. It is true that in *Gorry v. Minister for Justice* [2020] IESC 55 this Court quashed ministerial orders of this kind because he had failed to conduct a proportionality assessment in respect of the constitutional rights of a married couple, one of whom was an Irish national. The reason, however, for that conclusion was that the ambit of the protection of marriage in Article 41 was more extensive that the corresponding guarantee in Article 8 ECHR. As both O'Donnell and McKechnie JJ. observed in their respective judgments, it does not at all follow that just because the variety of immigration orders were deemed by the Minister in that case to be proportionate by reference to Article 8 ECHR that the same could necessarily be said by reference to Article 41 of the Constitution had the appropriate proportionality exercise been equally carried out. It is, however, different so far as the privacy rights derived from Article 40.3 and associational rights contained in Article 40.6.1.iii are concerned: save possibly in some unusual or special case, it does not appear to me that a proportionality analysis

by reference to these Article 40.3 privacy and Article 40.6 associational type rights is likely to yield any different result as compared with that conducted by reference to Article 8 ECHR.

29. Second, the nature of these privacy and associational rights must themselves be taken into account. Here it may be useful to reflect on the very nature of the immigration process itself. In the ordinary way a third-county citizen who is not otherwise a citizen of the European Union or the European Economic Area or the United Kingdom or the Swiss Confederation has no free-standing legal entitlement to enter the State and their right to do so is wholly dependent on securing the appropriate visa or other permission from the Minister for Justice and Equality. Conforming to our obligations under the Geneva Conventions, the Refugee Act 1996 provides that permission will be granted to those claiming asylum to enter and to remain in the State lawfully while their application for asylum is being processed. The implicit understanding, of course, is that such permission to remain will be withdrawn in the event that such an application for asylum were to fail.

30. During this period, it can be anticipated that applicants for asylum will acquire and exercise what may be regarded as Article 40.3 privacy and Article 40.6-style associational rights corresponding to the right to a private life contained in Article 8(1) ECHR. They will invariably make friends, pursue a variety of educational, vocational, sporting or work-related activities and generally avail of a range of sporting, cultural or other recreational activities. If, at the end of the asylum process, they are ultimately denied international protection and are required to leave the State, there can be little doubt but that these rights will be affected in that, for example, they may lose touch with these friends or they will no longer be able to pursue these other sporting or leisure activities in quite the same way or in quite the same circumstances as they did while

they lived in Ireland. This, of course, was the very point made by MacEochaidh J. in the High Court in *CI,* albeit in the context of whether Article 8(1) ECHR was engaged.

31. This, however, explains why these particular Article 40.3 privacy rights (in the sense of ordinary friendships etc.) and Article 40.6.1.iii-associational type rights will but rarely prevail in any such proportionality analysis. The State's interest in controlling its frontiers and regulating entry is always a constant one. This is an important State interest which will, absent special circumstances, generally prevail when balanced against the claim of the unsuccessful asylum seeker advancing privacy and associational rights of this kind, not least because these private rights could only have been acquired or exercised in the first place in circumstances where the claimant was allowed conditional entry into the State for the purpose of seeking this international protection. If it were otherwise, the capacity of the State to operate its immigration and asylum system in any fair, orderly or coherent fashion would be severely compromised.

32. This point was well made by Finlay Geoghegan J. in her judgment in *CI* when, speaking about an interference with Article 8 ECHR rights to private life and having examined the contemporary ECHR case-law on this theme, she observed ([2015] 3 IR 385 at 403):

> "…whilst the inevitable consequence of expulsion may be the severing of the social ties which may be considered to form part of the private life, it appears that what requires to be examined by the decision maker is not just the obvious impact on the private life in the sense of the social ties but rather the gravity of the impact of severing social ties on the proposed deportee or on his or her physical and moral integrity."

33. The same may be said of the applicant in this case. His Article 40.3-privacy and Article 40.6-associational rights – such as the many friends he has made or the associational

activities he has engaged in – would clearly be affected by his proposed expulsion from the State and a forced return to Albania. But there is nothing to show that there was anything exceptional or remarkable in this respect about the rights which he had acquired and exercised during his stay here: he attended school, he had been looked after during his minority by a foster family, he had moved out of that family into his own accommodation and found a job at a restaurant. All of these matters are doubtless very much to his credit, but much the same could be said of any number of other people in the State (whether Irish citizens or otherwise) so far as the exercise of these and similar rights at a time corresponding to the period during which the applicant was waiting for a determination of his asylum application.

34. The Minister was, of course, in error insofar as she said (or implied) that the deportation of the applicant did not affect these private and associational rights (whether under the Constitution or the right to private life protected by Article 8(1) ECHR) because they clearly would be so affected. The Minister was, however, generally correct to say, having set out fairly the case made by the applicant in this regard, that in view of the State's constant and important interest in maintaining the integrity of its borders and the fair operation of our asylum system, the expulsion of the applicant would not in these circumstances ordinarily constitute a *breach* of these rights. Again, absent special circumstances, these rights will but rarely prevail as against the State's fixed interest in ensuring that the integrity of the asylum system is maintained. This is true whether the proportionality analysis is conducted in respect of these particular constitutional rights or, alternatively, by virtue of Article 8(2) ECHR.

35. It was in this vein that the original s. 49(3) decision (the reasons for which Tara Burns J. found were expressly incorporated into the subsequent s. 49(7) review decision) stated that it was "in the interest of the common good to uphold the integrity of the

international protection and immigration procedures of the State and to protect the economic well-being decision of the State." At all events, the Minister's assessment of these issues – which, in any event, corresponded in substance to a proportionality analysis both for the purposes of the constitutional question and the Article 8(2) ECHR analysis – cannot be said to be either unreasonable or disproportionate in the *Meadows* sense of that term.

36. To that extent, therefore, the Minister's decision was fully justifiable by reference to Article 8(2) ECHR, since maintaining the integrity and coherence of the asylum system is such an important consideration that, absent exceptional circumstances, a decision of this kind can nearly always be justified by reference to Article 8(2) ECHR and will be regarded as proportionate in the circumstances. Such a conclusion is also reflected in the consistent jurisprudence of the European Court of Human Rights: see, *e.g., Pormes v. Netherlands* [2020] ECHR 572 where the Court stated (at [58]) that:

> "if an alien establishes a private life within a State at a time when he or she is aware that his or her immigration status is such that the continuation of that private life in that country would be precarious from the start, a refusal to admit him or her would amount to a breach of Article 8 in exceptional circumstances only."

Conclusions

37. In summary, therefore, I am of the view that the applicant had constitutional rights to privacy in Article 40.3 and to associate protected by Article 40.6.1.iii in the manner I have just described. I further conclude that even as a non-national he was entitled to avail of these rights having regard to the decision of this Court in *NHV*. To that extent, therefore, I find myself in respectful disagreement with the conclusion of Finlay

Geoghegan J. to the contrary in *Dos Santos*. While this means that, in strictness, the Minister ought to have conducted a proportionality analysis in respect of the impact which the proposed deportation would have on the applicant's constitutional rights of this nature, nothing turns on this - at least so far as the present case is concerned - given that these rights correspond in substance to the right to a private life protected by Article 8 ECHR.

38. Given the ubiquitous nature of these privacy and associational rights – in that they are acquired and exercised simply by reason of ordinary life in the State – they can but rarely prevail against the important interests of the State in controlling its frontiers and preserving the integrity of the asylum system. While the applicant's constitutional rights in this respect would naturally be affected by his expulsion from the State, it cannot be said that the Minister did not properly consider or weigh these rights or that the proportionality exercise which she in substance conducted when reviewing the file for the purposes of the s. 49 decisions can be said to be unreasonable or disproportionate in the *Meadows* sense of that term.

39. To that extent, therefore, the Minister's decision was also fully justifiable by reference to Article 8(2) ECHR, since maintaining the integrity and coherence of the immigration system is such an important consideration that, absent special or unusual facts, a decision of this kind can nearly always be justified by reference to Article 8(2) ECHR and will be regarded as proportionate in the circumstances. While I agree that the Minister erred in law in her analysis of the constitutional issue and in holding that the interference with the applicant's right to a private life did not attain the level of gravity such as would engage Article 8(1) ECHR, I nevertheless consider that her conclusions that the applicant had not advanced any special reasons or circumstances such as would outweigh the State's consistent interest in maintaining the integrity of the asylum

system amounted in substance to the requisite *Meadows*-style proportionality analysis both for the purposes of Article 40.3 privacy rights and Article 40.6.1 associational rights and in respect of Article 8 ECHR rights, these legal errors notwithstanding.

40. There is no doubt but that the conclusions of the Court regarding the decisions in *Razgar* and *CI* will have significant implications for the functioning of the asylum system. These decisions have been frequently cited by officials in the Minister's departments in thousands of decisions. One may expect that for the immediate future that the High Court and Court of Appeal will still be obliged to consider decisions of the Minister which will contain the very same errors regarding the scope of constitutional rights and/or Article 8(1) ECHR regarding the scope of these rights to private life. In these circumstances I suggest that both courts should examine whether the facts of each case did indeed present constitutional/Article 8(1) ECHR issues of sufficient and particular gravity such that they are capable of outweighing the Minister's fixed interests in maintaining the integrity of the asylum system.

41. All of this is to say that one must not assume that just because a majority of the Court has concluded that the Minister's decision should not be quashed, the same will also necessarily be true of all other cases presenting the same legal errors. There may, for example, be other instances of whether the private life and associational ties of the claimant are far more deeply embedded in this State than appears to have been true of this particular claimant.

42. In the circumstances I would nevertheless conclude that the Minister's overall decision cannot be faulted, these legal errors notwithstanding. It follows, therefore, that I would dismiss the applicant's appeal.