THE SUPREME COURT

Supreme Court Appeal No. 2018/9

O'Donnell J.
McKechnie J.
MacMenamin J.
Dunne J.
Charleton J.

Between/

I. Gorry and Joseph Gorry

Applicants (H.C.)/Respondents

- and -

The Minister for Justice and Equality

Respondent (H.C.)/Appellant

AND

Supreme Court Appeal No. 2018/11

Between/

A.B.M. and B.A.

Applicants (H.C.)/Respondents

-and-

The Minister For Justice And Equality

Respondent (H.C.)/Appellant

Judgment of O'Donnell J. delivered on the 23rd day of September, 2020

I. Introduction

1. There is no doubting the importance, or difficulty, of the issues raised by these appeals. For more than 40 years, the Irish courts, lawyers, and academic writers have struggled with the manner in which the provisions of the Constitution protecting the Family, and Articles 41 and 42 in particular, should be applied, particularly in the field of immigration. The interpretation of those Articles has never been easy, but changing attitudes to marriage and family relationships and the phenomenon of significant immigration are two of the areas in which this country has seen the greatest changes since the coming into force of the Constitution and which have, indeed, been reflected at the level of constitutional change.

2. The common question raised by these appeals is the approach the Minister must take when he or she is invited to revoke a deportation order made against a non-national who has become married to an Irish citizen, thereby creating a family. Obviously, the same considerations arise when it is proposed to make a deportation order against a non-national spouse of an Irish citizen or, indeed, when permission is sought for a spouse of an Irish citizen to enter and reside in the State. At a more general level, however, the fundamental question of the weight to be given to the constitutional protection of Marriage and the Family may arise in a variety of situations in which decisions come to be made in respect of one member of that family, often a spouse, in circumstances where it is plain that the decision will have an impact upon a marriage and family.

3. The facts of each of these cases are set out in the comprehensive judgment of McKechnie J., to which recourse should be had for any additional matter of detail.

For present purposes, the core facts of each case, which give rise to the legal issues, can be stated quite succinctly.

4. The *Gorry* case was the principal focus of the decision of the Court of Appeal. A Nigerian woman came to Ireland and sought asylum: unsuccessfully. Ultimately, a deportation order was made in June, 2005. She remained in Ireland – illegally and evading deportation. She met an Irish man, Mr. Gorry, in 2006, and formed a relationship. In 2009, they travelled to Nigeria, were married, and made an application for revocation of the deportation order and for a visa for Mrs. Gorry to enter Ireland. These applications were refused. Mr. Gorry visited his wife in Nigeria. He found the experience physically difficult and, on his return to Ireland, suffered a heart attack. He says he has been advised not to fly and, in particular, not to stay in Nigeria for any amount of time due to the lack of sufficient medical treatment for his condition if he were to experience a further heart attack. A second application for revocation was made and refused, and is challenged in these proceedings.

5. The High Court (Mac Eochaidh J.) quashed the decision of the Minister. The Court of Appeal upheld that decision, although differing somewhat as to the analysis to be applied. The couple had separated after the High Court decision; however, the Court of Appeal considered that the case should not be treated as moot because of the importance of the issues involved. The Court of Appeal considered it was incorrect to conclude that an Irish citizen had a right to have a non-national spouse to reside with them in Ireland, or even a *prima facie* right to do so, as the High Court had held. Indeed, it appears that this conclusion of the High Court and its possible ramifications were both significant in prompting the appeal to the Court of Appeal. However, that court also considered the Minister

had failed to correctly recognise and weigh the constitutional rights involved in the case. In particular, it appeared that the Minister had treated the question of the constitutional rights of the married couple and family involved as essentially indistinguishable from the rights they possessed under the European Convention on Human Rights ("E.C.H.R.") and had applied the analysis found in the case law of the European Court of Human Rights ("E.Ct.H.R.") without giving separate consideration to the position under the Constitution and, in particular, the family rights which are stated in the Constitution in emphatic terms implying, it was considered, a higher level of protection under the Constitution than was afforded under the E.C.H.R.

6. In the *A.B.M.* case, a man, also a national of Nigeria, came to Ireland in 2006 and sought asylum and/or subsidiary protection: the applications were unsuccessful. In June, 2008, a deportation order was made. A.B.M. did not, however, present himself for deportation, but rather evaded it successfully for seven years. In early 2014, he applied for revocation of the deportation order. In February, 2015, he married B.A., who was also a national of Nigeria and who had, herself, been refused asylum in 2002 but had been given leave to remain in the State in 2007 and had become naturalised as an Irish citizen in August, 2013. The parties claimed that in October, 2006, they had undergone a religious ceremony of marriage, but one which was accepted not to be legally binding. In July, 2015, the Minister was further informed that B.A. was pregnant. On the 20th of July, the Minister refused to revoke the deportation order which was then challenged in the present proceedings. The High Court (Humphreys J.) dismissed the claim. The Court of Appeal (Finlay Geoghegan, Irvine, and Hogan JJ.) allowed the appeal, essentially on the same grounds as had been applied in *Gorry*; that is, that the

Minister had failed to correctly identify and weigh the constitutional rights involved.

7. The issue common to both cases is, therefore, the approach to be taken by the Minister when it is said, in the broadest sense, that the interests of a married couple and a family are affected by the making of a deportation order or by the decision on the revocation of an order already made where, in each case, the marriage was entered after the making of a deportation order and its evasion. The outcome of both cases is, to this extent, very clear: the Minister's approach to both cases was flawed, essentially because the Minister had treated the constitutional analysis as identical, and perhaps even subsidiary, to the analysis by reference to the E.C.H.R. I agree with McKechnie J. that the conclusion by the Court of Appeal in this respect is correct and that these appeals must therefore be dismissed.

8. This might suggest that there is, therefore, a relatively high degree of clarity about the approach to be taken to the issues involved, but that would be misleading. It is apparent that there are marked differences of approach evidenced in the case law and while there exists a degree of agreement in a negative sense, namely that the Minister failed to correctly address the issues, there is little consensus, even in the judgments delivered in this case, to date, on the positive side of the calculation and, in particular, the weight to be given to the constitutional interests involved. Moreover, the judgment of McKechnie J. is, as I apprehend it, the first occasion upon which a judgment in this court (endorsing, in this respect, the judgment in the Court of Appeal) has been decided on the explicit basis that there is a constitutionally protected *right* to cohabit and, moreover, a *right to decide* to cohabit in Ireland. Such rights are, moreover, held to be family rights protected

by Article 41.1.1° and, therefore, rights which the Constitution describes as inalienable and imprescriptible, which have sometimes been described as indefeasible, and endorsed in the judgments of McKechnie J. in this court and Hogan J. in the Court of Appeal as among a complex of rights deserving of "the very highest level of protection feasible in a modern democratic society". This is a conclusion which deserves careful consideration. If full effect was to be given to the conclusion that an Irish citizen has a constitutional right to decide to cohabit with his or her spouse in Ireland, which is a right deserving of the very highest level of protection in a modern democratic society, there could be far-reaching implications for a wide range of decisions.

9. It might be said, however, that since the broad approach taken by the Court of Appeal is one which mandates a balancing test, and that allowed both for considerable weight to be accorded to factors on the other side of the balance and, moreover, an element of significant discretion in the decision-maker as to how to weigh those factors, there is little practical benefit in debating the analysis and that it is a matter of, rather, academic controversy whether there is a different route which may nevertheless come to the same result in these and many other cases. I do not agree. It is, of course, possible to start from the wrong place and take one or more wrong turns and still arrive at a correct destination, but it certainly makes arrival at the correct terminus more difficult and the possibility of error more likely. In any event, there is, I think, a risk that the approach now suggested in the judgment of McKechnie J. may unintentionally give rise to the very danger the Court of Appeal apprehended in the judgment of the High Court in *Gorry*; namely, the development of an approach whereby there comes to be accepted a strong presumption in favour of marital and family residence in Ireland which

must be overcome by the Minister before a decision can be made on deportation and which the decision-maker may struggle to overcome in particular cases. This is significant when the question of entry to or removal from the country is concerned, but is more significant again because the balance posited and the weightings suggested or applied must have application in many other areas of decision making. While the difference of analysis and approach is not decisive in this case, this decision stands at a junction in the development of the case law on Article 41 and where the route chosen my have longer-term significance. Accordingly, I have reluctantly come to the conclusion that it is necessary to offer my own views, concurring in the outcome of this case suggested by McKechnie J., while differing as to the route to that decision.

II. The Approach advanced by the Applicants

10. I respect both the learning and the humane instincts discernible in the approach in the judgment of my colleague and, indeed, those judgments in the courts below which are approved in it. I hope I can accurately and fairly express the reasoning as I understand it. In any event, the following account may facilitate analysis and criticism of my own reasoning, and perhaps highlight the sometimes-subtle differences between the approach of McKechnie J. and that which I would favour. The reasoning, as I understand it, proceeds as follows:

(i) Article 41.1.1° protects certain family rights that are not, however, specified in that sub-Article;

(ii) Although these rights are described as inalienable and imprescriptible, that description is not to be read literally;

(iii) These words are, however, an indicator that the rights protected by Article 41.1.1° should enjoy the highest possible legal protection which might realistically be afforded in a modern society;

(iv) Among the rights protected by Article 41.1.1° is *the right of a married couple to cohabit* which is derived from the State's guarantee under Article 41.1.2° to protect the Family "in its constitution";

(v) Article 41.1.1° also protects the right of a married couple *to decide to cohabit in Ireland* which can be derived from the State's guarantee in Article 41.1.2° to protect the Family "in its constitution and authority";

(vi) "Spousal autonomy" is a core constitutional value protected by Article 41.1.2°;

(vii) These and other unspecified rights protected by Article 41 are, however, not absolute, and can be subject to restriction if there is "compelling justification";

(viii) Considerations such as *the need to uphold the integrity of the asylum system*, *the interest in controlling entry to the State*, *maintaining an orderly immigration system*, *preventing disorder or crime*, *and ensuring the integrity of the social security and health system* are countervailing considerations which could provide such a justification;

(ix) It is, however, incorrect to speak of a right, even a *prima facie* right, of an Irish citizen to reside in Ireland with their non-national spouse;

(x) The Minister must, however, properly recognise the family rights involved, and in making a decision should pay due regard to:

(a) the guarantee given by Article 41.1.2° to protect the Family in its constitution and authority;

(b) the recognition that the married couple represents a fundamental unit in society possessing inalienable and imprescriptible rights;

(c) a recognition that the decision that the family should live in Ireland is a decision which they have a right to take and which the State guaranteed in Article 41.1.1° to protect; and

(d) a recognition of a right of the Irish citizen to live at all times in Ireland as part of what Article 2 refers to as his "birthright … to be part of the Irish Nation" and the absence of any right of the State (absent international obligations which do not apply) to limit that right.

11. There is little in this, at the level of generality at which it is stated, with which any reasonable person might immediately disagree and much that is plainly referable to the terms of the Constitution and the relevant case law. It is apparent that the approach is intended to permit a balancing exercise by the Minister which, moreover, may allow some, and indeed perhaps considerable, scope for the exercise of ministerial discretion by reference to the particular facts of individual cases. It may be that it is only in rare cases that the test might lead to erroneous decisions and still fewer which might be considered damaging to the State's legitimate interests. From the broadest perspective, it can be said that it is difficult to say that, at the margins of the immigration decision-making process, the State is significantly affected by whether the line is drawn quite strictly, and thus excluding some individuals, or more generously with the effect that more people are allowed come to, or stay in, this country to seek a better life which may, moreover, enhance our national life.

12. While I acknowledge the attractions of this approach, I regret that I cannot agree with it. I consider that, when analysed closely, it fails to give clear guidance to decision-makers and will, at a minimum, encourage litigation and consequent delay and obstruction of the decision-making process more generally, make it more difficult to come to correct decisions in most cases, and, in some cases, may lead to decisions which are unhelpful, and perhaps positively damaging, to the State's legitimate interests. More fundamentally, I simply do not consider that the approach is a correct interpretation of the Constitution.

III. Some Questions Which Arise

13. It will be necessary to address these matters at greater length, but it is possible to state, I hope reasonably succinctly, my concerns with this approach and thereby at least suggest the questions that it poses.

14. First, I do not agree that it is permissible to discount the clear words of the Constitution or to replace them with an obligation, however well-intentioned, to afford certain unspecified rights the highest level of protection feasible in a modern society. I would rather give the words the meaning they have always been understood to bear, and would interpret the undoubted strength of those words as indicating that the substantive protection afforded by Article 41 is not expansive or unlimited but, rather, specific, and derived, moreover, from the text and structure of the Constitution.

15. I doubt that the Constitution is to be interpreted as creating in Article 41 some unspecified super-rights to be discerned by future generations of judges and limited by equally unspecified considerations including the common good and ensuring the integrity of the social welfare system. Apart from uncertainty, such

an approach would create an inevitable risk that in good times the interests of the State in the common good will be undervalued and in bad times, when it is perhaps most important to maintain and protect rights which may be temporarily unpopular, those rights may be overborne.

16. More specifically, while I appreciate the approach seeks to afford considerable leeway to a ministerial decision-maker on matters concerning entry to the State, it is unsatisfactory that it provides little guidance as to the weight to be afforded to the respective considerations which makes, if anything, more troubling the fact that these constitutional rights are to be afforded some higher level of protection. The Minister is told that the *way* in which he or she made the decision is wrong, but not what weight should be given to the relevant factors in these cases. But, the values involved in this balance are almost entirely constitutional, and therefore the weight is assigned by the Constitution as interpreted by the Courts. The Minister has, undoubtedly, the statutory power to refuse to revoke the deportation orders and it is not suggested that there was any failure to exercise the power in accordance with the statute. The issue is whether the exercise of the power is invalid as interfering impermissibly with rights protected by the Constitution or the E.C.H.R. That is a legal matter rather than an issue for ministerial discretion. Unless there is guidance as to the weight which the Constitution requires, in particular, to be afforded to the factors at play, and in particular the fact of marriage, then it is inevitable that, even if the Minster were to address the matter in any similar case in the way outlined at para. 10 above, the decision could be the subject of challenge.

17. It is, moreover, strange to speak of individual rights (particularly those considered indefeasible or entitled to the highest level of protection) being limited (and, in

truth, overridden) by matters as general as those identified such as "the common good" and "the integrity of the immigration process". Individual rights have value precisely because they are not subordinated to the interests of others. Second, it is unusual for individual rights to be overridden by such vague and general considerations: it is, in truth, hard to understand why, for example, the integrity of the immigration system more generally is put at risk by allowing one couple or family unit to remain in this country. Furthermore, it is not normally enough to say that, while there is an interference with rights, the common good or the integrity of the immigration or social welfare systems are valid countervailing considerations. Instead, the proportionality test, which might be thought to apply with particular rigour in those cases of rights deemed worthy of the highest possible protection, usually requires not only that a legitimate countervailing interest be identified but also that it be established that the restriction of the right is no more than is strictly necessary to achieve that object. Once again, it is possible to envisage plausible arguments that the interference in family life caused by the forced removal of a spouse which may, in some cases, require spouses, and therefore a family, to live apart (and which is therefore not a mere restriction, but a negating of a right of cohabitation if such exists), could not properly be justified by general concerns with the common good or the integrity of the immigration system. In my view, at least, the judgments in the Court of Appeal do not provide a sufficient explanation why this is not so and, indeed, open the possibility that it may be found that such interference is not justified.

18. Finally, "spousal autonomy" is no more than a term describing the fact that some family decisions are, at least presumptively, beyond the power of the State. But, the complex of rights protected by the enumerated personal rights deemed

fundamental by the Constitution, and those which can be implied or derived from it, can equally be described as personal autonomy. The question is often, if not always, what is within that autonomy *i.e.* what is it for the person, or the family, to decide and control. It is obvious that there are significant limits to the area of autonomy – spousal or personal. A decision by spouses, or a family more broadly, does not have any impact upon whether a member of a family convicted of a crime should be imprisoned or for how long. Until now, the strong and almost unbroken trend of Irish authority was that spousal or family decisions could not control decisions as to who should be permitted to enter, or required to leave, the State. Repackaging the issue as spousal autonomy and describing it as a core constitutional value does not alter the issue or explain why that position has been or should be changed.

19. These are substantial questions, but if, notwithstanding all the difficulties with the approach raised, this was the only possible approach mandated by the Constitution then it would be necessary to accept it. It may be useful, therefore, to set out briefly at this point what I consider to be the correct position in the light of the Constitution in the decided cases.

IV. Some Preliminary Observations on the Place of Article 41 in the Constitution

20. The Constitution provides explicitly that Article 41 protects family rights which cannot be given away (inalienable) or lost by the passage of time (imprescriptible). The Constitution sees the Family as a collective body – a unit – and its benefit in functional terms: it is an essential institution providing stability for society. The essential protection afforded by the Constitution for a family is, therefore, the recognition of an area within which the institution of the Family,

primarily and presumptively, is in control, and within which the State cannot interfere. That is what is meant by the guarantees of Article 41.1.2° to protect the Family in its *constitution* and *authority*. The State cannot normally compel additions to or subtractions from the Family as a unit. Nor can the State, normally, make decisions for the Family on what might be described, loosely, as family matters.

21. The rights guaranteed by Article 41.1.1° are therefore the correlative of the duties imposed upon the State by Article 41.1.2° to protect the Family in its constitution and authority: it is the right to establish a family unit and have an area within which the Family is in control. That area is not without both horizontal and vertical limits: first, the freedom of the Family, for example, within areas which might clearly be considered a family matter, such as decisions on the education of children, in the broadest sense, is not absolute. The Constitution expressly provides that the State may require basic standards of education. Similarly, there is a horizontal limit to what is within the authority of the Family. There are many things that a Family cannot decide or control. There may indeed be significant contention as to where both the vertical and horizontal boundaries lie in any given case, but the structure of the Constitution is clear: it protects an area within which the institution of the Family is primarily in control and which is generally free from government or State interference. Entry into the State or removal from it, however, has not, up until now, been considered to be within that protected zone.

V. Entry to, and Removal from, the State does affect Constitutional Rights and Interests

22. Immigration decisions may, however, impinge on a number of rights protected by the Constitution and, in particular, the Family. In this regard, there are at least two rights involved which are not enumerated in the Constitution's text but may be deduced from it. First, the right of a citizen to live in Ireland is a fundamental attribute of citizenship. This conclusion may gain some additional force from the amended terms of Article 2 expressing the birthright of every person born on the island of Ireland to be part of the nation, but is not dependent upon that Article. It is, in essence, a right derived from the nature of citizenship: citizens who were not born on the island have the same right to reside here. Second, an individual personal right to marry is probably deducible from what is implied by the fundamental rights protections of the Constitution generally, but is put beyond doubt by the obligation on the State to guard with special care the institution of Marriage. Cohabitation is a normal and expected incident of marriage (and indeed family life) and, therefore, interference with it is to be scrutinised. For reasons I will address later, I do not agree that there is a separate unspecified right to cohabit (or to cohabit in Ireland or to decide to do so) protected by Article 41 (and therefore either inalienable and imprescriptible, or entitled to the very highest level of protection). If, however, there is a separate *right* to cohabit it is guaranteed by Article 40.3.1° of the Constitution and not by Article 41. It is clear, for example, that an unmarried couple must also have a similar right to cohabit with a partner of their choice with which the State cannot interfere. The right (if a separate right exists) is not dependent on marriage or to be deduced from Article 41. It is worth recalling that the majority of the Supreme Court in *McGee v. The Attorney General* [1974] I.R. 284 ("*McGee*") found that a right of *marital* privacy was, nevertheless, protected by Article 40.3.1° rather than Article 41.

23. However, even if it is assumed there is a right to cohabit, and irrespective of where it is located in the Constitution, I do not agree that there is a right to cohabit *in Ireland*. Nor is the *decision* to cohabit in Ireland within the exclusive authority of the Family. It adds little except confusion, therefore, to speak of a right to decide to cohabit in Ireland. Even if there is a right, or such a decision is within the authority of the Family, then there is a clear difference between the decision and its implementation. A decision to refuse permission to enter, to deport, or to refuse to revoke deportation, does not interfere at all with the *right* to make a decision. This illustrates the fact that what is necessarily contended for by the respondents' arguments is the right of an Irish citizen to cohabit in Ireland with his or her spouse.

24. A refusal to permit entry to the State (or a decision in relation to deportation) clearly affects the right of the citizen to reside in Ireland and will also affect the cohabitation of a couple and therefore their marriage, and the family created by it, but until now it has been established that the citizen's right to reside, together with cohabitation (whether viewed as a right or an incident of marriage), does not amount to a right to reside in Ireland with a non-national spouse, although I would consider that in some cases it may come close. The interests involved are weighty, and in some straightforward cases, where there are no countervailing considerations of weight, I agree with the observations of Finlay Geoghegan and Fennelly JJ. that it may be said that a Minister could not reasonably make a decision refusing entry to a longstanding non-national spouse of an Irish citizen who wished to reside in Ireland if no other consideration was present.

25. It is important to emphasise that in disagreeing with the interpretation of Article 41 adopted by McKechnie J., following the approach of Hogan J., I nevertheless

accept fully that a decision affecting the lives of a married couple in a fundamental way demands close scrutiny and requires justification under the Constitution. The Constitution protects the right to marry. The obligation to respect and guard with special care the institution of Marriage may operate at an institutional level, but it also has an impact at the level of an individual. An important part of the way in which the State shows its performance of its obligation to guard with special care the institution of Marriage is how it treats individual marriages. Therefore, when any decision is made which has a fundamental effect on a married couple, the decision-maker must normally take account of those matters. A decision which ignores the status of an individual as a married person would not be lawful and any decision which did not take account of that fact, or the impact on a married couple and the family of the decision, could properly be said to fail to respect the institution of Marriage which the State is obliged to guard with special care.

26. A Minister's decision must, therefore, set out those matters and considerations which are considered to justify an outcome which may have that effect. This will, almost certainly, involve a consideration of the matters set out in the judgment of McKechnie J. and may, in most cases, lead to the same conclusion, but the exercise starts from a different point: in this case, the entitlement of the State to decide who should or should not be permitted to enter this country or reside here and without the preloading of the scales involved by characterising a right of cohabitation as worthy of the highest level of protection feasible in a modern society.

27. Any decision to deport a married person from a country where their spouse is entitled to reside, to refuse to allow a non-national spouse to enter the country of

residence of the other spouse, or to refuse the revocation of a deportation order preventing the lawful entry to such a country, necessarily impinges upon the marriage and the family created thereby. Any such decision will require analysis by reference to any human rights instrument such as the Irish Constitution or the E.C.H.R. which, whether expressly or implicitly, protects a right to marriage, the institution of Marriage, and family life. However, I entirely agree that the analysis under both instruments cannot be blended to provide a single homogenous approach. Furthermore, I agree that the Minister's decision in both cases, which appear to follow a standard template, appears to also treat the analysis by reference to the constitutional rights as if it was identical to, and perhaps derivative of, the E.C.H.R. analysis. While analysis by reference to the E.C.H.R. is always instructive, and while I would expect that analysis by reference to any instrument broadly guaranteeing rights in a liberal democracy would cover similar ground, there is no reason to treat the provisions as essentially interchangeable. Indeed, there are good reasons – relating to the language of the documents, their distinct histories, and the functions they perform – to approach the questions separately and distinctly. Accordingly, I agree that it is clear that the Minister addressed himself incorrectly to the constitutional rights and values involved and that the decision of the Minister should be quashed. However, the correct analysis is more difficult. The position, in my view, is rather more complex than simply viewing the E.C.H.R. as providing a lower but broader level of protection since it will cover both married and unmarried families, whereas the Constitution provides a higher but narrower level of protection limited only to marital families.

28. While the outcome in many cases would be the same whatever approach is taken, there is a risk of creating a default position where certain family rights are held to

exist which must be overcome in any given case. The correct starting point, in my view, is the opposite. It is that a non-citizen does not have a right to reside in Ireland and does not acquire such a right by marriage to an Irish citizen.

29. The Constitution does protect the rights and interests of non-citizens in some, indeed many, respects (see, in this regard, the decision of this court in *N.H.V. v. The Minister for Justice* [2017] IESC 35, [2018] 1 I.R. 246). That does not mean, however, that the difference between citizenship and non-citizenship is not relevant in a number of important and, indeed, fundamental respects: the constitutional right to vote is perhaps the clearest example of a valid distinction between citizens and non-citizens recognised by the Constitution. One basic incident of citizenship is the right to reside in Ireland, even if that right is not absolute since the State can extradite an Irish citizen or surrender him or her to another country. But, a fundamental distinction between a citizen and non-citizen is that a citizen has the general right to reside here, the right to travel with the protection of the State, and with the benefit of its good offices, and to re-enter the country. A non-citizen has none of these rights. These are basic consequences of citizenship, nationality, and, ultimately, sovereignty.

30. Another essential feature of sovereignty, and which permits indeed the conferral of rights upon citizens, is the State's capacity to maintain territorial integrity and control its own borders. Originally, indeed, that was a core function of the executive and one of the indicia of an independent sovereign state, which this country once sought so tenaciously to assert and establish in the early years of the State.

31. There is, therefore, a basic and unavoidable distinction between an Irish citizen and his or her non-citizen spouse; that distinction is that the Irish citizen has an *a*

priori right to reside here, to form relationships, to be employed, to work and to pursue his or her life here, to participate in the democratic process as a voter or candidate and that a non-citizen does not. This basic distinction precedes questions of interference with family life or cohabitation and is the starting point for the analysis of any decision either to refuse entry to this country or to remove someone from it.

32. As already discussed, an Irish citizen has an undoubted right to marry even though that is not spelt out in express terms in the text of the Constitution. It is, perhaps, unnecessary for present purposes to identify the precise steps by which that right may be deduced from the constitutional text, but a constitution which requires a state to guard with special care the institution of Marriage necessarily implies a right on the part of its citizens to marry. That right, however, does not appear to be unqualified. In the period since the enactment of the Constitution, it does not appear to have been seriously doubted that the State may set out the requirements for a valid marriage in terms of celebration, witnesses, prior notification, and may set a limit on the age at which a person may marry. The law may limit the persons which the citizen may marry (a person cannot marry someone already married to another person, and cannot marry anyone else if already married). Prior to 2015, the law contained a prohibition on marrying a person of the same sex. The Thirty-fourth Amendment makes it clear that a person may only marry one person. Since 2014, at least, the law has sought to prevent a person from marrying for the purposes of acquiring the immigration advantage of free movement within the European Union.

33. The Constitution *could* have provided that a consequence of the marriage of an Irish citizen to a non-citizen/non-national was to give the non-citizen a right to

reside in Ireland, to work here, and to participate in the community. Indeed, at one point, marriage by a woman to a male Irish citizen conferred a *legal* right to naturalisation: s. 8 of the Irish Nationality and Citizenship Act 1956. Plainly, however, the Constitution does not, itself, do so. Perhaps more precisely, the Constitution might have provided that the right of an Irish citizen to reside here carried with it a right to be joined by her or his spouse. Again, the Constitution does not do so expressly and it is clear that no such right is to be implied. This was held authoritatively in *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593, by Costello J. (as he then was), where a claim was made by an Irish spouse that her non-Irish husband could not be required to leave the country. Costello J. rejected this argument in a vivid passage of the judgment which has been accepted as stating the law ever since:-

> "Mr Gaffney SC submitted on behalf of the plaintiffs that because of the very entrenched provisions of the family rights in the Constitution, that these could not be trenched upon, in any way, by the State and, in particular, by the Aliens' Order. He went so far as to answer a question I put, to say that if an alien landed in the State on one day and married the next day to an Irish citizen in the State, the State was required, by the Constitution, to safeguard the rights which were given to the family, and these could not be taken away by the Aliens' Act [*1935, and, therefore, by a requirement to leave the State*] … I cannot accept that view."

This judgment and the judgment of Gannon J. in *Osheku v. Ireland* [1986] I.R. 733, to similar effect, have been repeatedly cited with approval by this Court: *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26; *P v. Minister for Justice,*

Equality and Law Reform [2002] 1 I.R. 164; and, perhaps most pertinently in the present context, *A.O. & D.L. v. Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1 ("*A.O. & D.L.*").

34. For a number of reasons, therefore, I do not consider that the correct starting point is the identification of any right to cohabit, however characterised and valued, and where any interference with that right must be justified by a state interest whether described as compelling or not. There are obvious dangers in analysing an issue in terms of a hypothesised right (in this case, a right to cohabit with a spouse, or a right to cohabit with a spouse *in Ireland*, or *to decide* to cohabit with a spouse in Ireland) and which is in turn subject to limitations or simply being overridden by reference to considerations themselves not identified in the Constitution. Such an approach generates uncertainty, and therefore litigation, since the balance deemed correct can only be determined finally by a court with, moreover, the additional risk that the balance may fluctuate over time and between courts. Furthermore, if a general "right to cohabit" is the starting point, that blurs the important distinction of constitutional value just discussed and the distinction between a citizen and non-citizen.

35. There is a fundamental difference between any legislative provision which might, for example, prevent a person in Cork living with a spouse in Dublin and one which distinguishes between Irish citizens and non-citizens in relation to entry to the country. There is a further important distinction, which can too easily be overlooked, where it is alleged that a provision otherwise lawful and justifiable (for example, the exclusion from this country of a person who is illegally present here) is invalid because it *indirectly* affects a married couple and, consequently, a family. Finally, while I do not doubt that cohabitation is a normal incident of a

marriage, and therefore has constitutional value, I respectfully doubt that it is correct to assert, at least without significant qualification and refinement, a right to cohabit in the abstract, still less such a right posited as a right entitled to the highest degree of protection possible in a modern society.

36. While I agree that the Irish Constitution places a significant, and indeed high, value on marriage and also the family thereby created, and that this is something which must necessarily be taken into account in considering the lawfulness of any governmental or state decision to refuse permission to enter and reside, or to refuse revocation of a deportation order, I respectfully agree with the observations of Finlay Geoghegan J. in the Court of Appeal that such a decision should properly be analysed by reference to the lawfulness of the ministerial or state decision rather than by hypothesising a right on the part of the spouses to reside together in Ireland unless any interference with that right can be justified.

37. I also respectfully disagree that the words of Article 41, and in particular the words "inalienable" and "imprescriptible", should not be given their ordinary and natural meaning. This was first suggested by Hogan J. in *J.G. & Ors. v. Judge Kevin Staunton & Ors.* [2013] IEHC 533, [2014] I.R. 390, and repeated in his concurring judgment in this case, and accepted and endorsed by McKechnie J. at para. 134 of his judgment. Notwithstanding the considerable respect due to the source of this approach, I would not for myself be prepared to accept it, at least without much greater elaboration.

38. I note that *Kelly: The Irish Constitution* (5th ed., Bloomsbury Professional, 2018) ("5th edition of *Kelly*") states at para. 7.7.50 that "[*t*]his is an interesting, possibly controversial, attempt to use the presumed intentions of the drafters to modify the literal interpretation of the Constitution". I agree that the approach is novel and

controversial. Furthermore, I see no reason to presume that the drafters of the Constitution generally, or those reputed to have particular involvement in the terms of Article 41, did not intend that the words "inalienable" or "inviolable" (where that word is used) did not have their natural meaning. As is well known, Article 41 reflects natural law thinking: most clearly when it refers to rights antecedent to positive law. In that thinking, as I understand it, such natural rights are normally considered to be inalienable in the sense that they cannot be given away (since they are inherent in man's nature) and imprescriptible (in that they cannot be lost by passage of time, again for the same reason). There is every reason to think therefore that this was, indeed, the meaning the drafters intended. But, even if the principal drafters of the Constitution, or some of them, had their metaphorical fingers crossed behind their backs when Article 41 was drafted – which I doubt – I see no reason to assume that the people who adopted the Constitution shared any such view. Indeed, in 2012, when the Constitution was amended by the introduction of Article 42A (and the deletion of Article 42.5), the language of imprescriptibility was retained and, if anything, emphasised. Accordingly, I would proceed on the basis that these words are to be given their ordinary meaning and, therefore, that Article 41 protects certain rights which cannot be given away or lost by passage of time. The difficulty this language is capable of causing is illustrated in the case law, but that is not a reason to dilute the language chosen by the Constitution and the protection afforded by it. It is a reason to be cautious, however, about any approach which would extend, by judicial decision, the range of rights and interests entitled to the designation "inalienable and imprescriptible".

39. Even if I considered that the words "inalienable and imprescriptible" were not to be given their ordinary meaning, I would not draw the conclusion that these undoubtedly impressive-sounding words mean that Article 41.1 contains and protects unspecified rights entitled, moreover, to the "highest possible level of legal protection which might realistically be afforded [*to the protection of family life*] in a modern society". This approach leads inevitably to speculation as to a range of rights which may be protected by Article 41 and, just as inevitably, running the risk that these will be deemed incapable of being outweighed other than by extremely weighty or indeed, as it is expressed, compelling interests not, themselves, identified in the Constitution either. The resulting tangle of constitutional interests and values may lead to, at best, uncertainty and confusion.

VI. Article 41 in the Constitutional Structure

40. It is, I think, necessary to return to the precise words and structure of Article 41.1, set in the broader context of Articles 41 and 42 generally, and to attempt to discern what those Articles meant in 1937, mean today after amendment, and now require. This is not a simple task, since the quasi-theological language of the Articles is not easy to apply in any legal framework, but particularly so in a modern-day society quite different to that of 1937. Moreover, the two Articles have undergone four significant constitutional Amendments so that Article 41 now has a meaning which not only would not have been contemplated in 1937, but which in certain respects (for example the provision for divorce) can be said to be embody and enshrine the very thing sought to be precluded by the original version of Article 41. Furthermore, the interpretation of Article 41 today is not simply a case of taking account of the specific changes made in the respective

Amendments. These Amendments, both individually and collectively, have an impact on the overall interpretation of the document, and Articles 41 and 42 in particular. To take a simple example, the provisions of Article 41.4 permitting the contracting of marriage by two persons without distinction of sex has an inevitable impact upon the interpretation of the Article 40.1 guarantee of equality as human persons while having, at the same time, established beyond any doubt that the institution of Marriage, which the State has pledged itself to guard with special care, is a union between two people only. As O'Malley J. observed in *H.A.H. v. S.A.A.* [2017] IESC 40, [2017] 1 I.R. 372 at para. 128, the combined effect of the Amendments in respect of divorce and same-sex marriage has "resulted in a legal institution of marriage that cannot be described in terms of traditional Christian doctrine".

41. Nevertheless, it is helpful to consider the scope of Articles 41 and 42 as provided for in the 1937 version of the Constitution and then to consider the later Amendments. Not only has Article 41.1, in particular, remained unchanged throughout the period from 1937 to date, but the structural relationship which the Articles created, and particularly the respective positions of a married couple and a family *vis-à-vis* the State, were set in 1937 and remain fundamentally in place even if the definition and characteristics of Marriage, and consequently the Family, have altered and the position of children, and their rights, has been emphasised.

42. Article 41 in 1937 provided as follows:-

> "1 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution

possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

2 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

3 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

2° No law shall be enacted providing for the grant of dissolution of marriage.

3° No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved."

43. It is well known that this Article is one of the provisions of the Constitution which clearly shows the influence of natural law thinking. Nothing in the 1922 Constitution addressed the position of the Family specifically. As the 5th edition of *Kelly* points out at para. 7.7.01, however, Article 41 of Bunreacht na hÉireann was influenced in part by contemporary papal encyclicals, albeit also noting that a similar provision is to be found in the German constitution of 1919. Professor Oran Doyle has pointed persuasively to the influence of the then relatively recent 1930 papal encyclical *Casti connubii* (Of chaste marriage) (see: Doyle & Hickey *Constitutional Law: Text and Materials* (2nd ed., Clarus Press, 2019) at p. 473; and Doyle, "Family Autonomy and Children's Best Interests: Ireland, Bentham, and the Natural Law", (2010) 1 *International Journal of the Jurisprudence of the Family* 55). That contemporary natural law thinking which was reflected in the Article was strongly opposed to divorce, abortion, contraception, and to the-then popular practice of eugenics, but adopted a "render unto Caesar" approach in relation to the relationship between the Family and the State. The approach was to conceive of the Family as an institution, in this case a moral institution, with which the institution of the State could not readily interfere, at least within the area of authority of the Family.

44. Attention has tended to focus on the impressive, if unfamiliar-sounding language such as "inalienable", "imprescriptible", and "antecedent to positive law". But, it is wrong, in my view at least, to stop at Article 41.1 as if it was a self-contained provision bequeathed by the People in 1937 to later generations of judges who could be trusted to identify a constellation of pre-eminent rights to be given superadded protection. That would make little sense. When Article 41 spoke of

rights antecedent to positive law, they were not a mystery. Rather, what was intended was understood, at least in essence, by most interested observers.

45. A constitution may, as the 1937 Constitution does in these provisions, assert that the rights it protects and guarantees have always existed; but, fundamentally, it is the Constitution which identifies the rights it protects and their limits, which guarantees them, and gives them legal effect. The terms of the Constitution are, therefore, central. In *T.F. v. Ireland* [1995] 1 I.R. 321, Murphy J., at p. 333, refused to allow evidence to be called from theologians as to the natural moral law in respect of marriage:-

> "It may well be that "marriage" as referred to in our Constitution derives from the Christian concept of marriage. However, whatever its origin, the obligations of the State and the rights of parties in relation to marriage are now contained in the Constitution and our laws …"

46. As Declan Costello, writing extra-judicially ("Natural Law, the Constitution and the Courts" in P. Lynch & J. Meenan, *Essays in Memory of Alexis FitzGerald* (Incorporated Law Society of Ireland, 1987), p. 105, at p. 107) from a position sympathetic to natural law thinking, nevertheless observed, the best guide to the natural rights recognised or protected by the Constitution are the terms of the Constitution itself and the rights it expressly protects. Article 41 is not a springboard to speculation as to the rights in respect of the Family, which future generations of judges might consider should be deemed worthy of protection in a modern society; it is a signpost directed to the terms of the Constitution itself and what they imply.

47. It is noteworthy that, in Article 41, the Family is capitalised (as is Society, the State and the Nation), emphasising that the Family is seen in institutional and

functional terms. Article 41.1.2° follows directly from Article 41.1.1°. By it, the State guarantees to protect the Family in "its constitution and authority". It is important not to overlook the word "therefore". The guarantee to protect the Family in its constitution and authority is seen as a logical consequence of the recognition of the Family as a moral institution possessing inalienable and imprescriptible rights and, moreover, the natural primary and fundamental unit group in Society. It is basic to the functioning of such an institution that its *constitution* must be protected and guaranteed. The protection of the Family in its *authority* is seen as essential if it is to perform its function as the fundamental unit-group of society. As Costello J. (as he then was) put it at p. 626 of *P.H. v. John Murphy and Sons* [1987] I.R. 621 ("*P.H. v. Murphy*"), the rights, therefore, which the Family as an institution possesses, are those which can be said to be within the authority of the Family so constituted, and the correlative, therefore, of the duties imposed on the State by Article 41.1.2° to protect the Family in its constitution and authority and which "can be ascertained by reference to those duties".

48. It follows that the Family is seen both as a unit and an institution and that its merit is the stability that it provides to Society. Article 41.2 contains a provision, always controversial and now currently under debate, recognising the support given by a woman by her life within the home. This rarely invoked provision may, however, cast some useful light in the present context since it emphasises the operation of the Family with the domestic setting. The Constitutional Family creates a unit, and the corollary is that within its area of authority it will have control. The more, however, that the question can be said to relate to the public,

rather than the personal, the less it can be said to be within the authority of the Family to the exclusion of the State.

49. It seems clear that the pledge to protect the Family "in its constitution" was closely linked to the initial prohibition on divorce and by the subsequent provisions regulating the availability of that relief, since divorce was the most obvious way in which the *constitution* of a family is altered. That is not to say that the protection of the constitution of the Family is limited to the prohibition of, or more latterly the restrictions upon, divorce, but it does suggest that when considering the meaning and effect to be given to the term it is useful to consider what, unambiguously, was understood to be captured by it. In addition, the State cannot dictate the number of children in a family or, conversely, require a couple to have children at all. It required express Constitutional authority, originally in Article 42.5 and latterly in Article 42A, to permit adoption of children of a married couple. These are all issues going to what *constitutes* a Family. However, I do not see that a right to cohabit in Ireland can be deduced from the Constitutional obligation to protect the Family *in its constitution*. Cohabitation relates to the type of married, and therefore family, life an individual couple may have, and not to whether they are married or constitute a family.

50. What the Constitution envisages by "the authority" of the Family is illustrated by the terms of Article 42. The initial sentence of Article 42 echoes the terms of Article 41 in recognising the Family as the natural primary and fundamental unit-group in society. Article 42 acknowledges, therefore, that the Family is the primary and natural educator of the child. Significantly, in this regard, the Constitution moves, for the first time, from the collective rights of the family unit to a more specific level. It recognises, in this regard, the rights and *duties* of

parents to provide for the religious, moral, intellectual, physical, and social education of children.

51. Article 42 is useful, therefore, in understanding the delineation the Constitution sees between the role of the Family and that of the State. It is very clear that decisions in relation to education, for example, both in the strict scholastic sense, such as what school to go to or, indeed, whether children should receive education in a formal school setting, are, broadly speaking, for parents within the family. It is also clear that education in Article 42 comprehends most decisions involved in the upbringing of children and young people. Thus, and in general, families are entitled to sort out in their own way, and make their own decisions as to: how property will be held within the family (*In Re.: Art 26 and the Matrimonial Homes Bill 1993* [1994] 1 I.R. 305); how tasks will be allocated between spouses; whether both spouses will work or only one, and if so which, and whether full-time or part-time; how children will grow up and, in that regard, can make decisions which society more generally may consider foolish about, for example, the length of a child's hair, the time at which they may go to bed, whether they should drink alcohol at home, whether and when they should learn to ride a bicycle, what time to come home at, and even whether a child should avail of standard health screening procedures (*North Western Health Board v. H.W.* [2001] 3 I.R. 622); and the State is obliged to protect the Family's authority in that regard unless and until the separate rights of the children are jeopardised.

52. It is not necessary, or perhaps even helpful, to attempt to comprehensively define what falls within the scope of the Family's authority or the precise point at which the State must or may interfere even within those areas in which the Family has *prima facie* authority. Broadly speaking, it extends not merely to what is done or

decided within the home, but also what might be termed home/life decisions. It is, however, absolutely clear that the corollary of there being an area of life, at least presumptively, within the *authority* of the Family is that there are a range of matters that are outside the realm, on any view, of the Constitutional protection for the authority of the Family even if the subject of conscientious family decisions taken by the family in the heart of the home, and even if relating to an activity taking place in the home. Examples of issues which until now at least have not been considered to come within the Family's authority to permit are matters such as incest within the home, even between persons over the age of general consent (although this has been the subject of some debate) or the use and/or possession of drugs whether in a public place or in the home. A child cannot be served alcohol in licensed premises even if it is the conscientious desire of the child's parents, cannot drive a motor vehicle on a public road, and membership of an illegal organisation does not become lawful, or even less culpable, simply because it is the consequence of a family decision taken, even in the heart of a home. Possession of firearms is not permissible even if kept in the home within the marital bedroom and only used by members of the family on their private property, and no special procedure is necessary before a warrant is issued to enter and search a family home or any area in it. At a more prosaic level, it has been established that a family's conscientious decision that fluoride in the water supply is dangerous does not override, or even restrict, the State's contrary view. In *Ryan v. A.G.* [1965] I.R. 294, Kenny J. dismissed the argument that the addition of fluoride affected the authority of the Family to decide what drink and food the family should consume. Anticipating the approach of Costello J. (as he then was) in *P.H. v. Murphy*, Kenny J. considered that some clue to the ambit of the rights of

the Family referred to in Article 41.1 is to be found in the subsequent reference to the guarantee by the State to protect the Family in its constitution and authority. Legislation dealing with food and drink did not, in any way, affect the authority of the Family and was, therefore, not an interference with the rights guaranteed to the Family by Article 41. In the Supreme Court, Ó Dálaigh C.J. came to the same conclusion; there was nothing, he considered, in the legislation permitting fluoridation that could be said to be a "violation of the guarantee on the part of the State to protect the family in its constitution and authority".

53. That this is so is not, at least in my view, because the Family or any derived family rights are outweighed by some compelling State interest. It is rather that there are significant areas of activities that are not within the authority of the institution of the Family and where the State is not obliged to defer to the Family's decision. Such activities are not within the authority of the institution of the Family but, rather, within the authority of the institution that is the State. There are certain constraints imposed upon persons and individuals irrespective of their marital status and which follow from the obligations any individual in society, whether a citizen or not, owes to that society. This is all perhaps an unduly prolix way of attempting to say something said succinctly by Hardiman J. in *A.O. & D.L.* at p. 159: the decision on education or a child's medical treatment is *prima facie* within the Family's authority but "[*a*] decision about an alien parent's desire to live in the State is not".

54. In seeking to emphasise this distinction, I recognise that there is room for considerable debate as to the matters which may properly be considered to be within the Family's authority and the precise extent to which the State may interfere with matters falling within that area of *prima facie* Family authority. The

landmark case of *McGee* is noteworthy for many reasons, but one of its most important achievements was the recognition that a form of regulation of what was seen in 1937 as public activity (the importation of certain items) with a consequential impact on private activity, which would have been understood by the devotees of the encyclical *Casti connubii* as supportive of the institution of Marriage, was recognised as an impermissible interference with a decision and behaviour which was properly within the scope of marital and family and, ultimately, personal life decisions. *McGee* proceeds from the basic proposition that there was an area of family decision making (and actions pursuant to that decision) that was beyond the State's control or – to adopt the well-known language of the Wolfenden Report – there is an area which, in brief and crude terms, was not (generally) the State's business. The Irish Constitution goes further, it might be said: there is an area which is, rather, the Family's business and the State's obligation to ensure that it was so. Until now, entry to the State and deportation from it has not been regarded as a matter within the Family's authority. It is said, however, that even so, a decision to deport a married person trenches not just upon Marriage, but more specifically upon an unspecified right to cohabit, or to decide to cohabit, and indeed removes such a right altogether.

VII. A Right to Cohabit

55. Cohabitation is seen as basic and almost intrinsic to a marriage. A married couple's decision as to when, where, and how to cohabit seems, peculiarly, a matter for them alone. In today's world, a decision made by two people to live together is understood as a significant point in a couple's relationship. It is easy, thus, to speak of a right to cohabitation, consequently requiring a compelling State

interest before the State may do anything which interferes with it. This tendency is perhaps easier again because cohabitation was traditionally spoken of in relation to the common law in relation to Marriage, as both key evidence of a marriage where that was disputed, and a right owed by each spouse to the other. It seems, therefore, a natural progression to speak of a constitutional right to cohabitation.

56. However, I am reluctant to start from the proposition that the Constitution, either in Article 41.1 or, more plausibly, Article 40.3, protects a right to cohabitation. Cohabitation at common law was not seen as a right, still less a right enforceable against the State, but rather as a duty and one operating in private law between the spouses. At common law, as I understand it, one of the consequences of marriage, at least as traditionally understood in law, was that the spouses were under a duty of cohabitation: an obligation from which a spouse could only be released by the decree of divorce *a mensa et thoro*. This distinction is important. As Costello J. (as he then was) observed in *P.H. v. Murphy*, the primary purpose of a constitution guaranteeing fundamental rights is to protect those rights from unjust laws enacted by the legislature and arbitrary acts of State officials. It is not, primarily at least, addressed to the private law rights of individuals between each other. We should be careful, therefore, in using the archaic language of private marital duties in a way which leads us to slide unconsciously across the private law/public law divide and find a new right to cohabitation enforceable against the State.

57. If there is such a freestanding right then it is one that has not received significant weight, at least to date. There are many reasons, apart from their own decision, why a couple may not be able to cohabit when or where they wish, and until now it has not been thought that this implies any default on the part of the State. In *The State (Gallagher) v. Governor of Portlaoise Prison* [1987] I.L.R.M. 45,

Lynch J. held that the State was entitled to restrict the constitutional rights of a family by imprisoning one of its members on the grounds that such a restriction was clearly envisaged by Article 38. In *McElhinney v. Commissioner of An Garda Siochána* (Unreported, High Court: Geoghegan J., 10th of May, 1995), Geoghegan J. held that family reasons could not be invoked to defeat or limit the power of the Commissioner to transfer members of the force to any part of the country. In *Minister for Justice, Equality and Law Reform v. Gheorge* [2009] IESC 76 (Unreported, Supreme Court, 18th of November, 2009), Fennelly J. rejected the proposition that surrender under a European Arrest Warrant was to be refused where a person would, as a consequence, "[*suffer*] disruption, even severe disruption of family relationships". In the context of immigration, Hogan J. held that the arrest of a non-national for immigration purposes as she was about to marry was not unlawful because marriage to an Irish citizen did not confer a presumptive right to remain in the country.

58. It is necessary, however, to consider the case law where a right to cohabit has been referred to in those terms, the most important of which is perhaps *Murray v. Ireland* [1991] I.L.R.M. 465 ("*Murray*") where Finlay C.J. (with whom Hamilton P. and O'Flaherty and Keane JJ. agreed) accepted that:-

> "[*the*] fact that the Constitution so clearly protects the institution of marriage necessarily involves a constitutional protection of certain marital rights. They include the right of cohabitation; the right to take responsibility for and actively participate in the education of any children born of the marriage; the right to beget children or further children of the marriage; and the right of privacy within the marriage: privacy of communication and association".

59. This statement, though plainly *obiter*, is worthy of great respect. I do not think, however, that it can be taken as definitively establishing any such rights. A number of observations may be made. Although the language might tend to suggest that these rights were protected by Article 41 (since the rights posited are said to follow from the institution of Marriage guaranteed by that Article), Finlay C.J. expressed his complete agreement with Costello J. (as he then was) in the High Court. Both Costello J. in the High Court and McCarthy J. in the Supreme Court were clear that any such right was protected by Article 40.3, with McCarthy J. observing that the plaintiffs had not maintained the case in the Supreme Court that these rights were protected by Article 41. Little turned on this in the particular case and the other members of the court agreed with both judgments. Furthermore, the plaintiffs' claim failed and, therefore, the precise approach to the analysis is not central to the reasoning in the case, and does not appear to have been the subject of any detailed argument. However little it may lead to a difference in outcome, I am reluctant to follow the approach of hypothesising a series of rights and suggest they are protected by Article 41, particularly if a consequence is that they become inalienable, imprescriptible, indefeasible, or entitled to the highest level of protection which might realistically be afforded in a modern society, and do not consider that the language of *Murray* requires me to do so.

60. The list does include matters which it might instinctively be felt are, or should be, protected by the Constitution. However, the "right" to participate in and take responsibility for children's education is already expressed as a duty by Article 42.1 and the "right to procreate" is clearly not limited to married couples. It is clear that marital privacy, as recognised in *McGee*, is protected by Article 40.3.

61. Furthermore, without in any way devaluing the constitutional significance of what is involved, or suggesting any lower level of protection in fact for the values concerned, it may be better to conceive of these matters other than as rights, however characterised, giving rise to correlative duties. If, for example, there is a personal (or even marital) right to procreate, then questions arise as to the State's obligation to defend and, so far as practicable vindicate, that right. Is, for example, the State *obliged* to provide *any* fertility treatment without regard, perhaps, to the age of the person or the cost if a person cannot afford the treatment? It may be easier to conceive of these matters as decisions within a sphere of life, either marital or personal, with which the State cannot, or cannot readily, interfere, both because in the case of a married couple this is a matter peculiarly within the authority of their family unit and in the case of individual because it is a vital part of the human personality which the Constitution protects.

62. I do not consider, therefore, that I am required to approach this case through the prism of a constitutionally protected right to cohabit, still less one said to be protected by Article 41.1. The judgment of McKechnie J. would appear to be the first time this court would hold that there is a general right to cohabitation protected by Article 41 with all that such entails. For the reasons set out above, I do not agree. Cohabitation by a married couple, and indeed by any couple in a committed and enduring relationship is, however, something the State is required to have regard to in its decision making and to respect.

VIII. The Significance of Marriage

63. The Constitution, in Article 41.3, requires the State to guard with special care the institution of Marriage. The same provision describes the Family as being

founded on Marriage. There is, I think, a useful comparison with Article 43 which also acknowledges the natural right "antecedent to positive law" to hold private property and requires the State to not attempt to abolish the right of private ownership or the general right to transfer, bequeath, or inherit property. In both cases, the value is seen as general and institutional. The principal focus of the Constitution is to protect the institution of Marriage generally rather than individual marriages.

64. However, it seems clear that decisions in respect of individual married persons can, particularly if representing a settled practice or policy on the part of the State, be said to be capable of failing to respect the institution of Marriage and even, in some cases, to constitute an unjust attack on the institution of Marriage. There is no doubt, therefore, that the State is obliged to recognise and value the fact of marriage when it takes a decision that directly affects one party to the marriage.

65. Marriage is one of the few, and certainly the most enduring, examples of a status in law and one noted exception to Sir Henry Maine's famous observation that the development of law had been a shift from status to contract ("*Ancient Law*" with introduction by F.E. Pollock (New ed., Murray, London, 1930), pp. 190-191). Certain legal consequences follow from the acquisition of a status. Some of the case law in this area is distinguished between marriages, contrasting at one extreme the couple marrying on a whim in Las Vegas and repenting equally quickly with, perhaps, a lengthy happy marriage blessed with children. It is obvious that these two cases are different and may be treated differently, but not, in my view, by reference to their *status* as married couples. The Constitution does not conceive of different categories of marriage with some which are "better" marriages or with more claims on the State. Assuming for the moment that the

Las Vegas couple can be validly married by the law of Nevada, and that such a marriage is entitled to recognition in Irish law (which I do not think is in fact the case), then once two persons get married validly they acquire the status of a married couple and the legal consequences that flow from it, perhaps most notably that the marriage cannot be dissolved in Ireland without a court order and a determination that the court is satisfied that proper provision has been made for the spouses and any children. It is, I think, consistent with respect for the institution of Marriage that the fact of marriage should be given the same weight whatever the length or circumstances of any individual marriage. However, since it is the fact that it is a status that can be voluntarily chosen and, subject to the constraints of the law, dissolved, the law must consider more carefully the consequences of such a marriage. The State is not obliged by the requirement to protect the institution of Marriage to accord any automatic immigration status consequent on a marriage. Indeed, it might be said to be inconsistent with the State's obligation to guard with special care the institution if it were otherwise, since the respect for the institution would be significantly reduced if it could be entered into to achieve immigration status and, perhaps, dissolved soon after. Such marriages would, moreover, not assist in achieving the object the Constitution envisages of providing a stable unit for society.

66. This is not to say that the length and duration of a relationship is irrelevant. It is, however, weighed under that heading: that is, an enduring relationship of considerable duration rather than that of marriage. There is a lawyer's tendency to attempt to reduce the law to clear-cut rules and shorthand phrases. In this field, one example is the development of the concept of the "marital family" contrasted with the "non-marital family". The position is, however, at least in my view, less

clear-cut. Other than in Article 41.3 itself, Articles 41 and 42, the two concerned with the treating of the Family, do not differentiate between the marital status of the couple involved or the families that are thereby created. To take one example, parents who are not married are, as I understand it, just as free to provide education in their homes or in private schools as married couples are and cannot be obliged by the State, in violation of their conscience, to send their children to schools established by the State or to any particular school designated by the State. Whatever else may be said about Article 41.2, it has not been suggested that the "woman" and "mother" contemplated in those provisions is limited to a married woman even if that was overwhelmingly the model in existence when the Constitution was drafted. It was recognised by Gavan Duffy P. as long ago as 1946 that children had the same rights under the Articles, whether marital or non-marital: *Re M. (an Infant)* [1946] I.R. 334.

67. It is not difficult to see that an intimate relationship of some permanence where the two people treat themselves, and are recognised by others, as a unit in addition to their standing as individuals is something of constitutional value. Such a unit may, if sufficiently durable, be capable of providing the basis of social order indispensable to the welfare of the nation and the State. It would be wrong and inconsistent with the social order envisaged by the Constitution to disregard it or to treat that unit as being of no value because it was not founded on Marriage. The unfamiliar language of Articles 41 and 42 of the Constitution (and perhaps, as importantly, the somewhat fusty language with which they have become encrusted through repetition in judgments and textbooks over many years) should not distract us from the obvious fact that a basic part of the human personality that is at the core of the protection of the Constitution is the ability to associate with

others to form relationships, and particularly close intimate relationships of mutual benefit and support, which, in turn, create stable units which provide a benefit to society.

68. It follows that decisions of the State having an impact on such relationships engage the Constitution. The length and durability of a relationship formed by persons (whether married or not) is something that must be valued and respected by a state which guarantees to protect individuals as human persons. It is not necessary for the exaltation of Marriage that other pair-bonding nurturing relationships be humbled, still less ignored. It is, however, unnecessary to discuss this matter in both the cases under appeal; the parties were married and it is the fact of marriage which has been relied on in these proceedings.

69. It is possible to return to the series of situations posited earlier in this judgment by reference to examples drawn from the case law and suggest that they should be approached, as Finlay Geoghegan J. suggested in the Court of Appeal, by considering the lawfulness of the ministerial decision in each case rather than by a generalised balancing approach positing rights of cohabitation and other rights derived from the status of marriage which require to be outweighed. The fundamental question is whether, where a couple is married, the ministerial decision can be said to have failed to recognise the relationship, or to respect the institution of Marriage because of its treatment of the couple concerned.

70. It seems clear that the fact of marriage alone to an Irish citizen does not create an automatic right to enter the State or to continue to reside here having entered illegally or after lawful entry but where any permission has expired. It is not *per se* a failure to respect the institution of Marriage to do so. There may be legitimate considerations of immigration, with added consequences for the rights

of free movement in other E.U. Member States, which are not simply trumped by the fact of marriage.

71. It follows, however, that if the couple can add to the fact of marriage the evidence of an enduring relationship that if the State were to refuse the non-citizen party entry to the State for no good reason, and simply because it was a prerogative of the State, it could be said that such an approach failed to respect the rights of those involved and, in particular, the institution of Marriage. In that respect, I fully agree with the observation of Fennelly J., as slightly reframed by Finlay Geoghegan J. in the Court of Appeal, that – unless there was some other consideration in play – it would be difficult to envisage a valid decision refusing entry to the State to the long-term spouse of an Irish citizen seeking to return to Ireland to live. Indeed, I would consider that the same could be said of a long-term partner in an established non-marital family with an Irish citizen partner. Nevertheless, the starting point is that citizenship of one spouse plus marriage plus prospective interference with cohabitation does not equal a right of entry to a non-national spouse or give the Irish citizen spouse an automatic right to the company of their spouse in Ireland although, as discussed above, any refusal of entry would require clear and persuasive justification.

72. A different situation arises if the State's refusal is based not simply on the fact of immigration control, but because of the immigration history of the non-Irish spouse and, in particular, if a deportation order has been made and been evaded before the marriage was entered into. Refusal to revoke the deportation order would not normally amount to a failure to vindicate the right to marry, or to respect the marriage itself or the area within the authority of the marriage, or the institution of Marriage. However, the length and duration of the relationship may

become relevant – particularly if the relationship has endured abroad and the deportation order was a considerable time in the past.

73. More difficult again is the type of situation which might be said to present itself in the facts of the *Gorry* case. It may be said, in some cases, that the provision refusing entry may have the effect of preventing a married couple from cohabiting since Ireland is the only country where that can, as a matter of law or fact, occur and is, moreover, the home of one of the parties. There may be many reasons why a couple may not be able to cohabit, or to do so as, or where, they may like, and that may be a consequence of the marriage they have made. The parties remain married and it does not fail to respect that institution or protect it if cohabitation is made more difficult, or even impossible, by a decision of the State for a good reason. Imprisonment of one partner is one obvious example.

74. Nevertheless, in the context of immigration, when it is asserted on credible evidence that the consequences of a decision is that the exercise of a citizen's right to reside in Ireland will mean not just inability to cohabit in Ireland with a spouse to whom that person is validly married and where, moreover, it may be extremely burdensome to reside together anywhere else, it would fail to have regard to and respect for the institution of Marriage not to take those facts into account and give them substantial weight. This may, firstly, involve a more intensive consideration of the facts and evidence. The length and durability of the relationship may also be a factor since it tends to remove the possibility that the marriage is one directed in whole or in part to achieving an immigration benefit, and at the same time reduces the risk that any permission will establish a route to circumvent immigration control. There may come a point where the evidence of medical or other conditions establishes that it is impossible to cohabit anywhere but Ireland,

that the marriage is an enduring relationship, and that the non-citizen spouse poses no other risk, and where it can be said that failure to revoke the deportation order would fail to vindicate the right to marry and establish a family life. Such cases will be rare. A refusal to revoke a deportation order, after appropriate consideration of the facts and circumstances, is not invalid merely because it affects the spouses' desire to cohabit in Ireland and it would be more difficult and burdensome to live together in another country. It is, however, important to recall that the Minister retains a discretion to revoke the order on humanitarian considerations, even if revocation is not compelled by the Constitution or the E.C.H.R. Furthermore, any decision is subject to judicial review.

75. In making a decision on an application for revocation of a validly made deportation order on the grounds of subsequent marriage the Minister is not, in my view, required to do so on the basis that Article 41 protects an inalienable, imprescriptible, or indefeasible right to cohabitation of a married couple which is entitled to the highest level of protection available in a democratic society. Rather, Article 41 protects a zone of family life and matters. Decisions on immigration and deportation are not matters within the authority of the Family. The Minister is, however, required to have regard in an such case to:

(a) The right of an Irish citizen to reside in Ireland;

(b) The right of an Irish citizen to marry and found a family;

(c) The obligation on the State to guard with special care the institution of Marriage;

(d) The fact that cohabitation – the capacity to live together – is a natural incident of marriage and the Family and that deportation will prevent cohabitation in Ireland and may make it difficult, burdensome, or even

impossible anywhere else for so long as the deportation order remains in place.

76. It is apparent that this approach shares a number of features with the test which McKechnie J. would apply, following the judgment of Finlay Geoghegan J. and set out at paragraph 10 above. I would expect that the adoption of either approach would reach the same result in most cases, and a decision must be scrutinised by reference to the considerations addressed rather than the use of any particular form of language. It follows that a decision will not necessarily breach any rights if it did not anticipate this precise formulation or use the same language. I agree with McKechnie J. that it is not necessary to address the issue of Constitutional and E.C.H.R. rights in any particular sequence. The main point of difference between us relates to the analysis of Article 41 more generally and whether it protects a complex of unenumerated rights which may have application in areas other than deportation.

77. It follows from the foregoing that the test under the E.C.H.R. should not be applied in the consideration of issues arising under the Constitution. While the Constitution and the E.C.H.R. together provide extensive overlapping protection for families and marriage, it is necessary to recognise the different contexts. This is not, at least in my view, particularly because of an elevated position accorded to Marriage in the Irish Constitution; Article 12 of the E.C.H.R. expressly protects the right of individuals to marry and found a family, and it is difficult to see in what way this differs significantly from what is to be deduced from Article 41.3. It is, perhaps, because of the Constitution's emphasis on the Family and also because the Constitution is a national constitution and, therefore, the right of a citizen to reside in his or her own country is of particular weight. The fact that a

couple may be able to live together somewhere else does not neutralise that consideration. Even, however, when considering the matter from the perspective of the rights under the E.C.H.R., I have some reservations about reducing the formulation of Lord Phillips of Worth Matravers M.R. (as he then was) in *R. (Mahmood) v. Home Secretary* [2001] 1 W.L.R. 840 to a binary choice where, if the family can live together in the State of origin, there will be no breach of Article 8, but if it is unreasonable to expect the family to do so, Article 8 would be breached by enforcement of deportation or, conceivably, refusal to revoke a deportation order. As is clear from the terms in which it is expressed, the guidance given is general, and any decision will depend upon a number of factors such as whether the family can be said to be long-established in the state, whether the marriage was entered into after a deportation order was made and in the knowledge of it, and the circumstances giving rise to deportation which, as Lord Phillips observed, may also involve a consideration of the circumstances prevailing in the state seeking to deport. For example, if a person entered a state illegally and was considered on reasonable grounds to pose a threat to the safety of persons in that state, and marries before a deportation order could be enforced, deportation would not necessarily breach any Article 8 rights even though it might be unreasonable to expect the spouse to accompany that person, perhaps because of reasons relating to their own health. The issue cannot be reduced solely to the reasonableness of expecting the spouse to relocate even though that is clearly a significant factor; the assessment must be made on all the facts of the case and the circumstances prevailing. These considerations do not directly arise in either of these cases, however.

78. For the reasons set out I agree that the appeals should be dismissed.