

**THE HIGH COURT  
JUDICIAL REVIEW**

[2021] IEHC 747

**RECORD NO. 2016/550JR**

**BETWEEN**

**GIDEON ODUM AND SOPHIA CHUKWUDI (AN INFANT SUING BY AND THROUGH HER FATHER AND NEXT FRIEND GIDEON ODUM) AND RICHARD CHUKWUBUKE AGBONESE (AN INFANT SUING BY AND THROUGH HIS FATHER AND NEXT FRIEND GIDEON ODUM) AND WILLIAM ONYINYE AGBONESE (AN INFANT SUING BY AND THROUGH HIS FATHER AND NEXT FRIEND GIDEON ODUM)**

**APPLICANTS**

**-AND-**

**THE MINISTER FOR JUSTICE**

**RESPONDENT**

**JUDGMENT of Ms. Justice Tara Burns delivered on 22 November 2021**

**General**

1. The First Applicant is a Nigerian national who is asserted to have entered the State without permission in November 2007. The Second, Third and Fourth Applicants, who are Nigerian citizens lawfully resident in the State, are asserted to be the First Applicant's children, although he is not named as the father on the Third and Fourth Applicant's birth certificates. With respect to the Second Applicant's birth certificate, the First Applicant is named as her father, however an address in Nigeria is recorded for him in respect of a period of time when he allegedly was living in this jurisdiction. The First Applicant asserts that his correct details, on all three birth certificates, were intentionally not registered as he did not want his illegal status to come to light.
2. The First Applicant and the mother of the Second, Third and Fourth Applicants, had been in a relationship prior to 2007. They married in a religious ceremony in December 2007, however they did not partake in a civil ceremony. Accordingly, their marriage is not recognised within the State. They separated in November 2014. The First Applicant was made joint guardian of the Second, Third and Fourth Applicant by an order of the District Court, made consensually, on 20 January 2015.
3. After the separation, the First Applicant sought permission to remain in the State, which was refused. On 21 June 2016, a Deportation Order was made against the First Applicant. The reasons for making the Deportation Order were set out in a letter to the First Applicant as follows:-

"The reasons for the Minister's decision are that you have remained in the State without the permission of the Minister for Justice... Having had regard to the factors set out in section 3(6) of the Immigration Act, 1999 (as amended), including the representations received on your behalf, the Minister is satisfied that the interest of the public policy and the common good in maintaining the integrity of the asylum and immigration systems outweigh such features of your case as might tend to support you being granted leave to remain in this State."
4. Leave to apply by way of Judicial Review seeking an order of *Certiorari* of the Deportation Order was granted by the High Court on 25 July 2016 on the grounds, in summary, that

the Respondent had failed to consider the Applicants' constitutional rights pursuant to Articles 40, 41 and 42 of the Constitution; that the Article 8 family life rights decision was void for uncertainty; erred by applying an insurmountable obstacles test; failed to provide reasons for the deportation decision; and erred in the consideration of the First Applicant's employment prospects.

#### **The First Applicant's Permission to Remain Application**

5. On foot of the First Applicant's application for permission to remain, protracted correspondence was engaged in between the First Applicant and the Respondent. In summary, the Respondent sought details of the First Applicant's arrival into this jurisdiction; proof of residence since entering this jurisdiction; and information regarding how he had supported himself. Issues with respect to his identity on all three birth certificates and details of where the Applicants resided were sought in order to allow the Respondent to identify the level of contact and dependency involved.
6. In a letter dated 8 January 2015, the Respondent stated that "*the outcome of the access hearing will obviously have a major bearing on whether or not your client will be granted residence in the State.*" It also noted that the Second, Third and Fourth Applicants' mother had been claiming lone parent's allowance since September 2013 and a response was invited in respect of the apparent discrepancy. The Respondent indicated that if all of these issues were not clarified and addressed by 9 February 2015, a notification of a proposal to deport the First Applicant would issue.
7. The access hearing, referred to above, was resolved by two consent orders of the District Court dated 20 January 2015, the first of which appointed the First Applicant, of Unit 6, Ballincollig Business Park, Leo Murphy Road, Ballincollig, Cork as joint guardian of the Second, Third and Fourth Applicants, and the second of which directed, by consent, access to the First Applicant as per consent attached. A handwritten consent order was attached to the Court Order dealing with access. However, the consent order forwarded to the Respondent only reflected that the First Applicant was to be appointed joint guardian of the three children. Details of the First Applicant's access arrangements with his children were not notified to the Respondent. A proposal to deport the First Applicant duly issued.

#### **The Respondent's Consideration of s.3 of the Immigration Act 1999**

8. The "Examination of file under Section 3 of the Immigration Act 1999, as amended", which was included with the letter notifying the First Applicant of the Deportation Order, examined the various requirements which the Respondent is mandated to consider, pursuant to s. 3 of the Immigration Act 1999, when determining whether to issue a Deportation Order. Relevant portions of that document state as follows:-

"Section 3(6)(f) Employment (including self-employment) Prospects of the Person

Gideon Odum has submitted a letter dated 8th December 2014 from [BA], CEO, Deltec Computer Services, which states, "*I would be glad to offer him full-time employment if he is granted residency in Ireland.*" Notwithstanding this offer of employment, no job description or salary has been included, nor is there any

further up-to-date information on file to show that this position is still available to Mr Odum or that he has the specialist skills above a citizen of the State who is permitted to work in the State. Gideon Odum is not permitted by law to work in the State.

In a personal letter dated 27th April 2016, Mr Odum further states, *"There are lots of healthcare sections willing to employ me as the demand for carers is very high in Ireland."*

Representations received dated 02nd June 2016 include offers of interviews in the healthcare sector in respect of various positions such as a "Permanent Multi Task Attendant" with Caherciveen Community Hospital and a "Caregiver" with "Home Instead Senior Care".

It is not in doubt that, given his age, good health and work ethic, and indeed track record of volunteer work in this State, Gideon Odum's employment prospects; in the event that he held a right of residency in the State, accompanied by a right to work, are reasonable.

According to the CSO Monthly Unemployment Report for May 2016, the seasonally adjusted unemployment rate for May 2016 was 7.8%, down from 7.9% in April 2016 and down from 9.6% in May 2015. The seasonally adjusted number of persons unemployed was 169,700 in May 2016, a decrease of 1,500 when compared to the April 2016 figure or a decrease of 38,300 when compared to May 2015...

Therefore, having regard for the numbers on the Live Register, it is hardly in the interest of the common good that a third country national, such as Gideon Odum with no right of residence in the State, would be enabled to take up a position of paid employment in the State without having regard for the fact that other persons, including unemployed Irish and EU nationals, with equal skills and availability to Gideon Odum would be negatively impacted by such a decision.

In the absence of any information or documentation to suggest that Mr. Gideon Odum has any specialist skills which are in deficit in the State, it would have to be concluded that the only nature of employment which would be available to Gideon Odum would be positions of employment which could be filled by reference to an Irish or an EU national, or by a third country national with a right of residency in the State, accompanied by a right to work.

...

#### Section 3(6)(h) – Humanitarian Considerations

Gideon Odum states that he has three children who were all born in the State between 2008 and 2012. It is noted however that his name does not appear on the Birth Certificates of his two younger children. He states he is no longer married to

the children's mother, Ms. [A], but has submitted two Court Orders dated 20th January 2015. The first confirms he has been appointed joint guardian of his three children... The second Court Order relates to access and notes, "*Access to the father as per consent attached, to commence 25th January 2015*". It is noted that a complete Consent agreement is not within the file and therefore the access arrangements cannot be confirmed.

Mr Odum claims to have been residing in the State with his family since 2007 and that he "*is very closely bonded with his children and has been involved in their lives since they were born*". I have carefully considered the Court Order of 20th January 2015 in respect of Mr Odum's Guardianship and access rights to his children, I note that details of the access arrangements are missing from the file and no independent documentation has been submitted to show that Mr Odum is involved in his children's lives.

It noted from file that despite repeated requests to produce documentary evidence identifying the level of contact or dependency that exists between Mr Odum and his children, nothing substantive was produced in support of this. It is also noted that notwithstanding a scant number of utility bills and medical/grocery receipts, Mr Odum has failed to advance independent documentary evidence in this regard.

Representations received state that Gideon Odum has completed his training as a Healthcare Assistant in Ireland and that there are lots of healthcare sectors willing to employ him.

It is submitted that the humanitarian considerations in this case are not of such sufficient weight that the Minister should not deport Gideon Odum.

...

#### Section 3(6)(j) – The Common Good

It is in the interest of the common good to uphold the integrity of the asylum and immigration procedures of the State.

Having regard for the numbers on the Live Register referenced at 3(6)(f), it is hardly in the interest of the common good that a third country national, such as Gideon Odum with no right of residence in the State, would be enabled to take up a position of paid employment in the State without having regard for the fact that other persons, including unemployed Irish and EU nationals, with equal skills and availability to Gideon Odum would be negatively impacted by such a decision.

...

Consideration under Article 8 of the European Convention on Human Rights (ECHR)

...

## Private Life

...

Gideon Odum is not permitted to work or study in the State. It is submitted that in pursuing a course of study, as detailed above, and carrying "*out odd jobs for cash in hand*" as submitted by Mr Odum, shows a flagrant disregard for the immigration laws in the State. In light of the level of unemployment in the State and the current economic climate, allied to the fact that no information or documentation has been submitted to show that Gideon Odum has any specialist skills which are in deficit in the State, I submit that Gideon Odum's employment prospects are limited.

...

## Family Life

...

Having weighed and considered the facts of this case as set out above, it is accepted that any such potential interference may have consequences of such gravity as potentially to engage the operation of Article 8. However, it is submitted that any interference in this case:

- (a) Is in accordance with Irish law – Section 3 of the Immigration Act 1999, as amended, specifically provides for the making of a Deportation Order,
- (b) Pursues a pressing social need and a legitimate aim – i.e. the legitimate aim of the State to:
  - (i) Maintain control of its own borders to operate a regularised system for the control, processing and monitoring of non-national persons in the State. It is consistent with the Minister's obligations to impose those controls and is in conformity with all domestic and international legal obligations.
  - (ii) To prevent disorder and crime and
  - (iii) To ensure the economic well-being of the country
- (c) Is necessary in a democratic society, in pursuit of a pressing social need and proportionate to the legitimate aim being pursued within the meaning of Article 8(2) – i.e. Gideon Odum has been given an individual assessment and due process in all respects and there is no less restrictive process available which would achieve the legitimate aims and the pressing social needs of the State.
  - (i) The right of the State to maintain control of its own borders and to operate a regulated system for the control, processing and monitoring of non-national persons in the State.

Mr. Odum claims to have been residing in the State since 2007, however, he has not submitted complete independent documentary evidence to support this. I have

considered all documentary evidence submitted which supports a claim that he was present in the State at certain times between 2008 and 2012, however, credible evidence by way of the Birth Certificate of his daughter Sophia... naming him as the father, contradicts this assertion by stating his address, at the time of her birth in 2008, as being "Agip Estate Satellite Town, Lagos, Nigeria".

I have considered Mr. Odum's assertion that he only included his Nigerian address due to his illegal status in the State, however, his claim to have been residing in the State by the submission of disparate utility and medical bills dated between 2008 and 2012 is not complete or credible evidence that he has in fact been residing continuously in the State since 2007. I have considered the fact that Mr. Odum has knowingly put false information on the Birth Certificate to be a very serious matter and a flagrant disregard for the laws of the State.

It is submitted that Mr. Odum's contention to having been married in Ireland on the 1st December 2007 is not acceptable evidence as this marriage was not registered with the relevant authorities of the State, that is to say, the General Registrar's Office in Ireland. It is impossible to substantiate the unstamped World of Life Bible Ministry Marriage Certificate nor can it be relied on as proof of Mr. Odum's marriage or residency in the State in 2007. I have further considered that no documentary evidence has been advanced from Ms [A] to support Mr. Odum's claim that he had been resident in the State since 2007.

Gideon Odum submits that he resided with Ms [A] 'as husband and wife' until October 2014. Notwithstanding a request to provide the Minister with details of where Mr. Odum or his children were currently residing in order to identify the level of contact and dependency involved, no independent evidence has been provided to the Minister....

I have considered a Court Order dated the 20th January, 2015 confirming that Mr. Odum has been appointed joint guardian of the [three children]. A Second Court order relates to access and notes, "Access to the father as per consent attached to commence 25th January 2015". It is noted that a complete Consent Agreement is not within the file and therefore the access arrangements cannot be confirmed. Notwithstanding a small number of school receipts and grocery bills, no concrete or independent documentary evidence has been submitted to corroborate the assertion by Mr. Odum that his family are dependent on him. Nor has he supplied information in relation to his financial means within the State. Notwithstanding scant grocery or school receipts, Mr. Odum has not advanced any Bank Statements or independent documentation evidencing regular financial support for his three children.

...

Balancing the rights of Mr. Odum and the State

While it could be said that deporting Gideon Odum will interfere with his right to protection of family rights, it is submitted that the legitimate aim of the State is to maintain control of its own borders and operate a regulated system for control, processing and monitoring of non-national persons in the State. It is consistent with the Minister's obligations to impose these controls and is in conformity with all domestic and international legal obligations. The jurisprudence of the European Court of Human Rights has established that a State has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.

...

It is appropriate to observe that there is no general obligation on a member state to respect a married couple's choice of country in which to reside...

...

In *R. Mahmoud v. The Home Secretary* [2001] 1 WLR 840 the UK Court of Appeal found, *inter alia*, that the removal or exclusion of one family member from a State where other members of the family are lawfully resident, will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involved a degree of hardship for some or all members of the family.

...

In weighing the rights of Mr. Odum against those of the State, I acknowledge that it will be more difficult and less convenient for Mr. Odum to be with his children if he is deported. However, Mr. Odum's ex-wife and his three children are all Nigerian citizen. [EA], the children's mother currently holds a temporary permission to remain in the State which was due to expire in December 2016. There is no guarantee that this permission will be renewed. No evidence has been advanced by Mr. Odum that his ex-wife and children will suffer serious difficulties in their country of origin, notwithstanding this itself would not exclude Mr. Odum's expulsion. I have also considered that Gideon Odum's children are nationals of Nigeria and would be in a position to travel to Nigeria to visit their father. In that circumstance family life would not be ruptured beyond the normal consequences of separation. I submit also that the children being four, five and seven years old are of an adaptable age.

I have considered representations from Togher's Boys National School dated the 21st October 2014 confirming Richard Chukwubuke is currently in Junior Infants that his father's name is Odum Gideon Chukwudi. No documentary evidence has been advanced in respect of Sophie, who is seven years of age and school going, or William who is four years of age, nor is comprehensive evidence that Mr. Odum is active on a daily basis with his children such as confirmation of drop off and pick up from school, etc. I have considered a number of receipts submitted for September

2014 and periods in 2015, presumably in respect of financial support since the breakdown of the marriage, however, no evidence of concrete financial support has been submitted on behalf of the children's' mother to verify regular financial support from their father, Mr. Odum."

...

#### Conclusion

Gideon Odum has been given an individual assessment and due process in all respects. Accordingly, having considered and weighed all factors in this case, it is submitted that the legitimate aim of the State in seeking to remove Mr Odum to maintain control of its own borders and operate a regulated system for the control, processing and monitoring of the non-national persons in the State and to ensure the economic well being of the country outweighs Mr Odum's right for his family life.

It is submitted therefore that if the Minister makes a Deportation Order in respect of Gideon Odum, there is no less restrictive process available which would achieve the legitimate aim of the State to maintain control of its borders and operate a regulated system for the control, processing and monitoring of non-national persons in the State and to ensure the economic well-being of the State. These therefore exist as substantial reasons associated with the common good which requires that a Deportation Order be made in respect of Gideon Odum."

#### **Breach of the Applicants' Constitutional Rights pursuant to Article 40, 41 and 42**

9. The Applicants submit that the Respondent did not consider their constitutional rights pursuant to Article 40, 41 and 42 of the Constitution. They accept that they did not make representations to the Respondent in this regard, however, they assert that the representations made were in the nature of factual submissions rather than legal submission. They drew attention to the fact that the Respondent considered whether Article 8 ECHR rights were engaged in circumstances where they had not made such representations to the Respondent.
10. The Respondent submits that Article 41 constitutional rights do not arise as this family was not a family within the meaning of Article 41, as a recognised lawful marriage had not been entered into. It was further submitted that the First Applicant's parentage of the Third and Fourth Applicant was not established, which had implications for the nature of the constitutional rights asserted. Principally, the Respondent argued that the factual scenario underlying the relationship between the Applicants did not establish an active involvement by the First Applicant in the lives of the Second, Third and Fourth Applicants and that therefore a breach of constitutional rights did not arise for consideration.
11. In response, the Applicants accept that a marriage as recognised pursuant to Article 41 did not exist in the instant case. However, it was argued that the constitutional rights of the non-marital family, of the children and the personal rights of the Applicant were at



play. With respect to parentage, they referred to an offer from the First Applicant to undergo a DNA test which was not taken up by the Respondent. Grave exception was taken to the manner in which the case was pleaded by the Respondent and the fact that the First Applicant's parentage of the Third and Fourth Applicants was put in issue.

12. With respect to the First Applicant's parentage of the Third and Fourth Applicants, while the Respondent, in the course of her decision, did not formally accept that the First Applicant was the father of the Third and Fourth Applicants, she nonetheless proceeded to determine whether to issue a Deportation Order on the basis that he was. For that reason, it would be completely inappropriate for this Court to determine these proceedings on the basis that the First Applicant's parentage is at issue. Accordingly, taking its lead from the Respondent, the Court will consider the First Applicant to be the father of the Third and Fourth Applicants without making a factual determination that he is. The District Court Order relating to guardianship is not determinative of this issue, as it was a consent order. An inquiry was not conducted into the First Applicant's parentage of the children before the District Court as this was not put in issue by the children's mother who instead consented to the First Applicant becoming a joint guardian of the children.
  
13. In *Oguekwe v. Minister for Justice* [2008] 3 IR 795, the Supreme Court identified the constitutional rights of a citizen child, which must be considered by the Respondent when considering whether to deport a parent. The constitutional rights identified included the right to the society, care and company of her parent. The Court also set out a non-exhaustive list of the manner in which the Respondent should approach a consideration of whether to deport a parent of a citizen child. Denham J. stated at paragraph 85 of the judgment:-
  - "1. The Minister should consider the circumstances of each case by due inquiry in a fair and proper manner as to the facts and factors affecting the family.
  
  2. Save for exceptional cases, the Minister is not required to inquire into matters other than those which have been sent to him by and on behalf of applicants and which are on the file of the department. The Minister is not required to inquire outside the documents furnished by and on behalf of the applicant, except in exceptional circumstances.
  
  5. The Minister should consider the potential interference with rights of the applicants. This will include consideration of the nature and history of the family unit.
  
  6. The Minister should consider expressly the constitutional rights, including the personal rights, of the Irish born child....

The Minister should deal expressly with the rights of the child in any decision.

7. The Minister should also consider the Convention rights of the applicants, including those of the Irish born child. These rights overlap to some extent and may be considered together with the constitutional rights.
  8. Neither Constitutional nor Convention rights of the applicants are absolute. They require to be considered in the context of the factual matrix of the case.
  9. The Minister is not obliged to respect the choice of residence of a married couple.
  10. 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.
  11. The Minister should weigh the factors and principles in a fair and just manner to achieve a reasonable and proportionate decision. While the Irish born child has the right to reside in the State, there may be a substantial reason, associated with the common good, for the Minister to make an order to deport a foreign national who is a parent of an Irish born child, even though the necessary consequence is that in order to remain a family unit the Irish born child must leave the State. However, the decision should not be disproportionate to the ends sought to be achieved
  12. The Minister should consider whether in all the circumstances of the case there is a substantial reason associated with the common good which requires the deportation of the foreign national parent. In such circumstances the Minister should take into consideration the personal circumstances of the Irish born child and the foreign national parents, including... whether it would be reasonable to expect family members to follow the first applicant to Nigeria.
  13. The Minister should be satisfied that there is a substantial reason for deporting a foreign national parent, that the deportation is not disproportionate to the ends sought to be achieved, and that the order of deportation is a necessary measure for the purpose of achieving the common good.
  14. The Minister should also take into account the common good and policy considerations which would lead to similar decisions in other cases.
14. In *KRA v. Minister for Justice* [2019] 1 IR 567, Irvine J. stated at paragraph 41 of her judgment:-
- "41. ... 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."*

15. Children, who are not citizens of this State and who are not part of a family based on marriage protected by Article 41, nonetheless have constitutional rights as children, which arise from the inherent characteristics of the human personality and the nurturing relationship between parent and child. The extent and nature of those rights do not arise for consideration in this judgment, as the grounds of challenge to the Respondent's decision focus on the Respondent's failure to consider the Applicants' unspecified constitutional rights rather than establishing a breach of such rights. Nonetheless, arising from the nurturing relationship between parent and child as identified by Denham J. in *Oguekwe v. Minister for Justice*, a child, regardless of her non-citizen and non-marital family status, has a constitutional right to the care and company of her parent. Similarly, a non-citizen and unmarried parent has a constitutional right to the company of her child. However, such rights are not absolute and are limited by the common good and the State's legitimate interests. As referred to in *Oguekwe v. Minister for Justice* by Denham J., and emphasised by O'Donnell J. in *Gorry v. Minister for Justice* [2020] IESC] 55, the starting position with respect to decisions of this nature is that the State has a right to determine whether a foreign national can enter and remain in the State. While constitutional rights arising must be considered, the legitimate interests of the State must also be considered and a balancing exercise engaged in so as to determine where the greater interest lies.
16. In *IRM v. Minister for Justice and Equality* [2018] 1 IR 417, a case dealing with a citizen child and an unmarried father, the Supreme Court considered the significance of the factual matrix underlying the familial relationships stating at paragraph 112:-

"The potential interference with one or other of the constitutional rights to reside in Ireland and to the care and company of parents by deportation of a father is obvious. However, the impact of that interference for the citizen child will depend on many factors including age, existing or future probable relationship and contact with the father, possibly the relationship with, and circumstances of, the mother and many more. The impact on a ten-year old child who has lived in Ireland in the care of both parents for many years may be significantly different to that of a one-month-old child where the facts are such that it appears probable that, even if the father remained in Ireland, the child would not live with him. The assessment of the impact on the constitutional rights of, say, a two-month-old child by the deportation of his father may not differ greatly from that of an unborn child due to be born in two months' time, but both might greatly differ from that of the ten-year-old in the circumstances already described or, indeed, an unborn in the very early stages of gestation. The interests of the State in any given application may differ significantly and possibly depend, amongst other things, on the immigration or other relevant history of the potential deportee or applicant for revocation. The weight to be attached to those factors and the potential proportionality of any decision by the Minister to refuse revocation of a deportation order are not matters for this judgment."

And at paragraph 223:

“Article 42A is a composite provision recognizing the rights of children, making it clear that its provisions apply to all children regardless of the marital status of the parents, providing that the children’s best interests will be the paramount consideration and providing for the voice of the child to be ascertained in proceedings concerning them.”

17. Having regard to the aforementioned cases, it is clear that considerations regarding the impact of the interference with a child’s constitutional right to the care and company of her parents are dependent on the underlying factual matrix and family history. Accordingly, while the Second, Third and Fourth Applicants have a constitutional right to the company and care of the First Applicant and while the First Applicant has a constitutional right to the company of his minor children, breaches of these rights would only arise, as a result of the First Applicant’s deportation, if it is established that there was a meaningful involved relationship between the First Applicant and the Second, Third and Fourth Applicants.
18. In the instant case, while the First Applicant was made a joint guardian of the Second, Third and Fourth Applicants, no evidence was placed before the Respondent regarding the relationship between the First Applicant and the Second, Third and Fourth Applicants. This is of particular importance in light of the failure by the Applicants to put any flesh on the bones of the now asserted constitutional rights. In the absence of information establishing a meaningful active involvement by the First Applicant with the Second, Third and Fourth Applicants, there is no evidence that the constitutional rights arising were exercised or evidence that deporting the First Applicant would cause an infringement of such rights.
19. The Applicants assert that the Respondent failed to consider the best interests of the children, but in the absence of evidence of the relationship between the First Applicant and the children, there was no evidence before the Respondent that the best interest of the children required the First Applicant not to be deported. It cannot be inferred that a father remaining in the jurisdiction where his three children live is in the best interest of those children unless there is an active involved relationship between them.
20. Accordingly, while the Respondent did not expressly consider the constitutional rights now asserted, as these rights were never raised before her in the representations made to her, her decision does not reflect a breach of these constitutional rights in light of the paucity of evidence before her establishing their engagement or their breach. The Respondent engaged in a very detailed analysis of the information provided to her, which has been set out earlier. While the Respondent did not specifically set out constitutional considerations, the factual matrix underlying the assertion of the constitutional rights was thoroughly assessed. That assessment found that there was no evidence of a meaningful involved relationship between the First Applicant and the Second, Third and Fourth Applicants. Accordingly, a breach of the asserted constitutional rights arising from the decision to deport the First Applicant is not established on the evidence.

## **Article 8 Family Life rights**

21. The jurisprudence of the Irish Courts is extremely well settled to the effect that a migrant with a non-settled or precarious residential status cannot have Article 8 rights engaged, to include family life rights, unless exceptional circumstances arise. Should exceptional circumstances arise such that Article 8 rights are engaged, then a proportionality assessment pursuant to Article 8(2) of the ECHR must be carried out.

22. In *Oguekwe v. Minister for Justice and Equality*, [2008] 3 IR 795 Denham J stated at paragraph 47 of the judgment:-

"The competing and conflicting considerations which may arise in such decisions were summarised by Lord Phillips of Worth Matravers M.R. in *R. (Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840. Fennelly J. found them very useful in *T.C. v. Minister for Justice*, as do I. In the summary, at p. 861, Lord Phillips M.R. states:-

"From these decisions I have drawn the following conclusions as to the approach of the Commission and the European Court of Human Rights to the potential conflict between the respect for family life and the enforcement of immigration controls: (1) A state has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations. (2) Article 8 does not impose on a State any general obligation to respect the choice of residence of a married couple. (3) Removal or exclusion of one family member from a State where other members of the family are lawfully resident will not necessarily infringe article 8 provided that there are no 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. (4) Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a state if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled. (5) 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. (6) Whether interference with family rights is justified in the interests of controlling immigration will depend on (i) the facts of the particular case and (ii) the circumstances prevailing in the State whose action is impugned."

23. The First Applicant's complaint regarding the Article 8 analysis conducted by the Respondent is that it is asserted the Respondent engaged in a proportionality assessment regarding the interference with the First Applicant's family life rights. It is submitted that the inference must therefore be that the Respondent held the view that family life rights were engaged and that exceptional circumstances existed. However, they point to the discrepancy later in the decision where the Respondent finds that Article 8 rights were not engaged. In light of this uncertainty, they assert that Article 8 rights were not properly considered.

24. The interpretation of the Respondent's decision in this manner is mistaken. Instead, the Respondent correctly identified that there was a potential that Article 8 rights were engaged in light of the facts of the case and the potential interference with the First Applicant's family life which his deportation would cause. However, prior to analysing whether exceptional circumstances existed and whether the interference was of such gravity, the Respondent noted the legitimate State interests arising.
25. This does not mean that the Respondent determined that Article 8 rights were in fact engaged, as is clear from her opening sentence in this impugned paragraph. Identifying the recognised State interests engaged does not have the effect of invalidating the decision: they are the State interests at play and the fact that they are referred to does not imply that the Respondent has proceeded to conduct a proportionality assessment. It is clear from the very detailed and thorough analysis conducted by the Respondent with respect to the underlying facts of the case, and the information provided to her by the First Applicant, that the Respondent was of the view that exceptional circumstances did not arise in this matter. In any event, conducting the analysis in the manner which she did, did not result in a different outcome for the First Applicant or any prejudice being suffered by the First Applicant.
26. The Article 8 analysis is not uncertain, as asserted, but rather is detailed and comprehensive.

**Failure to Properly Consider the Applicant's Employment History and Employment Prospects**

27. The First Applicant submits that the Respondent erred in her consideration of his employment prospects by observing that had the First Applicant a work visa and permission to remain in the State, his employment prospects were reasonable, but in the absence of same, his prospects were limited.
28. This Court recently considered a complaint of a similar nature *in ANA v. Minister for Justice* [2021] IEHC 589, wherein I stated:-
  - "13. The argument is made that the Respondent did not have proper regard to the job offer as she negated the positive effect of this offer by reference to the fact that the Applicant did not have permission to reside or work in the State and that there was no obligation on the Minister to grant him permission to remain so as to facilitate his employment. However, that is not a misstatement of fact or law by the Respondent or something which the Respondent should not take into consideration in the overall balancing exercise which the Respondent must engage in. It is an entirely accurate summation of the position which the Respondent found himself: he had an offer of work but did not have permission to remain in the country or have a work visa. The reference to not having such permissions did not override the job offer which the Applicant had, as asserted by the Applicant, nor has the Respondent treated them as such.
  14. The Applicant seeks to rely on a judgment of this Court in *MAH v. Minister for Justice* [2021] IEHC 302 in support of the proposition that having regard to a lack

of permission to remain or work is not an appropriate consideration pursuant to s.3(6)(f) of the 1999 Act. In *MAH*, the Respondent had positively found that that Applicant had reasonable work prospects for reasons which were specified. Having made that finding, the Respondent relied on the fact that the Applicant did not have permission to remain or a work visa to nullify the finding that her work prospects were reasonable. This Court set out at paragraphs 28 and 29:-

“Section 3(6) clearly places a mandatory onus on the Respondent to consider particular, specified issues when determining whether a deportation order should issue in respect of a proposed deportee. Whilst the Respondent did consider the Applicant’s employment prospects, she reversed the clearly positive outcome in respect of that heading by having regard to the fact that the Applicant does not hold a work visa in respect of such employment prospects, nor has permission to remain in the State. These are inappropriate matters to have regard to under this sub-heading. Had the Applicant a work visa or a permission to remain in the State, a consideration pursuant to s.3(6) of the 1999 Act would not arise in the first place. Accordingly, what s.3(6) requires of the Respondent is to initially consider each of the sub-headings on a standalone basis and to then engage in a balancing act to determine whether a deportation order should issue having regard to all issues mandated to be considered pursuant to s.3(6).

29. Incorrectly, the Respondent nullified the separate consideration of the good employment prospects which the Applicant was found to have by reference to her not having a work visa or permission to be in the State. These issues are separate to her employment prospects: they can clearly be taken into account by the Respondent in the balancing exercise which she must conduct but they should not be utilised in a compartmentalised determination regarding her employment prospects simpliciter. This was an error on the Respondent’s part.”

15. The error which the Respondent fell into in *MAH* did not occur in the instant case. The fact that the Applicant does not have permission to remain or a work visa is noted as a fact, but it is not utilized to make a determination that the Applicant does not have reasonable work prospects, which was the error which the Respondent made in *MAH*. Instead, it is noted as a fact to be considered as part of the balancing exercise which the Court referred to in *MAH*.”

29. In the instant case, the Respondent’s reasoning that the First Applicant’s employment prospects were limited was that having regard to the nature of the employment which he was qualified for, he would be competing against Irish and EU nationals and other persons who have a right to reside and work in the State. In light of the unemployment figures then existent, which were high, his employment prospects were limited. This is a finding which was open to the Respondent to make and is neither irrational nor unreasonable having regard to the employment situation then pertaining in the State.

30. As in *ANA v. Minister for Justice*, the fact that the First Applicant did not have a right to reside or to work within the State is noted as a fact to be considered as part of the balancing exercise referred to in *MAH v. Minister for Justice*. Also noted as a fact are the high unemployment figures then existing. A determination was made by the Respondent that in light of the unemployment figures, the common good would not be served if a person in the First Applicant's position, who did not have a right to reside or a right to work, could be enabled to take up paid employment. These are factors which are open to the Respondent to consider in the balancing exercise which she must conduct. Her determinations in this regard were open to her to make and are not irrational or unreasonable.

**Ancillary Complaints regarding the Article 8 analysis**

31. The Applicants complain that the Respondent's Article 8 analysis is flawed for a number of other reasons, namely that the Respondent considered irrelevant case law and incorrectly applied an "insurmountable obstacles" test.
32. Regarding the case law considered by the Respondent, the Applicants do not suggest that there was some other case which ought to have been considered by the Respondent. Their argument is simply that the cases considered involved cases where the children involved were illegal within the jurisdiction rather than the instant situation where the children have permission to be in the State.
33. The decision of the Respondent is not rendered unlawful as a result of considering the case law she had regard to. It is appropriate that the Respondent have regard to the relevant legal principles applicable in an Article 8 analysis. The fact that the underlying circumstances of those cases differ from the instant case can only be of relevance if it can be established that the legal principles set out in those cases are not applicable to the case at hand. The Applicants do not make that submission and have not established that there was a legal error by the Respondent having regard to the cases considered.
34. The Applicants also argue that the "insurmountable obstacles" test was the incorrect test to apply in the Article 8 analysis because constitutional rights were involved. The "insurmountable obstacles" test was approved of by the Supreme Court in *Oguekwe v. Minister for Justice* when Article 8 rights arise for consideration. It is in this context that the Respondent considered this test. Accordingly, an error does not arise in this regard.

**Failure to Give Reasons for the Respondent's Decision Regarding Humanitarian Considerations**

35. The Applicants submit that the Respondent failed to give reasons for its decision that humanitarian considerations did not outweigh deporting the First Applicant.
36. The Respondent's reasons for finding that humanitarian considerations were not of sufficient weight to negative the deportation of the First Applicant are patent from the terms of the decision: it had not been established before the Respondent that there was a meaningful involved relationship between the First Applicant and the Second, Third and Fourth Applicants. The Applicants might not agree with that determination but the reason for the decision in this regard is clearly stated.



**Rendering the District Court Order of Guardianship Null and Void**

37. The Applicants complain that deporting the Applicant renders the District Court Order making the First Applicant a joint guardian of the Second, Third and Fourth Applicants, null and void. This argument fails to have any regard to the fact that the District Court Order was made on consent. Accordingly, a fact finding process was not engaged in by the District Court. The First Applicant's parentage of the Second, Third and Fourth Applicant was not put in issue by the mother of the children. Accordingly, the District Court Order does not reflect facts as determined by a Court, but rather a consensual position of the parties to the District Court proceedings. In any event, the Deportation Order issued against the First Applicant does not render the District Court Order null and void.

**Conclusion**

38. Accordingly, the Applicants have failed to establish any of the grounds of challenge to the Respondent's decision. The Court will therefore refuse the relief sought and make an order for the Respondent's costs as against the First Applicant.