THE SUPREME COURT

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

Supreme Court Record No. 2018 / 9
Court of Appeal Record No. 2014 / 1161
High Court Record No. 2012 / 859 JR

Between /

I. GORRY and JOSEPH GORRY

Applicants / Respondents

-and-

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent / Appellant

and

Supreme Court Record No. 2018 / 11
Court of Appeal Record No. 2017 / 31
High Court Record No. 2015 / 449 JR

Between /

A.B.M. and B.A.

Applicants / Respondents

-and-

THE MINISTER FOR JUSTICE AND EQUALITY

Respondent / Appellant

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 23rd day of September, 2020

Introduction

1. This judgment concerns two appeals which raise the same general issues of principle concerning the appropriate approach required by a decision-maker (most likely the Minister) to an immigration decision concerning the non-national spouse of an Irish citizen. In each case the Applicants are a lawfully married couple comprising one Irish citizen and a non-national spouse; as it happens, each of the non-national spouses is a Nigerian national. The Minister (also referred to as "the Appellant") has made deportation orders in respect of these foreign spouses. Each set of Applicants made an application to the Minister to revoke the respective deportation orders, but both were unsuccessful in this regard. Accordingly, the Applicants issued judicial review proceedings seeking, *inter alia*, an order of *certiorari* quashing the Minister's refusal to revoke such orders.

2. The Applicants in the first set of proceedings were successful before Mac Eochaidh J (see *Ifeyinwa Gorry and Joseph Gorry v. Minister for Justice and Equality* [2014] IEHC 29). In the course of his judgment, the learned judge concluded that an Irish national married to a non-Irish national has a *prima facie* right to reside in Ireland with that other person, though such right is not absolute and the State is not obliged in every case to accept the country of residence chosen by that couple.

3. However, the High Court took a different approach in respect of the second set of Applicants, who were refused the reliefs sought (see *A.B.M. and B.A. v. Minister for Justice and Equality* [2016] IEHC 489). Humphreys J took the view that the idea of a *prima facie* right to reside in Ireland needs "slight rephrasing", preferring to state that the couple "should receive *prima facie* acknowledgment and consideration of their status under Article 41 of the Constitution" but that the same does not amount to a *prima facie* right.

4. In a further case also raising the same general issue (where the relevant decision of the Minister was a refusal to grant a visa to the Nigerian spouse of the Irish citizen applicant), Eager J broadly followed the approach of Mac Eochaidh J in *Gorry* and found for the applicant, granting an order of *certiorari* in respect of the Minister's decision: see *Ford & Anor v. Minister for Justice and Equality* [2015] IEHC 720.

5. These judgments were appealed (in *Gorry* and *Ford*, by the Minister, and in *ABM* by the applicants) to the Court of Appeal, which delivered judgment in each of them on the 27th October, 2017: see *I. Gorry and Joseph Gorry v. Minister for Justice and Equality* [2017] IECA 282 (containing the discussion in respect of the substantive issues in each of the cases) and *A.B.M. and B.A. v. Minister for Justice and Equality* [2017] IECA 280 and *Ford & Anor v. Minister for Justice and Equality* [2017] IECA 281 (short, supplementary judgments).

6. The Court of Appeal allowed the appeal by Mr ABM, who was the individual directly involved, and dismissed the Minister's appeals in *Gorry* and *Ford*. Its conclusions on the matters of principle were set out in the judgments of Finlay Geoghegan and Hogan JJ in *Gorry*. Although the Court did not uphold the reasoning of Mac Eochaidh J in the High Court, insofar as the Court of Appeal stated that it is not correct to say that the couple have a *prima facie* constitutional right to live in Ireland pursuant to Article 41 of the Constitution, it was satisfied that the outcome of *Gorry* was correct in that the Minister had taken a legally incorrect approach to the assessment, consideration and determination of the applications. The same applied to *ABM*. The reasons supporting each decision are set out in detail below. In short, it took the view that the Minister erred in applying the same approach to the State's

obligations in relation to the constitutional rights of the Applicants as was done in relation to its obligations pursuant to section 3 of the European Convention on Human Rights Act 2003, having regard to Article 8 of the European Convention on Human Rights. In so doing, it held that the protections of Article 41 of the Constitution are stronger than those contained in Article 8 ECHR and that the Minister had erred in not subjecting the Applicants' constitutional claim to any detailed analysis independent of that conducted in respect of Article 8 ECHR.

7. Another judgment of relevance is that of Mac Eochaidh J in *A H and K O'L v. Minister for Justice and Equality* (*ex tempore*, High Court, Mac Eochaidh J, delivered on the 11th October, 2016) ("*A H v. Minister for Justice*"). Again the case involved the refusal by the Minister to revoke a deportation order in respect of the foreign (i.e. not a national of the EU or an EEA state) spouse an of Irish citizen. In large part the learned judge adopted and followed his own earlier judgment in the case of *Gorry* and granted *certiorari* of the Minister's decision. The Minister similarly appealed this matter to the Court of Appeal but for procedural reasons was unable to get the case on for hearing alongside *Gorry*, *Ford* and *ABM*.

8. The Minister sought and was granted leave to appeal to this Court in respect of each of these four cases. Leave was granted on the basis that the cases raise issues of general public importance which require clarity. These issues concern an area of sensitive Government activity in terms of immigration policy and have the potential to impact large numbers of Irish citizens and their non-national spouses. It is agreed by the parties and was accepted by the Court of Appeal that the constitutional issues raised in this case have not been considered in recent times by an appellate court.

9. This Court listed the four cases together for case management, during which process it was decided that the appeals in *Gorry* and *ABM* would proceed to hearing, with the resolution of those appeals determining the outcome of the other two matters also. This judgment covers both cases. It should be noted at the outset that, for reasons set out below, both *Gorry* and *ABM* are now moot, but this Court took the view that they should nonetheless be determined, given the constitutional importance of the issues raised.

10. The Minister says that the approach adopted by the Court of Appeal is unduly prescriptive, likely to give rise to practical difficulties in its implementation, and inconsistent with the previous jurisprudence of this Court. To properly consider these complaints, it is necessary to address wide-ranging and fundamental issues concerning the nature of the protections afforded by Article 41 of the Constitution and the relationship of that provision with Article 8 ECHR. This judgment concerns the nature of the rights which the Applicants possess under the Constitution and how these rights must be approached by the Minister when considering an application to permit the non-national spouse to enter, remain or reside in the State. Fundamentally, such applications bring into conflict undeniably weighty concerns on both sides: the very understandable private interests of the spouses in living together, on the one hand, and the clear public interest in the State being able to exercise effective control over its immigration system, on the other. What is needed, ultimately, is a careful balancing of the considerations on each side. That, of course, is an exercise which must be conducted by the Minister – it is not for the courts to dictate immigration policy. However, the Minister must consider such applications in a lawful manner. This necessitates the proper identification and weighing of the interests on both sides and the application of the

correct test so as to arrive at a reasonable and proportionate decision. This judgment aims to clarify how that exercise should be conducted.

Constitutional, Statutory and International Framework

11. At the outset it may be helpful to set out in one place a number of constitutional, statutory and ECHR provisions to which repeated reference will be made over the course of this judgment. To start with the Constitution of Ireland, Article 2 thereof states that:

> "It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage."

12. Article 40.3.1° of the Constitution provides that:

> "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

13. Article 41.1 of the Constitution states as follows:

> "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."

Article 41.3.1° of the Constitution provides that:

> "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."

14. Article 8 of the European Convention on Human Rights ("the ECHR" or "the Convention"), headed "Right to respect for private and family life", provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

15. As will be seen, a major issue in this case concerns the relationship between Article 8 ECHR and Article 41 of the Constitution. The ECHR, of course, is not in itself a part of domestic Irish law for the purposes of Article 29.6 of the Constitution. Its provisions cannot be directly applied in the Irish courts by a litigant seeking to protect their rights. The

Oireachtas has elected to give effect to the Convention by enacting the European Convention on Human Rights Act 2003 ("the 2003 Act"), the long title of which explains the object of the Act as being to "enable further effect to be given, subject to the Constitution, to certain provisions of the [Convention] and certain Protocols thereto". Section 3(1) of the 2003 Act provides that:

> "Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

Thus the Minister, as an organ of the State, is required to perform his functions in a manner compatible with the State's obligations under the Convention.

16. Section 4(1) and (2) of the Immigration Act 2004 ("the 2004 Act") provide as follows:

> "4.—(1) Subject to the provisions of this Act, an immigration officer may, on behalf of the Minister, give to a non-national a document, or place on his or her passport or other equivalent document an inscription, authorising the non-national to land or be in the State (referred to in this Act as 'a permission').
>
> (2) A non-national coming by air or sea from a place outside the State shall, on arrival in the State, present himself or herself to an immigration officer and apply for a permission."

Sections 5(1) and (2) of the 2004 Act provide that:

> "5.—(1) No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act, or a permission given to him or her after such passing, by or on behalf of the Minister.
>
> (2) A non-national who is in the State in contravention of subsection (1) is for all purposes unlawfully present in the State."

17. Section 3 of the Immigration Act 1999 ("the 1999 Act") provides, in subsections (1) and (11), as follows:

> "3.—(1) Subject to the provisions of section 3A [prohibition of *refoulement*] and the subsequent provisions of this section, the Minister may by order (in this Act referred to as 'a deportation order') require any non-national specified in the order to leave the State within such period as may be specified in the order and to remain thereafter out of the State.
>
> (11) The Minister may by order amend or revoke an order made under this section including an order under this subsection."

Factual Background and Procedural History – *Gorry* case

18. The First Named Respondent, Ms Gorry, is a Nigerian citizen. The Second Named Respondent, Mr Gorry, is an Irish citizen. A chronology of the relevant events and dates has helpfully been agreed by the parties.

19. On the 24th June, 2005, a deportation order was signed in respect of Ms Gorry, who is asserted to have been in the State since the 30th March 2005. She was notified of the order on the 21st September 2005 and required to present to the Garda National Immigration Bureau ("GNIB") on September 29th. She did not do so and thereafter remained in the State, evading deportation.

20. It seems to be accepted that the Respondents met for the first time in 2006. Three years later, in September 2009, they left the State to travel to Nigeria where they married; the validity and legality of such marriage has never been questioned by the Minister. The Respondents say (and it has not been contradicted or challenged) that they were advised by the Immigration Office in Dublin that they should marry in Nigeria and then apply for a visa for Ms Gorry to enter the State. On the 16th December, 2009, applications were submitted for a visa permitting Ms Gorry to travel to Ireland and for the revocation of the deportation order made against her. The basis for this application seems to have been the change in her circumstances following her marriage to Mr Gorry. These applications were refused on the 3rd February, 2010.

21. Mr Gorry visited his wife in Nigeria in March 2010. Without dwelling too much on the details, it is evident from the papers in these proceedings that Mr Gorry found this visit very difficult because of the heat and humidity in Lagos. He returned to Ireland on the 20th March and suffered a heart attack three days later. He was treated by angioplasty and a coronary stent. These facts were of significance for the decision made by the High Court in these proceedings (see para. 30, *infra*). Although they are not particularly germane to the issue of high constitutional principle at the core of the appeal to this Court, it is worth observing at this juncture that Mr Gorry averred that due to his heart condition he would be unable to travel to Nigeria again to see his wife. He says that his doctors advised him that he should not fly, let alone go to Nigeria for any amount of time, and that it would be very risky for him to go to Nigeria due to the lack of sufficient medical treatment if he were to suffer a further attack.

22. On the 2nd November 2010, the Gorrys made a second application to revoke the deportation order in respect of Ms Gorry. This fresh application was based, in large part, on the health problems suffered by Mr Gorry subsequent to his trip to Nigeria, the difficulties which he would have in receiving adequate medical treatment for his heart condition if he was to relocate to that country, and the fact that he had been warned by his doctors not to travel by air, thus preventing him from visiting his wife. However, by decision dated the 17th July, 2012, this application was also refused.

23. It is this decision that is challenged in the *Gorry* proceedings. It is therefore worth referring to it terms. The Minister accepted that family life within the meaning of Article 8 ECHR arises between Mr and Ms Gorry. The Appellant referred to the jurisprudence of the European Court of Human Rights, the UK courts and the courts in this jurisdiction (discussed below), concluding that such case law establishes that removal or exclusion of one family member from a State where other members of the family are lawfully present 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 excluded member, even where this involves a degree of hardship for some or all family members. The decision refers to the country of origin information in relation to healthcare in Nigeria (acknowledging limitations therewith) and concludes that it is not accepted there are insurmountable obstacles to Mr

Gorry settling in Nigeria, or that treatment for his medical condition would not be available there.

24. The Minister's decision then recounts and applies the principles extracted by Lord Phillips in *R. (Mahmood) v. Home Secretary* [2001] 1 W.L.R. 840 at p. 861 relevant to the deportation or exclusion of a family member (in respect of which see para. 141, *infra*), concluding that:

> "[I]t is clear that where a person establishes family ties in a State while fully aware that he/she has no lawful residency, or entitlement to such in the State, it will only be in exceptional circumstances, or for compelling reasons, that the enforcement of an existing deportation order will be contrary to or in breach of Article 8. The question to be determined in the instant case therefore is whether such exceptional circumstances arise.
>
> Having considered all the facts in this case, it is submitted that no exceptional circumstances arise in the case such that a decision to re-affirm the deportation order in respect of [Ms Gorry] would constitute a violation of Article 8."

25. The decision then considers the revocation application by reference to the Constitution. It provides as follows:

> "With regard to the rights of a non-national married to an Irish citizen or a person entitled to reside in the State, it is accepted that family rights under Article 41 of the Constitution arise. However, these rights are not absolute and may be restricted. As found by the Courts, there appears to be no authority which supports the proposition that an Irish citizen or a person entitled to reside in the State may have a right under Article 41 of the Constitution to reside with his or her spouse in this jurisdiction. Reference is made to the consideration of the position of the couple, as well as the rights of the State under Article 8 consideration above and the conclusions reached therein.
>
> All factors relating to the position and rights of the family have been considered, and these have been considered against the rights of the State. In weighing these rights, it is submitted that the factors relating to the rights of the State are weightier than those factors relating to the rights of the family. It is submitted that a decision to re-affirm the deportation order in respect of [Ms. Gorry] is not disproportionate as the State has a right to uphold the integrity of the immigration system and to operate a regulated system for the control, processing and monitoring of non-national persons in the State."

26. This portion of the decision concludes by noting that "there are no new exceptional circumstances presented beyond those previously considered by the Minister which would warrant the revocation of the Deportation Order signed in respect of [Ms Gorry]." Accordingly, her application was refused.

27. Ms Gorry returned to Ireland on or about the 15th September, 2012, two months after the second refusal, without the permission of the Minister.

<u>High Court Judgment – *Gorry*</u>

28. On the 15th October, 2012, Mr and Ms Gorry were granted leave to seek an order of *certiorari* quashing the Minister's decision to affirm the Deportation Order and a declaration that their legal and constitutional rights had been infringed by the Minister's failure to acknowledge, weigh and consider those rights. They argued, *inter alia*, that no sufficient proportionality assessment was undertaken, that the Minister had failed to properly consider their family life, in breach of Article 41 of the Constitution, and that he had erred in law in applying the "insurmountable obstacles" test as it was unreasonable in the circumstances to expect Mr. Gorry to settle in Nigeria.

29. The judgment of the High Court was delivered by Mac Eochaidh J on the 30th January, 2014 (*Ifeyinwa Gorry and Joseph Gorry v. Minister for Justice and Equality* [2014] IEHC 29). The learned judge quashed the decision of the 17th July, 2012.

30. The judgment sets out in detail the heart problems suffered by Mr Gorry after his trip to Nigeria in March 2010. It also refers to the documentation submitted to the Minister as part of the second application to revoke the deportation order, much of which related to these health problems; apparently there was some uncertainty as to whether all of the documentation submitted was in fact considered as part of the application, but that concern no longer exists. Mac Eochaidh J, referring to the decision of Bingham L.J. in *E.B. (Kosovo) v. Secretary of State for the Home Department* [2008] UKHL 41, the decision of the UK Court of Appeal in *V. W. (Uganda) and A. B. (Somalia) v. The Secretary of State for the Home Department* [2009] EWCA Civ. 5 and the decision of Clark J in *Alli and Alli v. Minister for Justice, Equality and Law Reform* [2009] IEHC 595, was of the view that the proper test is not assessed by reference to an insurmountable obstacles standard, but rather by asking: is it reasonable to expect a spouse to join the removed or excluded spouse in his or her country of residence? He therefore found that the Minister erred in law in applying the insurmountable obstacles test and had also erred in stating that the Gorrys had failed to show that there was no treatment available for Mr Gorry's medical condition in Nigeria.

31. More significant, for the purposes of this appeal, are the learned judge's findings in respect of the Gorrys' arguments concerning Article 41 of the Constitution. He referred to the numerous authorities indicating that an Irish and non-Irish married couple do not have automatic rights to reside together simply by virtue of marriage and that the State is not obliged to respect the residence choices made by such couples (see, e.g. *A.A. v. The Minister for Justice, Equality and Law Reform* [2005] 4 I.R. 564, *Cirpaci v. The Minister for Justice* [2005] 4 I.R. 109 and *S(P) and E(B) v. The Minister for Justice, Equality and Law Reform* [2011] IEHC 92). Nonetheless, he was of the view that the jurisprudence equally establishes that marriage between a national and non-national may engage a right of residence in the State which could only be denied for countervailing purpose. The learned judge therefore stated as follows at para. 42:

> "Having reviewed all of these decisions, my view is that an Irish national married to a non-Irish national has a constitutional right to reside in Ireland with that other person, subject to lawful regulation. The right is not absolute. The State is not obliged in every case to accept the country of residence chosen by such a couple. Though I believe such a *prima facie* right exists, not every set of circumstances will engage the right. The couple who marry on a whim in a drive-in church in Las Vegas having met earlier in the evening, may well find that their circumstances do not trigger the respect for marriage reflected in the provisions of Article 41 of the Constitution and a consequential right to reside in the State."

32. It was against this backdrop that the Minister's assessment of the Gorrys' application was examined, with the relevant section of the Minister's decision being set out at para. 25, *supra*. The learned High Court judge stated as follows:

> "This is a mistaken understanding of the law. The starting point in any consideration where a mixed Irish and non-Irish nationality couple seeks to live in Ireland is that they have a *prima facie* right to do so by virtue of Article 41 of the Constitution. It is recalled that Article 41.3 pledges the State to guard with special care the institution of marriage. The circumstances of the marriage will indicate whether that right is engaged. If engaged, the State is entitled to supervise the right by requiring an entry visa for the non-national, for example. The mere fact that it is engaged does not mean that it cannot be trumped by a lawful countervailing purpose which must ensure that the denial of the right of residence is proportionate to the policy objective sought to be achieved. … In my view, the Minister and his officials erred in failing to acknowledge the rights which the applicants enjoyed. It was wrong to start the analysis of the constitutional position by denying that there were any constitutional rights to reside with one's spouse involved." (para. 44)

33. He went on to observe that insofar as the couple's Article 41 rights were made referable to the consideration of their rights under Article 8 ECHR, the wrong test had been used in respect of the latter and this error therefore infused the consideration of constitutional rights also. The learned judge further referred to the conclusion in the Minister's assessment file that "there are no new exceptional circumstances presented beyond those previously considered by the Minister which would warrant the revocation and the Deportation Order", holding that (i) he was not aware of any rule of law requiring "exceptional" new circumstances; (ii) (and in any event) even if the law required exceptionality, Mr Gorry's serious heart disease surely satisfied this criterion; and (iii) any conclusion that his heart disease constituted "exceptional new circumstances" but was not sufficient to warrant revocation would be unlawful.

34. Finally, Mac Eochaidh J rejected the Minister's contention that the poor immigration history of Ms Gorry should disentitle the couple to the reliefs sought. This point has been raised again on this appeal and is referred to in further detail at paras. 211-214, *infra*.

35. For the sake of the narrative, it should be noted at this point that Mr and Ms Gorry separated some time after the judgment of the High Court; the Minister was informed of this on the 6th December, 2016. Although that gives rise to an element of mootness, both the Court of Appeal and now this Court have determined to hear the Minister's appeal nonetheless, given the importance of the issues raised.

Factual Background and Procedural History – *ABM* case

36. Before continuing the journey of the *Gorry* proceedings into the appellate arena, it is necessary first to take a detour so as to consider the history of the *ABM* case, for both appeals were heard together by the Court of Appeal.

37. Again, there is very little dispute at a factual level as to the circumstances of the *ABM* proceedings and a chronology of the relevant dates for present purposes has likewise been agreed by the parties. The First Named Respondent, Mr. ABM, is a national of Nigeria.

So too is the Second Named Respondent, Ms BA, though, as will be seen, she became an Irish citizen in 2013.

38. Mr ABM claims that he left Nigeria for Italy, via Togo, in August 1999. Ms BA applied for asylum in Ireland on the 21st September, 2000. Both Respondents left children of previous relationships behind in Nigeria. Ms BA obtained a divorce from her first husband in January 2001. On the 28th August, 2002, the Refugee Applications Commissioner ("the RAC") refused to recommend Ms BA's asylum claim.

39. On the 13th September, 2006, Mr ABM, having arrived in the State, applied for asylum.

40. The Respondents assert that they entered a religious marriage (which is said not to have been legally binding and was not a lawful marriage for the purposes of Article 41 of the Constitution) on the 21st October, 2006. The Appellant states that he was not informed of this ceremony until representations were received in January 2014.

41. On the 8th March, 2007, the RAC recommended the refusal of Mr ABM's asylum claim. His appeal to the Refugee Appeals Tribunal (now the International Protection Appeals Tribunal) was refused, as was his subsequent application for subsidiary protection.

42. On the 26th June, 2007, Ms BA was given permission to remain in the State. She became an Irish citizen in August 2013.

43. On the 24th June 2008, Mr ABM was notified that a deportation order had issued in respect of him and that he was obliged to leave the State. He was directed to present himself to the Garda National Immigration Bureau on the 15th July, 2008 but failed to do so. Thereafter he was classed as evading deportation up to July 2015. In December 2013, the Minister adopted a policy document regarding family reunification for non-EEA nationals.

44. On the 9th January, 2014, Mr ABM applied to revoke the 2008 deportation order under section 3(11) of the 1999 Act. He was continuing to evade GNIB at this time; this was the first contact made by Mr ABM since his failure to present himself in July 2008.

45. On the 9th February, 2015, the Respondents underwent a civil marriage ceremony; as with the Gorry couple the status of this marriage has not been doubted.

46. On the 13th July, 2015, a submission was prepared on behalf of the Minister recommending refusal of the section 3(11) application. On the same date, he undertook not to deport Mr ABM until the consideration of this application had taken place. On the 17th July, 2015, he was informed that Ms BA was pregnant (at that point she was four months pregnant). The formal decision refusing the application was made on the 20th July, 2015. Mr ABM was informed of that decision by notification of the same date. He was also told that the undertaking given the previous week had expired and was requested to attend before the GNIB on the 28th July, 2015, to make arrangements for his deportation.

47. Again, it is worth setting out in brief the salient parts of the Minister's decision in respect of Mr ABM, which are set out in greater detail at paras. 36-40 of the judgment of Finlay Geoghegan J in *Gorry*. As in the Gorry decision, the Minister's decision in this case similarly considers first the relevant facts; second, the position under Article 8 ECHR; and

only then Article 41 of the Constitution. Reference is made to the fact that the parties knew of Mr ABM's precarious immigration status at the time of their civil marriage in 2015. The principle, derived from ECHR case law, that deportation in such circumstances will violate Article 8 only in "the most exceptional circumstances" is also cited. The decision refers to the insurmountable obstacles test and provides that the question is whether, where an obstacle exists, realistically or reasonably, it is an obstacle which is capable of being surmounted.

48. The decision notes that the applicants do not have children together but that both have children from previous marriages who continue to reside in Nigeria. Although there is no express conclusion on the absence of insurmountable obstacles or the existence of exceptional circumstances, it would seem to inevitably follow that, given the Minister's decision, neither test is satisfied.

49. As to the argument based on the Constitution, the Minister's decision records that BA is an Irish citizen, that the applicants married on the 9th February, 2015, and that consequently it is accepted that the couple constitute a family within the meaning of Article 41. It then continues:

> "With regard to the rights of a non-national married to an Irish national or a person entitled to reside in the State, it is accepted that family rights under Article 41 of the Constitution arise. However, these rights are not absolute and may be restricted. As found by the courts, there appears to be no authority which supports the proposition that an Irish citizen, or a person entitled to reside in the State, may have a right, under Article 41 of the Constitution, to reside with his or her spouse in this jurisdiction. Reference is made to the consideration of the position of the couple, as well as the rights of the State under Article 8 in the consideration above and the conclusions reached therein."

The conclusion is that there existed substantial reasons associated with the common good, in particular the control of immigration, which required the deportation order in respect of ABM to be affirmed.

50. The Respondents were granted leave to bring judicial review proceedings on the 27th July, 2015. They sought an injunction seeking to restrain the deportation of Mr ABM pending the determination of the proceedings; however, this application was refused by Stewart J on the 4th August, 2015. Mr ABM was deported on the 22nd September, 2015. Ms BA gave birth to a child in December 2015.

High Court Judgment – *ABM*

51. The judgment of the High Court was delivered by Humphreys J on the 29th July, 2016 (*ABM & anor v. Minister for Justice and Equality* [2016] IEHC 489). Mr ABM and Ms BA argued that the Minister's proportionality examination was flawed due to a failure to recognise the nature and strength of their rights under Article 41 of the Constitution. They understandably placed particular reliance on the decision in *Gorry*, given in 2014.

52. Humphreys J noted that the point made in *Gorry* was "substantially qualified" in the later judgment of Mac Eochaidh J in *S.A. v. Minister for Justice and Equality (No. 2)* [2015] IEHC 226, where he stated at para. 13 that it is not incumbent on the Minister to commence an assessment of the rights of recently married spouses with a recognition of a *prima facie* right to live together in the State. The learned judge observed that "*[i]t has been a constant*

refrain of the European Court of Human Rights that there is no automatic obligation on a State to respect the choice of place of residence decided upon by a particular family", referring to the relevant case law in that regard. He then stated that:

> "There is no logical reason why there should be a significantly different position under Article 41 of the Constitution. It is true, of course, that Article 41 uses somewhat more emphatic language than art. 8 of the ECHR, but neither provision exists in a vacuum. Even Article 41 cannot be interpreted in such a way as to fail to cohere with the overriding objective of an ordered society." (para. 26).

53. In his view, "*It is one thing to say that a married couple, or partners in a domestic relationship, have a legitimate interest in living together, which should be given due regard by the State. It is quite another to assert that they have a ' prima facie right' in that regard.*" (para. 27). He regarded voluntary assumption of risk as the key element. Parties who choose to get married must be taken to do so in the knowledge of whatever factual and/or legal obstacles may exist to their living together. Such couples bear the primary responsibility for the consequences which follow where the relationship they have entered into is built on these shaky foundations. He noted that it would be destructive of any ordered immigration control system if a person could convert his or her *prima facie* illegal status into a *prima facie* legal one merely by getting married to a person who has an entitlement to be in the State. On the constitutional issue, therefore, he concluded as follows:

> "The notion of a '*prima facie* right' to reside in Ireland deriving from the very status of marriage itself, as referred to in *Gorry*, needs, I think, slight rephrasing. In my view, there is no such *prima facie* right. Presence in the State which is unlawful cannot be converted into the lawful or prima facie lawful merely by a ceremony of marriage. A married couple, one of whom is a citizen, should receive *prima facie* acknowledgement and consideration of their status under Article 41 of the Constitution, but that does not mean either that a deportation decision has to be phrased in any particular way (still less to use terms such as '*prima facie*'), or that such acknowledgment amounts to a right or even a *prima facie* right in any particular case or precludes the deportation of any particular applicant. Cases fall on a spectrum. For example, a sham marriage to an Irish national conducted for immigration purposes confers no rights on an applicant to resist deportation, whether pursuant to Article 41 or otherwise. A last-ditch marriage by an illegal immigrant may confer no rights to resist deportation. A non-national who marries an Irish citizen prior to his or her arrival in the State is arguably in a marginally stronger position, and a settled migrant stronger still." (para. 35)

He added that even if some sort of *prima facie* right can be asserted, Mac Eochaidh J acknowledged in *Gorry* that such can in any event be outweighed by countervailing considerations, such as the interests of immigration control.

54. The learned judge continued as follows:

> "37. The applicants rely on the discussion in *Gorry* which is critical of a passage in the Minister's analysis which is quoted at para. 43 of that decision, and which includes the phrase that *'there appears to be no authority which supports the proposition that an Irish citizen or a person entitled to reside in the State may have a right under Article 41 of the Constitution to reside with*

> *his or her spouse in this jurisdiction'*. However, that quotation is part of a longer passage, the earlier part of which is quoted in a separate part of the judgment in *Gorry* at para. 37. This includes the phrase that *'it is accepted that family rights under Article 41 of the Constitution arise. However, these rights are not absolute and may be restricted'*.
>
> 38. Mac Eochaidh J. took the view that the sentence quoted in isolation at para. 43 was in error. As set out above, I do not consider that it was in error, but in any event, if one reads that in the context of the earlier sentence, it is clear that the Minister's analysis is sensitive to the possibility that Article 41 rights exist, although they are not absolute. Where is the error in that reasoning? It is very hard to discern."

55. Humphreys J disagreed with the approach of Hogan J in *X.A. (a minor) v. Minister for Justice, Equality & Law Reform* [2011] IEHC, where the learned judge stated that a decision which compels a couple to live more or less permanently apart "*is one which, quite obviously, requires compelling justification"*; Humphreys J stated that he does not accept the proposition that 'compelling justification' is required in such circumstances. He stated that the extent of any rights under Article 41 will depend on the circumstances of the marriage. He referred to a spectrum, with a marriage of convenience at one end and a married settled migrant at the other. In his view, the Minister could not possibly require "compelling justifications" to separate one party to a marriage of convenience from the other party. He further stated that the same would apply where a marriage is entered into at a time when the immigration status of one of the parties is uncertain: a rational immigration system could not function if compelling justification was required to remove such a person. On the other hand, such level of justification may well be required where a settled migrant enters into a marriage.

56. The learned judge then came back to what he considered to be the key issue of voluntary assumption of risk. It is clear that, in his view, Mr ABM and Ms AB are not persons "who have been forcibly separated by State action": rather, they voluntarily put themselves in that position and it is their conduct which gives rise to the situation where there may have to be a parting of ways. He referred to the judgment of Noonan J in *Khan v. Minister for Justice and Equality* [2014] IEHC 533 to the effect that even where Article 41 and Article 8 rights arise, the Minister is still entitled to come to the view that the countervailing interest of the State in maintaining the integrity of the immigration system ought to prevail over those rights.

57. On this point, he concluded that it is ultimately a matter for the Minister to balance the interests involved. This was done, and Humphreys J took the view that Article 41 of the Constitution was clearly considered by the Minister and that the balancing exercise was not unlawful or disproportionate. In the absence of some specific and clearly identified unlawfulness being established, he was not prepared to accept the premise that it is sufficient for a court to determine that the Minister's balancing exercise failed to "pay sufficient attention to or consider appropriately Article 41" (per Eager J in *Ford* at para. 60).

58. Humphreys J also addressed the applicants' argument (again based on *Gorry*) that the Minister had erred in referring to the lack of *"insurmountable obstacles to the applicants' relationship continuing if the deportation was effected."* The learned judge agreed with Mac Eochaidh J that there is no "insurmountable obstacles" test, in the sense of a determinative

bar that the applicant must meet or fail to meet. He regarded the question of insurmountable obstacles as one of a basket of questions to be asked in the overall circumstances. In his view, a decision is not invalid simply for referring to "insurmountable obstacles". He recalled that the High Court in *Gorry* had stated that this test is "*derivative language which can only be understood in the context of all of the cases from which it is derived*"; given how extensively the phrase is discussed in the case law, the learned judge was not willing to assume that the Minister was not aware of its meaning in connection with such case law – that meaning being that it is a legitimate question but not an all-or-nothing test.

59. Humphreys J also rejected a further argument which is of no continuing relevance on this appeal. Accordingly, the learned judge dismissed the application and refused the reliefs sought. He adjourned the proceedings to permit the applicants to make an application for leave to appeal. The learned judge subsequently certified the following points of law of exceptional public importance:

(i) Does an Irish citizen possess the right pursuant to Article 41 of the Constitution to have his/her non-national spouse reside in the State?

(ii) If the above exists, whether such a right of residence must be the starting point for any consideration by the respondent Minister pursuant to s. 3(11) of the Immigration Act 1999 (as amended).

(iii) Whether the respondent is entitled to consider the insurmountable obstacles criterion contained in the case law of the European Court of Human Rights when considering representations made in respect of the spouse of an Irish citizen pursuant to s. 3(11) of the Immigration Act 1999 (as amended).

Judgments of the Court of Appeal

60. The Minister appealed the judgments in *Gorry* and *Ford* to the Court of Appeal; Mr ABM and Ms AB appealed the judgment of Humphreys J on the certified points of law set out above. The three appeals were heard at the same time. The Court, which in each case comprised Finlay Geoghegan J, Irvine J and Hogan J, delivered judgment in all three cases on the 27th October, 2017 (see *A.B.M. and B.A. v. Minister for Justice and Equality* [2017] IECA 280, *Ford & Anor v. Minister for Justice and Equality* [2017] IECA 281 and *I. Gorry and Joseph Gorry v. Minister for Justice and Equality* [2017] IECA 282). The Court's treatment of the legal issues arising is contained in the *Gorry* decision, with very short supplemental judgments being delivered in the other two matters. Accordingly, the focus here will be on what was said in *Gorry*.

61. The main judgment was delivered by Finlay Geoghegan J. The learned judge referred to the fact that the appeals in *Gorry* and *Ford* were moot but that the Court had determined that it should hear and decide the *Gorry* appeal in light of the importance of the questions raised.

62. The learned judge noted at para. 46 that the constitutional issues raised in *Gorry* and *ABM* relate to the situation where the Minister is required to make an immigration order in relation to a non-national who is a lawful spouse of an Irish citizen, as was undoubtedly the case in respect of the applicants in each case. They therefore constituted a family within the meaning of Article 41 of the Constitution, as acknowledged by the Minister in each of the decisions challenged.

63. Finlay Geoghegan J framed the issues in the case as concerning the nature of the rights which the Irish citizen spouse and the family (including the non-national spouse)

possess under the Constitution and how these rights must be approached by the Minister in considering whether or not the non-national spouse may be permitted to remain or reside in the State. Thus the appeal concerned the obligations imposed on the State in such circumstances. A related issue was whether the Minister's obligations when considering constitutional rights in such an application differ from his obligations when considering the State's responsibilities under Article 8 ECHR. The second discrete issue identified by the Court was the appropriate test to be applied in an Article 8 ECHR situation; it being noted in particular that the application of the "insurmountable obstacles" test had given rise to disagreement between the parties.

64. The learned judge first made some incontrovertible points concerning the differences in the bases for the Minister's obligations having regard to Article 41 of the Constitution and Article 8 ECHR; such matters are discussed below (see para. 124 *et seq.*, *infra*). Having done so, she stated as follows at para. 56:

> "It appears to follow that where a married couple (a family within the meaning of Article 41 of the Constitution), one of whom is an Irish citizen, make an application to the Minister, in reliance in part on constitutional rights, to permit the non-national spouse reside in the State, that the Minister should first consider the application in the context of the constitutional rights of the applicants and obligations imposed on the State by the relevant articles of the Constitution. Following this, should it prove necessary to do so, the Minister may then also consider the application in the context of the Minister's obligation pursuant to s. 3 of the 2003 Act to decide the matter in a manner consistent with the State's obligations under the ECHR."

65. She observed that the Minister, in his assessments in both *Gorry* and *ABM*, appears to have assumed that the rights and obligations arising under Article 41 of the Constitution and Article 8 ECHR (pursuant to section 3 of the 2003 Act) are similar or even identical, a point endorsed by Humphreys J in *ABM*. Finlay Geoghegan J disagreed with this analysis – in her view, the obligations on the Minister differ materially as between the two provisions.

66. In relation to the constitutional issue in the case, the learned judge identified two essential questions: (i) what are the constitutional rights of the citizen and the family that the Minister is obliged to take into account in his decision, and (ii) what relevant obligations are imposed thereby on the State? She observed that the difference in approach between the trial judges in *Gorry* and *ABM* essentially came down to a difference in terminology, with Mac Eochaidh J referring to "a *prima facie* right" and Humphreys J preferring to say that the couple should receive "*prima facie* acknowledgment and consideration of their status under Article 41". Both judges, correctly, in her view, identified that the relevant rights are not absolute and that all cases will fall on a spectrum.

67. Finlay Geoghegan J described the identification of the constitutional rights at play as a complex matter, and rightly stated that the starting point must be the relevant articles of the Constitution. She referred to the right of the Irish citizen to live in Ireland (Articles 2, 9 and possibly 40.3.1°) and the protection of marital rights, including the right of cohabitation, in Article 41.1 (and possibly also 40.3.1°). The learned judge recognised that neither such right is absolute. Referring to the decisions of this Court in *North Western Health Board v. H.W.* [2001] 3 I.R. 622 and *Re Article 26 and the Matrimonial Homes Bill 1993* [1994] 1 I.R. 305 (both discussed below; see paras. 161-162, *infra*), she stated at para. 72 that:

"The decision of the family at issue in this appeal is a decision that the family should live in Ireland. That is a decision which a married couple have a right to take and which is within the authority of their family. Their ability to implement the decision may, however, not fully lie within their control."

68. The reason for this, of course, is that Ms Gorry, as a non-national, has no right to be in Ireland unless she obtains permission from the Minister (see section 4 of the Immigration Act 2004) or some other international legal obligation applies, which was not the case here. Accordingly, Finlay Geoghegan J stated as follows:

"74. Having regard to the inherent power of the State, as a sovereign state, to control the entry of non-nationals into the State, it does not appear to me correct, in the absence of any express right given in the Constitution to a citizen to have a non-national spouse reside with him or her in the State without the need to obtain the relevant visa or other permission required by statute, to state that the Irish citizen has a constitutional right to have the non-national spouse reside with him or her in Ireland.

75. Even if one considers the right of the family to be protected in its composition pursuant to Article 41, or to put it another way, the married couple's right to cohabitate, or the citizen's individual personal right to cohabit with his spouse, and take into account the citizen's right to live in Ireland, it still does not appear to me to give him an automatic right pursuant to the Constitution to cohabit with his non-national spouse in Ireland. Such an individual right would appear to be contrary to the inherent power of the State to control immigration subject to international obligations. This is so even if one considers that any such constitutional right is not an absolute right and may be limited.

76. Neither does it appear to me correct or helpful to state that the couple have a *prima facie* constitutional right to live in Ireland pursuant to Article 41. I understand the trial judge in *Gorry* to have been using it in the sense of a constitutional right which is not absolute or which is subject to regulation, but nevertheless an identified constitutional right."

69. In her view, the correct analysis of the rights which a couple such as the Gorrys have under the Constitution, and the obligations thereby imposed on the Minister in considering their application, begins with the identification of the constitutional rights involved. These Finlay Geoghegan J identified as follows:

"(i) the guarantee given by the State in Article 41.1.2 to protect the family in its constitution and authority;

(ii) a recognition that Mr. and Mrs. Gorry are a family, a fundamental unit group of our society possessing inalienable and imprescriptible rights which rights include a right to cohabit which is also an individual right of the citizen spouse which the State must, as far as practicable, defend and vindicate (Article 41.1 and Article 40.3.1)

(iii) 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 has guaranteed in Article 41.1 to protect; and

(iv) a recognition of the right of the Irish citizen to live at all times in Ireland as part of what Article 2 refers to as his 'birth right … 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."

70. The Constitution places corresponding obligations on the Minister to take the decision with due regard to each of the above constitutional rights; it does not, however, oblige the Minister to give effect to their decision to live in Ireland (para. 79). The Minister is also entitled to take into account relevant considerations in accordance with the State's interest in the common good, including the inherent power to control the entry of non-nationals to the State.

71. Finlay Geoghegan J referred to the *obiter* remarks of Fennelly J in *Cirpaci* (see para. 151, *infra*) to the effect that there may, in certain factual circumstances, be a constitutional right of the citizen to have their non-national spouse reside with them in the State. While agreeing that in some circumstances the only reasonable and proportionate decision open to the Minister may be to permit the non-national spouse to reside in Ireland, she preferred to consider this as an obligation imposed on the State by the Constitution rather than as a personal right of the citizen, as such.

72. She continued that the Minister, in taking any such decision, must consider and weigh the constitutional rights of the applicants and the relevant interests of the State in a fair and just manner to achieve a reasonable and proportionate decision on the facts. At a practical level, she envisaged a two-stage approach:

- The first stage involves the identification of the relevant constitutional rights, which in her view are those quoted at para. 69, *supra*. These rights do not depend on other factual issues (such as the circumstances or length of the marriage, or the immigration record of the non-national) – once the couple are a family within the meaning of Article 41, they are entitled to all of the rights identified;
- The second stage is the consideration and assessment by the Minister in accordance with the obligations imposed on the State by those rights, and his entitlement to take into account relevant State interests in the common good, such as immigration control. It is in this second stage, in the learned judge's view, that facts such as the circumstances/length of the marriage and immigration history of the spouse may fall to be taken into account as part of the balancing of interests required to reach a reasonable and proportionate decision on the facts.

73. Finlay Geoghegan J therefore concluded that it is not correct to say, as the trial judge did in *Gorry*, that a married couple comprising an Irish citizen and a non-national have a *prima facie* right to live in Ireland pursuant to Article 41 of the Constitution. Rather, in her view, "*they have rights to have the decision taken by the Minister in accordance with the rights which the Irish citizen has, and they as a family have, pursuant to the Constitution and the obligations imposed on the State by the Constitution and the rights inherent in the State in relation to the control of entry to the State by non-nationals*" (para. 86). She was not therefore prepared to uphold the reasoning of Mac Eochaidh J.

74. This, however, did not mean Finlay Geoghegan J was of the view that the consideration given by the Minister to the application in relation to the constitutional rights of the applicants was in accordance with law. She noted that the Minister had applied the same

approach to the State's obligations under Article 41 as he had to the obligations imposed by section 3 of the 2003 Act (having regard to Article 8 ECHR). While Humphreys J had upheld this approach, Finlay Geoghegan J did not consider it to be correct. The learned judge had identified the starting point for the constitutional analysis as being the recognition by the Minister of the relevant rights of the applicants; that, however, is a different starting point, imposing different obligations, than the statutory obligation imposed by section 3 of the 2003 Act. Having regard to the text of Article 41 of the Constitution and Article 8 ECHR, she considered that the former affords more protection to the rights of the family based on marriage than does the latter. The Minister takes issues with this textual analysis, and this forms a major issue on this appeal (see paras. 196-204, *infra*).

75. For Finlay Geoghegan J, the practical effect of this is that the starting point of the assessment concerning Article 41 rights must be in accordance with the principles set out above; in particular, the Minister's analysis must start with the recognition of the constitutional rights of the applicants and the obligations imposed thereby on the State, including the obligation to protect the right of the couple to decide that their family live in Ireland. By contrast, the starting point under Article 8 is that there is no general obligation on the State to respect the choice of residence of married couples. Moreover, under the jurisprudence of the European Court of Human Rights, if the marriage was entered while the immigration status of one of the parties was precarious then it is only in "exceptional circumstances" that removal of the non-national will violate Article 8. No such requirement is imported into the consideration of the constitutional family rights concerned. The learned judge concluded that the consideration given by the Minister to the constitutional rights of the applicants in the *Gorry* case was not in accordance with law.

76. The learned judge went on to address the "insurmountable obstacles" test. She stressed that this only arises the Article 8 ECHR rights, i.e. it arises only where the Minister has first decided to refuse permission having regard to the constitutionally protected rights. She agreed with the Minister that Mac Eochaidh J had erred in concluding that that test is no longer to be applied, given that it is the test still applied by the European Court of Human Rights. In her view, however, the difference between the ECtHR test and that applied by Mac Eochaidh J (i.e. whether it would be reasonable to expect the Irish spouse to join their deported partner in their country of origin) is one of nomenclature rather than substance. In view of her decision on the constitutional issue and the mootness of the case, she did not consider it necessary to assess whether the relevant principles had been properly applied in the *Gorry* case. She did note, however, that the approach of the Minister in the *ABM* case was slightly different, and closer to the approach articulated by Clark J in the *Alli* case. In her view, the application of the insurmountable obstacles test requires that the evidence be assessed in relation to the practicality and feasibility of family moving to the country of origin of the non-national, as well as the proportionality of the decision to remove the non-national.

77. A helpful summary of the conclusions of Finlay Geoghegan J is set out at para. 105 of her judgment. She held that although she would not uphold the trial judge's reasoning in *Gorry*, she would uphold the order of *certiorari* in light of the legally incorrect approach taken by the Minister to the assessment, considerations and determination of the constitutional aspect of the Gorrys' application. Given that the proceedings are moot, she concluded that the matter should not be remitted to the Minister for a further decision.

78. A concurring judgment was given by Hogan J, who agreed with that given by Finlay Geoghegan J. He stated that, on reading the file, it was difficult to avoid the impression that the Minister had taken the view that Article 8 ECHR is directly applicable in our domestic law and indeed that it is the primary source of protection of family rights, with Article 41 playing a subsidiary role. He observed that the two provisions were treated as having the same legal status and content, with there being no attempt by the Minister to subject the constitutional claim to any independent, detailed analysis. He considered this to be an inversion of the appropriate legal norms.

79. The learned judge then re-stated "some key legal propositions" concerning the status of the ECHR in Irish law and its relationship with constitutional remedies. Referring to this Court's decision in *Carmody v. Minister for Justice and Equality* [2010] 1 I.R. 635, he stated that it is implicit in that judgment that where a litigant makes claims based on the Constitution and on the Convention, the former should be considered first and the latter should be considered only if the former claim fails. In his view, the Minister's approach effectively treated Article 8 ECHR as directly applicable and enforceable under Irish law, an approach which is "fundamentally wrong".

80. In terms of what he saw as the Minister equating Article 8 ECHR and Article 41 of the Constitution in terms of their status and content, Hogan J stated that while there is "a good deal of overlap", there are nonetheless clear differences. Though not relevant for this appeal, the scope of the provisions is different, in that the ECHR provision protects all forms of family life whereas Article 41 extends only to the family based on marriage. Hogan J noted that even as regards the marital family, there are clear differences of approach. As in Finlay Geoghegan J's analysis, Hogan J referred to the text of the two provisions, noting that the Constitution uses more emphatic terms than does Article 8 of the Convention. In his view, while it may be that not every word of Article 41 was intended to be taken absolutely literally, it was clear that the drafters intended to secure the maximum possible degree of protection for family rights, and that they could hardly have used stronger or more emphatic language in doing so.

81. The learned judge referred to cohabitation and joint decision-making as fundamental features of the family as a "moral institution", as referred to in Article 41.1. In his view, spousal autonomy is a "core constitutional value" and this is embraced by Article 41.1.2 when it speaks of protecting the family "in its constitution and authority", terms which find no counterpart in Article 8 ECHR. Referring to the case law of this Court, he observed that the principle of spousal autonomy includes the right of a couple to make joint decisions about the ownership of a family home and family planning; in his view, it must also apply to other decisions bearing on the composition and autonomy of the couple, such as where they will live.

82. However, while the State is obliged to protect family autonomy, Article 41.1.2° itself envisages that this will be subject to social order and ensuring the welfare of the State, which includes considerations such as the prevention of crime, manipulation of the immigration system and the integrity of the social security and health systems. Hogan J was thus satisfied that it is incorrect to say that the couple may insist as a matter of constitutional entitlement that their choice of residence must be respected, but equally incorrect to say – as the Minister did in this case – that their choice need not be respected unless there would be "insurmountable obstacles" to the Irish citizen moving to the home country of the third country national. The learned judge continued:

> "30. What is required here is something of a *via media* between these potentially competing positions. Unlike the position under Article 8 ECHR, the starting point [in the constitutional analysis] is that the couple's choice of country of residence must be considered and given considerable weight by the Minister, not least given that in this context at least the right of the Irish citizen to reside in Ireland is for all practical purposes an absolute one. The Minister must then take account of and balance other competing State interests – ranging from the suppression of crime, maintaining the integrity of the asylum system, guarding against unfair competition in the labour market from third country nationals and protecting the social security system. The fact that the couple married when the immigration status of the non-national was known to be precarious is yet another factor which can be weighed in the balance, although in itself it is not necessarily always a dispositive feature. This balancing process must furthermore be proportionate and must respect the constitutional rights of the parties in the *Meadows* sense of this term (*Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 510)."

83. He concluded by agreeing that the Minister had erred in assessing the Gorrys' constitutional rights, in assuming that (i) Article 8 ECHR is directly effective and the primary source of rights protection; (ii) that Article 41 of the Constitution and Article 8 ECHR are co-extensive for these purposes; and (iii) that Article 41 goes no further than Article 8 ECHR in saying that the State is not obliged to respect a married couple's choice of residence unless the "insurmountable obstacles" test is satisfied.

84. On the same date, the Court of Appeal also delivered its short, supplementary judgments in *ABM* ([2017] IECA 280) and *Ford* ([2017] IECA 281). Both were delivered by Finlay Geoghegan J. In allowing the applicants' appeal in the former case, the learned judge stated as follows:

> "14. …[T]he rights which an Irish citizen such as B.A. and a family comprising a lawfully married couple such as A.B.M. and B.A. have pursuant to the Constitution and the obligations imposed on the Minister by the Constitution in considering an application such as at issue in this appeal are considerably more extensive than a mere "acknowledgement and consideration of their status under Art. 41 of the Constitution" as determined by the trial judge herein.
>
> 15. Furthermore for the reasons set out in the judgments in *Gorry*, the trial judge herein was in error in his conclusion that the rights of the applicants or the obligations imposed on the State pursuant to the Constitution and those imposed on the State pursuant to s. 3 of the European Court of Human Rights Act 2003 … having regard to Article 8 ECHR are not significantly different."

85. Given that the assessment given by the Minister to revoking the deportation order in *ABM* was not in accordance with law having regard to the constitutional rights of the applicants, Finlay Geoghegan J considered that the applicants were entitled to an order of *certiorari*. However, she did not consider that the application should be remitted to the Minister for a fresh decision given that events had since moved on: the proper course would be for a fresh application to be made to the Minister for revocation of the deportation order which will fall to be considered in accordance with law and on all current facts relating to the

family comprised by the applicants and their child who was born after the impugned decision of the Minister.

86. In *Ford*, the Court of Appeal upheld the order of the High Court that the decision of the Minister be quashed, for that decision expressly stated that the same principles apply in relation to a consideration of rights pursuant to Article 41 of the Constitution as do in relation to Article 8 ECHR. However, the *Ford* case was by this stage moot (the applicant having since submitted further applications to the Minister) and thus the Court of Appeal vacated that part of the order of the High Court remitting the original application for further consideration by the Minister.

Issues

Determination granting leave

87. The Minister sought leave to appeal to this Court from the judgments of the Court of Appeal, stating that they raise matters of general public importance with the potential to affect a very large number of Irish citizens. The Respondents opposed the grant of leave, arguing that the judgment of the Court of Appeal is clear and that no issue arises therefrom which meets the threshold for leave to appeal. Moreover, it was contended that leave should be refused on the basis of mootness: in the *Gorry* case, because the Gorrys have since separated and Mr Gorry is no longer seeking to have Ms Gorry live with him in Ireland, and in the *ABM* case because that family's circumstances have changed substantially in light of ABM's deportation and the birth of their Irish citizen child, such that a new application to revoke is now appropriate rather than a remittal to reconsider the first application.

88. By determinations dated the 11th April, 2018, this Court granted leave to the Minister in each of the four cases (see *Gorry v. Minister for Justice and Equality* [2018] IESCDET 56, *A.B.M. and B.A. v. Minister for Justice and Equality* [2018] IESCDET 54, *Ford & anor v. Minister for Justice and Equality* [2018] IESCDET 55 and *A H and K O'L v. Minister for Justice and Equality* [2018] IESCDET 57). It observed that the proper approach to be taken by the Minister on an application for revocation of a deportation order or for a visa to enter the country in respect of a non-citizen married to an Irish citizen resulted in inconsistent High Court judgments, with the view taken by the Court of Appeal itself being significantly different again. The Court was therefore satisfied that an issue of public importance arises which requires clarification.

89. Given that the overarching legal principles in each of the cases were essentially identical, the Court proposed to list the four of them together for case management. During that process it was decided to list the *Gorry* and *ABM* appeals together for hearing, with the outcome of the remaining cases to be determined by this judgment.

Issues Papers

90. In his Issues Paper received by the Supreme Court Office on the 16th October, 2018, the Minister states that the following issues arise in these cases:

i. Is there a positive obligation imposed on the Minister to promote or facilitate a decision by a married couple to reside in the State where a non-EEA national is married to an Irish citizen?

ii. Whether the Minister is entitled to have regard to all factual circumstances including any rights asserted to exist under Article 41 of the Constitution and Article 8 of the

European Convention on Human Rights (as implemented by the European Convention on Human Rights Act, 2003) together in a holistic manner - when considering such residence applications - and accordingly whether the formal, bifurcated approach identified by the Court of Appeal in its judgment to the assessment of such applications by the Minister is correct as a matter of law.

91. The Respondents in both cases, in their joint Issues Paper, frame the points slightly differently although, as will be apparent, in substance there is a large degree of overlap between the parties' respective positions. In any event, the Respondents say that the following issues arise:

i. the nature of the analysis of Article 41 family rights in the revocation decisions in these cases;

ii. the nature of the rights which the Irish citizen spouse and the family based upon marriage (including a third country national spouse) possess under the Constitution;

iii. how those rights must be approached by the Minister in considering whether or not the third country national spouse may be permitted to remain or reside in the State, or come to the State to join their Irish citizen spouse.

iv. whether the Minister's obligations when considering constitutional rights in such an application differ from those which apply when considering the application with regard to the State's obligations pursuant to Article 8 ECHR.

v. the overlap and differences between Article 41 and Article 8 ECHR family' rights and the assessment of the proportionality of decisions that may lead to Irish citizen having to leave the State to enjoy marital family life or decisions that may lead to the marital family being unable to live together as a family unit because it is unreasonable to expect the Irish citizen spouse to move to the country of citizenship of the third country national spouse.

Submissions

92. The Court is grateful for the comprehensive written submissions furnished by the parties in both *Gorry* and in *ABM*, as well as for their helpful oral submissions. For understandable reasons, there is very considerable overlap between the submissions in both cases; indeed, in most respects they are identical. For this reason, unless the contrary is noted, it can be taken that the summary of the parties' submissions presented below is equally applicable to both cases.

Submissions of the Appellant

93. The Minister stresses at the outset of his written submissions that there is much in the reasoning of the Court of Appeal with which he does not take issue. His concerns relate to a number of discrete aspects of the Court's reasoning. In particular, he is of the view that the Court of Appeal departed from the jurisprudence of this Court and that its decision is unduly prescriptive and likely to give rise to practical difficulties in its implementation. Thus it is submitted that clarification is required as this issue will affect many other immigration cases and will arise across a range of different factual contexts.

94. The Appellant considers that the core question on this appeal concerns the approach he must adopt when considering an application by a non-national spouse to enter, remain or reside in the State. He submits that the holistic approach outlined by this Court in *Oguekwe* is the correct one. The Court of Appeal, by contrast, has adopted the very "micro specific" approach deprecated in *Oguekwe*.

95. In addition to disagreeing with the Court of Appeal's reasoning in respect of the approach which the Minister should adopt to such applications, the Minister also submits that the court below was in error in its analysis of the rights of the applicants and, in particular, Article 41 of the Constitution. This error, he said, fed into the Court's subsequent conclusions in respect of the approach to be adopted.

96. He does not disagree with all that was said by the Court of Appeal in this context, observing, for example, that that court was quite right to find that there is no constitutional right of the citizen to have their non-national spouse reside with them. What he objects to is the Court's construction of Article 41 as imposing obligations on the State to respect and protect the right of the couple to decide that their family live in Ireland. In this regard, he submits (i) that the positive duties which the court identified as arising from Article 41 are inconsistent with the text and case law relating to that provision and (ii) that the court erred in attaching undue legal significance to the use of terms in Article 41 such as "inalienable", "imprescriptible", "moral institution" and "antecedent and superior to all positive law".

97. The Minister questions whether the Court of Appeal was correct in finding that the judgment in *Murray v. Ireland* [1991] I.L.R.M. 465 stands as precedent for the identification of a right of co-habitation of married couples within Article 41. More fundamentally, he submits that the court's approach goes beyond the text and authorities on the nature of that provision. In his submission, this provision does not impose a freestanding obligation to protect the family generally or to promote their interests; rather, the Constitution's concern is to preserve the decision-making primacy of the family over internal matters.

98. This, he submits, is clear from the case law, and in this regard he relies on *L v. L* [1992] 2 I.R. 77, *North Western Health Board v. HW* [2001] 3 I.R. 622, *In re Article 26 and the Matrimonial Home Bill 1993* [1994] 1 I.R. 305, *A.O. and D.L. v. Minister for Justice* [2003] 1 I.R. 1, *P.H. v. John Murphy & Sons* [1987] I.R. 621 and *FP & AL v. Minister for Justice* [2002] 1 I.R. 164. It is submitted that these cases make clear that the objective of the provision is to safeguard the authority of the family over certain internal issues: to make it clear that the family, rather than the State, has primacy in these areas. The key issue in these cases is that they involve an external party acting as the primary decision-maker for the family, and this is what the provision protects against. They are not cases where a family takes a decision, the implementation of which encounters obstacles: they are cases where the family was denied the entitlement to take a decision in the first place.

99. Thus the Minister submits that the rights contained in Article 41 are essentially negative in character. They preclude the State from asserting primary authority over the family's decision-making entitlements, but do not impose any duty on the State to promote or facilitate the decisions which the family has taken.

100. It is submitted by the Appellant that one of the key practical problems with the judgment of the Court of Appeal is that it is somewhat ambiguous as to both the nature and implications of the applicants' Article 41 rights. It contains references to the need to "protect"

the right of the family to decide to live in Ireland, but these are followed by statements that the Minister is not obliged to give effect to this right. Insofar as these references can be construed as imposing some additional form of obligation on the Minister to promote or facilitate a decision to live in Ireland, it is submitted that the Court was in error. At most, Article 41 protects the *fact* of the family's entitlement to make a decision, but there is no basis for interpreting it to require the Minister to attach positive weight to the *content* of that decision.

101. The Minister submits that there is a practical difficulty in the application of the Court of Appeal's decision. He says that there is ambiguity over the court's precise attitude to the scope of the Article 41 entitlements. If it requires the Minister to give presumptive priority to the family's decision, or to facilitate it, this is inconsistent with Article 41. On the other hand, if he is required to respect the fact of the decision but not its content, there is a question as to how much practical significance or influence this will have. It is submitted that the Court of Appeal's approach is liable to produce confusion rather than clarity. The Minister further questions whether the limited scope of this Article 41 entitlement supports the pre-eminence given to it in the approach of the Court of Appeal.

102. The Minister makes a number of points in respect of the "two-stage approach" identified by Finlay Geoghegan J. It is said that this approach impermissibly gives presumptive priority to the Article 41 entitlements of the family, thereby overextending that provision and giving it undue prominence in the Minister's decision. He also objects to the bifurcation of the factual analysis of the marriage into two stages, with the circumstances or length of the marriage only falling to be considered in the second stage. It is not clear how this would work in practice, and it appears to preclude the Minister from assessing the legality of the marriage (by reference to the facts and evidence) at the first stage. It is further submitted that there is no legal necessity or practical logic to bifurcating the Minister's evaluation of the marriage in this way.

103. Finally, in this regard, the Appellant submits that this approach is a clear departure from the prior decisions of this Court in *Cirpaci*, *Oguekwe* and *AA & EP v. Minister for Justice, Equality and Law Reform* [2005] 4 I.R. 564. *Oguekwe* provides that all legal and factual considerations relevant to the rights of the parties and the common good should be balanced without according pre-eminence or priority to any particular factor. The Court of Appeal, on the other hand, has elevated one factor above all others – thereby giving it a status which is not justified by the text of the Constitution and is not supported by authority. Therefore, because the Court of Appeal's approach is inconsistent with *Oguekwe*, and because neither the text of Article 41 nor the fact that a marriage has formal legal recognition requires that fact alone to be elevated above all others in the Minister's analysis, it is submitted that the approach of the court below ought not to be followed.

104. The Minister also makes submissions in relation to the conclusions of the Court of Appeal concerning the Minister's approach to Article 8 ECHR, namely, that he had erred in addressing the rights thereunder prior to addressing constitutional rights. Hogan J relied, in this regard, on the decision in *McD v. L* [2010] 2 I.R. 199. However, the Minister distinguishes that case on the basis that there the High Court applied the Convention directly and outside the interpretative framework provided by the 2003 Act: there was no provision at issue to trigger the application of the Convention. Here, on the other hand, the Minister has a direct statutory obligation under section 3 of the 2003 Act. The Minister also takes issue with Hogan J's reliance on *Carmody v. Minister for Justice and Equality* [2010] 1 I.R. 635 as

establishing that a constitutional claim should be considered before a Convention claim. He submits that that decision considered the differences in remedies available under the 2003 Act and the Constitution; where, as here, the remedy which could be provided (a decision to accede to their application) is the same pursuant to both provisions, the concerns identified by this Court in *Carmody* do not arise.

105. As noted above, the Appellant criticises the Court of Appeal's emphasis on the text of Article 41. It is said that the court attached significant importance to terms that plainly are not intended to be taken literally. More fundamentally, he says that the court below focussed on the language used to *describe* the rights rather than on the *content* of the rights protected therein. Returning to his submission that Article 41 protects only the primacy of familial decision-making, he submits that this makes a comparison of the relative status of the rights under each provision more complex. While Article 41 is expressed in more strident terms, it is more limited in its scope than Article 8 ECHR.

106. It is further submitted that the Court of Appeal's insistence on a rigidly distinct approach to Constitution and Convention rights is a departure from previous authorities (*Oguekwe*; *Gashi* [2004] IEHC 394). That court's approach requires as a matter of law that the provisions be considered *separately* and in *sequence*. This risks favouring abstract form over factual assessment. The factual considerations will be similar; it is said that there is no logical reason to always start with a constitutional analysis. Whether the Minister had paid adequate regard to the rights of an applicant is a question of substance rather than sequencing; provided the Minister has regard to both the constitutional and Convention rights of the applicants in a fair and proper manner that strikes a fair balance between the interests engaged (as he did in this cases), the decision is not an unlawful one by virtue only of the order in which it is explained.

107. As regards the decisions at issue in these proceedings, it is submitted that they are in full compliance with the approach mandated in *Oguekwe*. There was fair and careful consideration of the factual matrix in the context of both Article 41 and Article 8 ECHR. This was lawful and appropriate given the considerable overlap between the two. Furthermore, while the decisions make greater reference to the jurisprudence of the ECtHR, this is not unusual given its more extensive range of case law on the topic. This does not mean, *ipso facto*, that the Convention was given greater legal weight than the Constitution. In any event, it is submitted that the Respondents have not identified any matters pertinent to Article 41, but not Article 8 ECHR, which were not considered or were inadequately considered by the Minister, nor how a different conclusion would have resulted had Article 41 been the starting point. To require the Minister, as a matter of law, to set out the same factual considerations in respect of both provisions, repeated fully and verbatim the second time, would be highly formalistic. Finally, it is submitted that even if the constitutional rights of the applicants are weightier than their Convention rights, it is not meaningfully so in these cases, where the context involves brief marriages against a backdrop of known immigration difficulties.

108. In the event that this Court should hold against him on the matters of legal principle, the Minister submits that relief ought to be denied to the applicants in any event on discretionary grounds. The basis for this submission is the clear illegality and wrongdoing of the applicants in breaching the immigration rules of the State and evading deportation. Furthermore, as regards Mr ABM and Ms BA, it is submitted that they provided either false or misleading information to the Minister in their dealings with him. It is said that this plain illegality disentitles them to the remedies sought, given the absolute duty of good faith and

honesty in dealing with the Irish immigration and protection authorities. The Minister relies, in this regard, on, *inter alia*, *AGAO v. Minister for Justice* [2007] 2 I.R. 492, *C(R) & M(GG) [Zimbabwe] v. The Refugee Applications Commissioner* [2010] IEHC 490 and *G.O. & ors v. Minister for Justice, Equality and Law Reform* [2008] IEHC 190.

Submissions of the Respondents

109. The Respondents submit that the Minister's submissions are abstract in content and tone and shy away from examining the actual decisions under challenge. They submit that this is significant in light of the Minister's express findings in those decisions that there is *no* authority to the effect that a constitutional right to enjoy family life in Ireland *may* exist, and the Minister's subsequent finding equating the position of a married Irish citizen with that of a non-citizen who is entitled to reside in Ireland. It is said that it is unclear from the Minister's submissions precisely what his position is regarding the scope and effect of Article 41.

110. The Respondents accept that the right to enjoy a marital family in Ireland is not absolute and that the circumstances of the marriage are relevant. They stress that they do not contend for, nor did the High Court or Court of Appeal find, any absolute right for a third country national spouse to reside in Ireland with their Irish citizen spouse. They say that it is clear from the judgments of the Court of Appeal that there is no such absolute right. It is clear from those judgments that the family's decision to live in Ireland is a decision which they have a right to take and which the State in Article 41 has guaranteed to protect, but it is not their case that there is an absolute right to reside in Ireland. They submit that nothing in the approach of the Court of Appeal requires any undue weight to be given to Article 41; rather it ensures that the Minister properly takes into account the rights therein when he is making his decision. Thus while the Minister must acknowledge and respect the family's decision, the Court of Appeal did not state or imply that he is bound by such decision, and indeed it was careful to emphasise that he is not.

111. The Respondents stress on many occasions in their written submissions that nothing in the judgments of the Court of Appeal requires the Minister to "facilitate" or "promote" the family's decision to live in Ireland, as the Minister has suggested. They say that this is to mischaracterise the judgments of the Court of Appeal. Those terms are not mentioned in the judgments of that court and the Respondents have at no stage contended that the Minister is under any such duty. Thus they submit that the Minister is incorrect to say that the effect of those judgments is to oblige him to give effect to the couple's choice to live together in Ireland: it is very clear from the text of those judgments that the Minister is not obliged to permit the couple to live in Ireland. Furthermore, while the Minister suggests that the Court of Appeal's judgments oblige him to attach "positive weight" or "presumptive priority" to the *content* of the couple's decision to reside in Ireland, again neither of these concepts appear in the judgments.

112. It is submitted that the High Court (in *Gorry*) and the Court of Appeal were correct in finding that the jurisprudence is clear that marriage between an Irish citizen and a third country national may engage a constitutional right to live as a family unit in the State, which can only be denied for countervailing proper purpose. The Respondents therefore submit that the Minister erred in his decisions in stating that there was no authority for the proposition that such a right may exist. The decisions of this Court in *Cirpaci* and the High Court (Clarke J, as he then was) in *AA v. Minister for Justice* [2005] 4 I.R. 564 are pointed to as authorities supporting the existence, in certain circumstances, of such a right. They submit that the effect

of these judgments is that in certain circumstances, such as are said to exist in these cases, the Minister may be obliged to permit a citizen and third country national spouse to reside together in the State, but the right of the family to reside here is not absolute. The judgments of the Court of Appeal are entirely in keeping with the *ratio* of *Oguekwe*: there may, at the end of the process where the competing rights are balanced, be a prevailing right to reside which trumps the interests of the State.

113. The Respondents suggest that the Minister seeks on this appeal to use the very strength and emphasis of the language of Article 41 to deprive it of real effect, in that he is arguing that because it cannot be given effect to literally, it should not be given any significant effect at all. The Respondents submit that the Minister's "tepid" approach to Article 41 (i.e. suggesting that the Minister is required to have regard to the *fact* of the family's entitlement to make a decision as to where to reside, but not to its *content*) is formalistic and inconsistent with the emphatic and mandatory terms of that Article. It is said that the Minister's objective on this appeal is to reduce Article 41 to a mere cipher.

114. To the extent that the State may be taken as having suggested otherwise, the Respondents submit that the right of a married couple to live together as a family is at the core of Article 41's protection of the family "*in its composition and authority*". The rights protected by that Article are those of the martial family as an institution and those of its individual members. The position of the third country national changes when they marry and become part of a family based on marriage, particularly if they marry an Irish citizen. Referring to the authorities on Article 41, they submit that decisions about cohabitation and where the family will live are as fundamental and important as joint decisions regarding ownership of the family home and family planning/contraception, as discussed in *Re Article 26 and the Matrimonial Homes Bill 1993* and *McGee v. Attorney General* [1974] I.R. 284, respectively. It is submitted that the family rights of cohabitation and integrity as a family unit, as well as the right to respect for the family's authority to make decisions for itself, are matters of fundamental constitutional value which must be afforded significant weight by the Minister.

115. While the Minister has criticised the "prescriptive" approach of the Court of Appeal and suggested that a more holistic appraisal is required, the Respondents submit that this is no more than an invitation to this Court to permit him not to give appropriate weight to Article 41. What the Court of Appeal has done is provide a practical method for analysis of those rights. Moreover, it is practical to take as a starting point that the married couple is entitled to make a choice about where it will live. The Minister, in considering whether to exclude the non-national spouse from the State, should acknowledge and respect that choice, which should be a significant factor in the proportionality balance.

116. In response to the Minister's submission that the mere fact that a marriage is lawful should not automatically compel the Minister to consider Article 41 rights engaged, the Appellants state that if the Minister has in mind marriages of convenience, the same should not pass the first leg of Finlay Geoghegan J's test at all.

117. As regards the relationship between constitutional and ECHR rights, the Respondents submit that while the family rights under Article 41 of the Constitution are similar to those under Article 8 ECHR, there are differences. As stated in the court below, "protection" (Article 41) connotes more than "respect" (Article 8). While there may be some overlap between the provisions, the nature of the rights themselves are substantially different.

In this regard the Respondents refer to the emphatic language of Article 41. They say that he Minister on this appeal seeks to whittle away at the language of the Constitution so as to equate Article 41 with Article 8 ECHR.

118. It is submitted that the Minister treated Article 41 as having, at best, the same legal status and content as Article 8. He erred in considering that Article 8 ECHR is directly effective and the primary source of rights protection; in considering that Article 41 and Article 8 are co-extensive for these purposes; and in considering that Article 41 goes no further than Article 8 ECHR in saying that the State is not obliged to respect a married couple's right of residence unless the "insurmountable obstacles" test is satisfied. It is clear from a reading of his decisions that he afforded primacy to the rights under Article 8 ECHR, so that the claim by reference to the constitutional provision was treated as supplementary to the Convention claim. No attempt was made by the Minister to subject the claim based on constitutional rights to any detailed independent analysis. Indeed, after eight pages devoted to the claim based on the ECHR, the much shorter consideration of constitutional rights expressly references the Article 8 consideration which preceded it, as though the rights were exactly the same.

119. While the Minister submits that there should be no ordering of the consideration of the separate sources of rights, preferring a holistic appraisal, the Respondents submit that it is clear from his decisions that no consideration, holistic or otherwise, was given to the differences in the nature of the rights, and that the constitutional rights were considered as an addendum to the Article 8 rights. The Article 8 ECHR analysis of proportionality was applied to Article 41, as though there was no need for any form of separate analysis.

120. In relation to *Oguekwe*, it is submitted that nothing in that judgment relieves the Minister of the obligation to correctly identify the constitutional rights and interests engaged and to clearly and comprehensively address those interests. Moreover, even if the constitutional and ECHR rights can be considered together, this does not mean that exactly the same analysis can be applied to both. Even if the factors to be considered are the same, it is not the case that they have the same weight in each assessment or that the balancing exercise is the same. Given that each has a different starting point, the end result will often differ. It is submitted that it is clearly appropriate to first consider in detail the constitutional rights engaged. They must be assessed carefully if any proportionality analysis is to be properly conducted. Proportionality was not the subject of a sufficiently profound assessment, as necessitated by the Constitution.

121. Both sets of Respondents reply to the Minister's submission that relief should be withheld on discretionary grounds. The Gorrys submit that the proceedings are moot and that it would be highly artificial to withhold relief on this basis in circumstances where the relief is no longer required and the Respondents have continued in the matter despite there being no incentive to do so. They submit that the invitation to uphold the appeal on this narrow and case-specific ground is inconsistent with the approach taken by the Minister in seeking leave to appeal. Moreover, it is submitted that on the facts the behaviour of the Respondents is a far remove from the sort of behaviour which has disentitled applicants to relief in other cases. It is further submitted that the Minister did not seek to have the Respondents' relief withheld on this basis in the Court of Appeal and so should not be entitled to do so before this Court.

122. In respect of Mr Gorry, it is further submitted that it is unreasonable to expect him to move for reasons other than his residence rights as a citizen, including his health, age and

family ties to Ireland. The practical effect of the continued existence of a deportation order in the present circumstances is to force the Irish citizen to choose between their right as a citizen to reside in the State and their right as a husband/wife to live with their spouse. It is further submitted that in the High Court, Mac Eochaidh J also upheld the Gorrys' claim on irrationality grounds and that while the Court of Appeal did not expressly address this point, this is a further reason not to allow the Minister's appeal.

123. Ultimately, the Respondents submit that the Minister did not consider the guarantee in Article 41 that the State will protect the family in its constitution and authority, did not recognise that the decision to live in Ireland is one made within the authority of the family and therefore protected by that guarantee, and did not recognise the right of the Irish citizen to live in Ireland. While the rights identified by the Court of Appeal are not absolute and are capable of being outweighed by State interests, the balancing exercise must commence from an appropriate point and the identification of the constitutional rights which do exist is the most appropriate place to start. The strong language of Article 41 is more imperative than that of Article 8 ECHR and this is an important consideration when assessing the proportionality of the interference with those rights. In this case, Article 41 was treated as, at best, supplementary to the ECHR claim, with no attempt at any independent detailed analysis of the constitutional rights. Finally, it is submitted (per *Cirpaci*) that situations will arise where a decision to deport will not be proportionate in light of the constitutional family rights engaged, and that this may be so even where deportation would not breach Article 8 ECHR.

Discussion/Decision

The Text of Article 41 of the Constitution and Article 8 ECHR

124. As noted above, the ECHR is not part of Irish law and cannot be directly relied upon by a litigant in the Irish courts. It has been given effect in a more limited way, and subject to the Constitution, by the 2003 Act (see para. 15, *supra*). Two distinct issues arise on this appeal as regards the relationship between Article 41 of the Constitution and Article 8 ECHR. The first, at the level of principle, concerns the nature of the protections afforded by each provision: precisely what rights are protected and to what extent? The second issue, somewhat dependent on the answer to the first, concerns the extent to which the Minister's decision on an application to, for example, revoke a deportation order, must contain separate analyses of the applicant's rights under both provisions, or whether instead a composite analysis will suffice. I will return to the interaction between Article 41 and Article 8 ECHR in the specific context of the Minister's impugned decisions at para. 196, *infra*.

125. Article 41 and Article 8 ECHR are set out at paras. 13 and 14 above. One important differentiating feature, though one not relevant to this appeal, concerns the nature or type of families which may invoke the protections of each provision. Article 8 ECHR is broader in the sense that it may be invoked by non-marital families. It protects all forms of family life and so can be called in aid even by *de facto* families not based on marriage (see, for example, *Keegan v. Ireland* (1994) 18 EHRR 342). On the other hand, the decided cases to date have interpreted the protections of Article 41 of the Constitution as extending only to the family based on marriage (see, for example, *W. O'R v E.H. (Guardianship)* [1996] 2 I.R. 248). Both families in this appeal are married couples and so may rely on the constitutional provision.

126. Given that the Applicants can invoke both provisions, the question arises as to whether there is any difference in terms of the substance or content of the rights protected under each, or the extent of those protections. The Minister's position is that Article 41 is more limited in terms of what rights it protects and that its protections are no weightier than

those under Article 8 ECHR. Humphreys J in his decision in the *ABM* case in the High Court stated that:

> "26. It has been a constant refrain of the European Court of Human Rights that there is no automatic obligation on a State to respect the choice of place of residence decided upon by a particular family … There is no logical reason why there should be a significantly different position under Article 41 of the Constitution. It is true, of course, that Article 41 uses somewhat more emphatic language than art. 8 of the ECHR, but neither provision exists in a vacuum. Even Article 41 cannot be interpreted in such a way as to fail to cohere with the overriding objective of an ordered society."

127. His underlying observation is correct insofar as the learned judge is driving at the fact that under neither provision are family rights absolute: clearly the rights invoked by the Applicants, be they sourced in the Constitution or the Convention, cannot automatically override the relevant State interests or compel the Minister to decide the application in a particular way without conducting the required balancing exercise. However, to the extent that the learned judge appears to have taken the view that Article 41 and Article 8 are coterminous and co-extensive in their effect, I am of the view that this was an error.

128. The first port of call in construing these provisions has to be their text. The plain meaning of the terms used, seen in the context of the documents as a whole, is the most obvious guide to the nature and extent of the protections thereunder. Of course, those terms must be construed in light of the jurisprudence of the domestic courts and the European Court of Human Rights. One cannot divine the true meaning, relationship between and relative extent of the provisions simply by laying them side by side and contrasting the language used. Thus, it will in due course be necessary to look at the detailed case law which has developed. We will start, however, with the text of the Articles.

129. Pursuant to Article 41.1.1°, the Family is recognised "as the natural primary and fundamental unit group of Society" and as a "moral institution" which possesses "inalienable and imprescriptible rights", those rights being "antecedent and superior to all positive law." Pursuant to Article 41.1.2°, 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.

130. Article 8.1 ECHR provides that everyone has the right to "respect" for, *inter alia*, his private and family life. Article 8.2 provides that there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety etc (see para. 14, *supra*).

131. I agree with the judgments of the Court of Appeal that on a textual comparison of the two provisions, the constitutional recognition and guarantee are stronger than that contained in the ECHR. As rightly observed by both Finlay Geoghegan and Hogan JJ, at a most fundamental level, protection of rights connotes more than respect therefor. With respect, I cannot agree with the Minister's suggestion that the court below has attached "undue legal significance" to terms in Article 41 "that are plainly not intended to be taken literally", i.e. the use of the terms "inalienable", "imprescriptible", "moral institution" and "antecedent and superior to all positive law". Plainly these terms are not intended to suggest

that family rights under Article 41 are absolute; as stated by Costello J in *Murray v Ireland* [1985] I.R. 532 at p. 538:

> "Similarly, the power of the State, to delimit the exercise of constitutionally protected rights, is expressly given in some Articles and not referred to at all in others, but this cannot mean that, where absent, the power does not exist. For example, no reference is made in Article 41 to any restrictive power but it is clear that the exercise by the Family, of its imprescriptible and inalienable right to integrity as a unit group, can be severely and validly restricted by the State when, for example, its laws permit a father to be banned from a family home or allows for the imprisonment of both parents of young children."

132. Of course, certain of the terms just described have a plain meaning. Generally speaking, an "inalienable" right is one which cannot be taken or given away, transferred or repudiated. An "imprescriptible" right is one which is not subject to being taken away by the lapse of time. These terms, therefore, may be said to carry a definable meaning. However, the references to the family as a "moral institution" and, particularly, to the rights referred to being "antecedent and superior to all positive law" are perhaps less clear, though the influence of natural law thinking is unmistakeable. Nonetheless, even if it is the case that not every word appearing in the provision can be taken absolutely literally, the emphatic nature of the words used, and the sheer number of occasions in which such strong language is employed in the provision, is undoubtedly of significance in interpreting the Article. The import of the Minister's submission is that the Court should use the very strength of the terms of Article 41 to read down the extent of the protections afforded by that provision to something closer to that guaranteed by the less forceful language of Article 8 ECHR. This does not seem to me to be an appropriate approach to interpreting the provision.

133. It is readily apparent that by the use of these terms the drafters intended to secure for the rights of the family the maximum degree of protection available; they are not absolute rights, of course, but the stridency of the language is notable, and this must be taken into account in interpreting the Article. Moreover, merely because some of these words are rhetorical or descriptive in nature does not mean that this Court should be blind to those words, or interpret the provision as though they were not present in it. As stated by Hogan J in his earlier judgment in *FH v. Staunton* [2013] IEHC 533:

> "While terms such as 'inalienable', 'imprescriptible' and 'inviolable' are liberally employed throughout the Fundamental Rights provisions of the Constitution, it must be recalled that these terms draw their provenance from the use of the very same or similar terminology in the continental constitutions of the 19th and 20th century. Neither the drafters of those constitutions nor the drafters of our Constitution intended that terms such as 'inalienable' or 'inviolable' should be read absolutely literally: …<u>These terms were rather used to signify and to emphasise the importance of these rights and to convey their importance so that … such rights would enjoy 'the highest possible level of legal protection which might realistically be afforded in a modern society'. Rather these terms were used to signify and to emphasise the importance of these rights and to convey their importance</u>. The use of language of this kind further conveys an important signal as how necessary it was considered that these rights should be safeguarded against encroachment." (Emphasis added)

134. I believe that this is the correct approach to interpreting the provision. For these reasons I do not accept the Minister's suggestion that the Court should overlook the more forceful terms of the Constitution so as to give Article 41 a meaning which goes no further than does Article 8 ECHR. Even if the difference between the provisions was no more than the difference between the requirement to "protect" family rights and the requirement to "respect" those rights, I would be very much of the view that the former formulation conveys a greater guarantee than does the latter; when this is allied to the undoubtedly stronger and more emphatic language contained in Article 41 relative to Article 8 ECHR, the conclusion that the constitutional provision goes further than the Convention provision seems, to me, unavoidable.

135. Of course, it is apparent even from Article 41.1.2° itself that the rights of the family are subject to social order and ensuring the welfare of the Nation and the State. It has never been suggested by the Applicants, or by the Court of Appeal, that the rights therein are absolute. This is an important point which will be returned to later.

136. I do not accept the Minister's submission that the Court of Appeal paid too much attention to the language used to *describe* the rights in Article 41 and Article 8 ECHR rather than to the *content* of the rights therein. The argument is that the concept of "family life" protected by the ECHR is broader than the protection of one particular dimension of the Family under the Constitution, namely, its "constitution and authority". Thus, it is said that even if the Constitution does use stronger language, what is protected is more limited in scope than the capacious reference to "family life" in the Convention.

137. It is not necessary for this judgment to work out the full length and breadth of the scope of protection provided by each provision in this regard. It may be the case that particular circumstances could arise which are said to fall within the concept of "family life" but not within the constitutional guarantee of protection of the "constitution and authority" of the family. The Minister's submission on this point, however, is predicated on Article 41 protecting only the primacy of decision-making of the family; for the reasons set out below, I am satisfied that the protections of the constitutional provision go beyond simply protecting the family from having its decision-making authority usurped by the State. In my view, the rights identified by the Court of Appeal, including the right to decide to live together, fall squarely within the protection afforded to the "constitution and authority" of the family. I am therefore satisfied that the constitutional protections are engaged and that the relative strength of the protections under the Constitution and the Convention is therefore relevant to the Minister's decision.

138. As a starting point, it can be stated that on a textual analysis the protections of Article 41 of the Constitution are stronger than the guarantee of respect contained in Article 8 ECHR. The obvious question, then, is how far each of the provisions goes in its protection of family rights. Before answering this question it is necessary to consider the case law of the European Court of Human Rights and of the Irish courts.

The Jurisprudence of the European Court of Human Rights on Article 8

139. The jurisprudence of the European Court of Human Rights has long grappled with the conflicts that frequently occur between the legitimate interest of the State in controlling immigration and the claims of families seeking to be permitted to reside together in the State of which one of them is a non-national. In *Abdulaziz v. United Kingdom* (1985) 7 E.H.R.R. 471, at para. 67 the European Court stated as follows:

"67. The Court recalls that, although the essential object of Article 8 … is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective 'respect' for family life … However, especially as far as those positive obligations are concerned, the notion of 'respect' is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals … In particular, in the area now under consideration, the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved. Moreover, the Court cannot ignore that the present case is concerned not only with family life but also with immigration and that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory." (Emphasis added)

140. The Court continued, in the following paragraph, by noting that the duty imposed by Article 8 "cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country." That this is so has since been repeated by the Court on many occasions. To take but one example, the following comments of the Grand Chamber of the Court in *Jeunesse v. Netherlands* (2015) 60 EHRR 17 (App. No. 12738/10, judgment of the 3rd October, 2014) are instructive:

"100. … [T]he Court reiterates that a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there. The Convention does not guarantee the right of a foreign national to enter or to reside in a particular country … The corollary of a State's right to control immigration is the duty of aliens such as the applicant to submit to immigration controls and procedures and leave the territory of the Contracting State when so ordered if they are lawfully denied entry or residence.

…

103. Where a Contracting State tolerates the presence of an alien in its territory thereby allowing him or her to await a decision on an application for a residence permit, an appeal against such a decision or a fresh application for a residence permit, such a Contracting State enables the alien to take part in the host country's society, to form relationships and to create a family there. However, this does not automatically entail that the authorities of the Contracting State concerned are, as a result, under an obligation pursuant to Article 8 of the Convention to allow him or her to settle in their country. In a similar vein, confronting the authorities of the host country with family life as a *fait accompli* does not entail that those authorities are, as a result, under an obligation pursuant to Article 8 of the Convention to allow the applicant to settle in the country. The Court has previously held that, in general, persons in that situation have no entitlement to expect that a right of residence will be conferred upon them …

…

106. While the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective 'respect' for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.

107. Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect a married couple's choice of country for their matrimonial residence or to authorise family reunification on its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest. Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion …

108. Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. It is the Court's well-established case-law that, where this is the case, it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8 …"

141. The principles derived from the jurisprudence of the European Court of Human Rights were helpfully summarised by Lord Phillips MR in *R. (on the application of Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840 in a passage previously cited with approval by Fennelly J in *Cirpaci* and by Denham J in *Oguekwe.* From these decisions he drew the following conclusions as to the approach of that court 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."

142. Mac Eochaidh J, in *Gorry*, having reviewed the case law and the Minister's decision in respect of those Applicants, concluded at paragraph 31 that the proper test in respect of the contest between State and family rights, in the context of Article 8 ECHR, is not assessed by reference to an insurmountable obstacles standard, but rather "by applying the age-old and most reliable of legal standards in administrative law: is it reasonable to expect a spouse to join the removed or excluded spouse in his country of residence?" He thus held that the Minister had erred in law in failing to revoke the deportation order in the absence of insurmountable obstacles as, in the learned judge's view, there is no such test.

143. Humphreys J considered this issue at paras. 48-53 of his judgment in *ABM*. He agreed with Mac Eochaidh J that the insurmountable obstacles test is derivative language which can only be understood in the context of all of the cases from which it has been derived. Given that the test is referred to extensively in the case law, he did not consider it proper to assume that the Minister was not aware of its true meaning in accordance with that jurisprudence, i.e. that it is legitimate question but not an all-or-nothing test. He therefore agreed with Mac Eochaidh J that there is no "insurmountable obstacles" test in the sense of a determinative bar that an applicant must meet or fail. Rather, it is one of a number of questions that can be asked as to the overall circumstances. The absence of insurmountable obstacles does not guarantee the failure of a claim, but similarly a reference by the Minister to insurmountable obstacles does not render a decision invalid.

144. In the Court of Appeal, Finlay Geoghegan J agreed with the Minister's submission that Mac Eochaidh J had erred in stating that the insurmountable obstacles test is no longer to be applied: the European Court of Human Rights continues to apply that test and the Irish courts are obliged to take judicial notice of its decisions and the principles therein. However, she felt that the difference between this test and what Mac Eochaidh J considered to be the correct test (i.e. whether it would be reasonable to expect the Irish spouse to move to the other spouse's country) is really one of nomenclature rather than substance. She stated that a consideration of individual decisions demonstrates that it is a very fact-specific test and referred to the decision of Clark J in *Alli & Anor. v. Minister for Justice, Equality & Law Reform* [2009] IEHC 595 to the effect that the test requires "no more than a significant difficulty which cannot easily be overcome", albeit that "minor or significant inconvenience" would not satisfy the test. Finlay Geoghegan J noted (at para. 102) that the Minister had taken a slightly different approach to the insurmountable obstacles test in *ABM*, an approach closer to that of Clark J in *Alli*. Referring to the judgment of the European Court of Human Rights in *Jeunesse*, Finlay Geoghegan J concluded as follows on this topic:

> "104. I draw attention to the obligations of domestic authorities stated by the ECtHR above in the context of the application of the insurmountable obstacles test to assess evidence in relation to both the practicality and feasibility of the family moving to the country of the non-national. The third matter to be assessed is the proportionality of the removal of the non-national where it would require such a move in order to keep the family together. I recognise that in the case of a potential move of a family with children a more stringent application of the proportionally assessment may be required by the 'best interests' of the children principle. However that does not appear to take away from the fact that the ECtHR considers that in considering 'insurmountable obstacles', what is required is to look at both the 'practicality and feasibility' of the family, or more particularly in this instance the Irish citizen, moving to live in Nigeria."

145. I have little to add to this analysis. While it is clear that the European Court of Human Rights continues to refer to a nominal "insurmountable obstacles test", this test must be properly understood in the sense described by Clark J in *Alli* and by Finlay Geoghegan J in the judgment under appeal. It would undoubtedly be an error were the Minister to interpret the test too literally, for clearly that would set the bar far higher than is reflected by the substance of the decisions of the ECtHR. Beyond making those observations, however, it is not necessary, in light of my conclusions on the other issues arising, to consider the application of that test to the facts of the within cases.

Article 41 of the Constitution – Immigration/Asylum Case Law

146. It should be acknowledged from the outset that even if the protections of Article 41 of the Constitution are stronger than those under Art 8 ECHR, it is clear that any rights thereunder are not absolute and may have to yield to the interests of the State in maintaining an orderly immigration system. The State undoubtedly has a right to control immigration. This entails the power to regulate, *inter alia*, the entry, residence and removal of non-nationals from the State. This is regarded as an inherent power of the sovereign State, though it is given effect and regulated by statute. Hardiman J stated as follows at p. 168 of his judgment in *F.P. v. Minister for Justice* [2002] 1 I.R. 164:

> "The inherent nature of these powers in a state is demonstrated by their assertion over a vast period of history from the very earliest emergence of states as such, and its existence in all contemporary states even though these vary widely in their constitutional, legal and economic regimes, and in the extent to which the rule of law is recognised."

147. In *AO and DL v. Minister for Justice* [2003] 1 I.R. 1, Keane C.J. at pp. 24-25 stated as follows:

> "The inherent power of Ireland as a sovereign State to expel or deport non-nationals (formerly described in our statute law as 'aliens') is beyond argument. In *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593 Costello J. said at p. 599:
>
> > 'the State … must have very wide powers in the interest of the common good to control aliens, their entry into the State, their departure and their activities within the State.'
>
> In *Osheku v. Ireland* [1986] I.R. 733, Gannon J. said at p. 746:

> ‘The control of aliens which is the purpose of the Aliens Act, 1935, is an aspect of the common good related to the definition, recognition, and protection of the boundaries of the State. That it is in the interests of the common good of a State that it should have control of the entry of aliens, their departure, and their activities and duration of stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter. The integrity of the State constituted as it is of the collective body of its citizens within the national territory must be defended and vindicated by the organs of the State and by the citizens so that there may be true social order within the territory and concorde maintained with other nations in accordance with the objectives declared in the preamble to the Constitution.’

This statement of the law by Gannon J. was expressly approved of by this court in *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26.

However, while the power to expel or deport non-nationals inheres in the State as a sovereign state, and not because it has been conferred on particular organs of the State by statute, it has, almost from the foundation of the State, been regulated by statute.”

148. A non-national (meaning a person who is not a citizen of Ireland or any other EU Member State or any EEA State) has no right to be in Ireland unless he or she obtains permission from the Minister (unless some other obligation is imposed on the State pursuant to EU law or international law, which is not the case here). Presently the requirement to obtain such permission is imposed by section 4 of the Immigration Act 2004, as amended (see para. 16, *supra*).

149. It follows, as is clear from the authorities, that a married couple comprising an Irish citizen spouse and a non-national spouse do not have an automatic right to reside together in Ireland simply by virtue of their marriage and that the State is not obliged to respect the choice of residence of such a couple. The first named plaintiff in *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593 was a Chinese national who arrived in this country in 1978 and worked in a restaurant. As a result of a serious incident in 1979, the Minister informed him that he must leave the country. Later that year he married the second-named plaintiff. They had three children and his wife was expecting a fourth child. His wife sought a declaration that she was “normally entitled to the society of [her husband] within the State.” According to Costello J at p. 596, “[t]hat is so, and I don't think it needs any declaration of the court for that to be made clear.” Further down the page and into the next page, however, the learned judge continued as follows:

> “Mr Gaffney SC submitted on behalf of the plaintiffs that because of the very entrenched provisions of the family rights in the Constitution, 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. In other words, the order

made under the Aliens Act 1935 was unconstitutional. I cannot accept that view. I do not think that the rights given to the 'family' are absolute, in the sense that they are not subject to some restrictions by the State and, as Mrs Robinson SC has pointed out, restrictions are, in fact, permitted by law, when husbands are imprisoned and parents of families are imprisoned and, undoubtedly, whilst protected under the Constitution, these are restrictions permitted for the common good on the exercise of its rights. It seems to me that the Minister's decisions and the Act, and orders made under it are permissible restrictions and I cannot hold that they are unconstitutional."

150. There is no shortage of authorities stating that the Minister is not obliged to respect the choice of residence of such a married couple. In *Fitzpatrick v. Minister for Justice* [2005] IEHC 9, Ryan J (as he then was) reiterated the definition of the rights of such married parties as being "less than absolute". This was referred to by Clarke J (as he then was) in his judgment in *AA and anor v. Minister for Justice Equality & Law Reform and Another* [2005] 4 I.R. 564, where he stated at para. 19 that "[i]t is clear that parties such as the applicants do not have an absolute right to reside in this jurisdiction as a family, notwithstanding the constitutionally recognised family rights which they hold as a married couple." To similar effect, although the claim in this case was not based on marriage, are the comments of Birmingham J (as he then was) in *G.O. (a Minor) v. Minister for Justice* [2010] 2 I.R. 19: "I cannot accept that it is open to individuals to arrive in the State on what is essentially a false basis, as indicated by the rejection of their claim to asylum status, and then proceed to so organise their family affairs as to frustrate the operation of the immigration system" (p. 37). In *Khan v. Minister for Justice and Equality* [2014] IEHC 533, Noonan J observed that "[i]t is axiomatic that the mere fact of marriage between an Irish citizen and a non-national cannot of itself give rise to any automatic or absolute right for the couple to reside in the State." There the learned judge concluded at para. 60 that the Minister "was still entitled to come to the view that even where Article 41 and Article 8 rights arose and were engaged, the countervailing interest of the State in maintaining the integrity of the immigration process ought to prevail over those rights." Finally, if I might refer to the judgment of Clark J in *U (H) & ors v. Minister for Justice, Equality & Law Reform* [2010] IEHC 371, where the learned judge stated that:

"It is frequently forgotten in arguments relying on the considerable constitutional protection afforded to the family under Article 41 that social order and the welfare of the State are part and parcel of the respect afforded to the family and the role played by the family in upholding that social order and the common good of the citizens of the State. The rights of the family cannot detract from social order and the common good and are, like other strongly protected rights, not absolute. The competing rights of the State to serve the common good and the welfare of the nation in preserving a fair and effective immigration policy are not set at nought by family rights. When a decision to deport is being considered, family rights must be weighed against the competing interests of the State. Neither the Constitution nor the Convention guarantees that the marriage between an Irish citizen and a foreign national gives that couple an automatic right to live together in Ireland and defeat immigration policies. This is clear from such authorities as *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593, *Osheku v. Ireland* [1986] I.R. 733.and *A.O. and D.L. v. The Minister* [2003] 1 I.R. 1. These authorities establish that a foreign national who marries an Irish citizen does not acquire the rights of an Irish citizen. If that foreign national is unlawfully in the State when he marries, his status is not cured by his marriage."

151. However, there are also a number of cases which contemplate a situation whereby either the factual circumstances of the case will be such as to give rise to a right of the Irish citizen to live in Ireland with their non-national spouse or, at the very least, will give rise to a situation whereby the only lawful outcome to the balancing exercise required of the Minister will be to grant permission to the non-national spouse to enter/reside/remain in the State. An important judgment in this regard is that of Fennelly J for this Court in *Cirpaci v. The Minister for Justice, Equality & Law Reform* [2005] 4 I.R. 109. There the learned judge stated as follows at para. 30:

> "It is legitimate for the respondent to have regard to the duration of the marriage relationship when weighing in the balance the family rights in question. In the course of argument, a number of hypothetical cases were explored. At one extreme an Irish citizen might contract a marriage, valid under the laws of a remote jurisdiction, while on holiday there. Could such a person, within days of the marriage, insist, to the point of demanding that the brevity of the marital relationship was irrelevant, that his or her new spouse be granted a visa admitting him or her to reside in the State? At the other extreme would be an Irish citizen, who had lived abroad for many years, perhaps for his or her entire working life. Such a person has, as a citizen, an undoubted right to return to reside in Ireland on retirement or earlier. It is not necessary to pose the constitutional question whether that person would have the right to be accompanied by his or her foreign spouse of many years. For my own part, I have no doubt that such a right exists. It would not, of course, be absolute. The foreign spouse might be a notorious criminal. It is enough to say that, in the most benign of such circumstances, the respondent would be entitled and possibly bound, in exercising the statutory powers applicable to such situations, to give favourable consideration to a claim that such a person be permitted to be accompanied by his or her spouse. Thus, I am satisfied that the respondent is entitled to take into account, when considering whether to revoke a deportation order, the length of time during which the parties to a marriage have lived together as a family unit." (Emphasis added)

152. Referring to this passage in his judgment in *A.A. v. Minister for Justice*, Clarke J stated as follows at para. 29:

> "It, therefore, seems clear that in a case where a valid deportation order has been made and where the first respondent is requested to revoke that deportation order by virtue of the existence of new circumstances in the form of family rights (under the Constitution) or rights deriving from a permanent relationship (under the Convention) the first respondent is obliged to consider the rights of all concerned. Indeed, it would appear that it is possible that, in certain circumstances, for the reasons outlined by the Supreme Court (Fennelly J.) in *Cirpaci* the first respondent may even be obliged in some cases to come to a conclusion in favour of acting so as to permit the parties to reside together in the State." (Emphasis added)

153. In *S (P) & E (B) v Minister for Justice* [2011] IEHC 92, Hogan J stated as follows:

> "22. In these circumstances, the practical effect of the Minister's decision would be to condemn this couple to live apart, more or less permanently. It is very hard to see how such a decision would conform to the State's obligation contained in Article 41.3.1 of the Constitution 'to guard with special care the institution of marriage', absent some

compelling justification. Of course, the imperative need to uphold the integrity of the asylum system could – and often does – provide such a justification.

23. In this regard, the task of the Minister is to balance potentially competing interests in a proportionate and fair manner. It is true that there is a considerable public interest in deterring illegal immigration and the Minister must naturally be prepared to act to ensure that the asylum system is not manipulated and circumvented. Nevertheless, the requirement that the Minister must balance competing rights necessarily involves a recognition that, important as the principle of maintaining the integrity of the asylum system undoubtedly is, it must sometimes yield – if only, perhaps, in unusual and exceptional cases – to countervailing and competing values, one of which is the importance of protecting the institution of marriage. The rights conferred by Article 41 of the Constitution are nevertheless real rights and must be regarded as such by the Minister. They cannot be treated as if, so to speak, they were mere discards from dummy in a game of bridge in which the Minister as declarer has nominated the integrity of the asylum system as the trump suit."

154. Similarly, Hogan J in his judgment *in A (X) (an Infant) and Others v. Minister for Justice and Others* [2011] IEHC 397 stated that:

"15. There can be no suggestion that the family rights protected by Article 41 are in some way absolute. Yet, at the same time, the rights thereby conferred cannot be regarded as being purely theoretical, the essence and substance of which must be respected at all times. This very point was made by Cooke J. in *Ugbelese v. Minister for Justice, Equality and Law Reform* [2010] 4 I.R. 233, 241):-

> 'The judgment of the court as given by Denham J. in the *Oguekwe* case [2008] 3 I.R. 795 identifies, in effect, two key factors involved in the exercise required of the Minister when deciding whether a deportation order should be made in such cases. First, the Minister must consider all facts relevant to the personal constitutional rights of the child and secondly, he must identify a 'substantial reason' which requires the deportation of the non-national parent. Having ascertained 'the facts and factors affecting the family' and the child in each case 'by due inquiry' he must consider the circumstances in a fair and proper manner so as to arrive at a decision which is reasonable and proportionate in all of those circumstances.
>
> In other words, the personal and Convention rights of the child and of the family are not absolute but may be required to yield, or be subordinated to, the public interest of the State in the common good in controlling its frontiers where, after due investigation and consideration, a reasonable and proportionate decision is made that there is substantial reason for interfering with those rights.'

…

21. … [T]he Minister's decision must always respect the essence and substance of the right of the married couple under Article 41. A decision which, in practice, compels the couple to life more or less permanently apart is, by definition, a very significant interference by the State with a core principle valued and protected by Article 41.

> Such a decision is one which, quite obviously, requires compelling justification: see, e.g., my own judgment in *S. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 92. While the necessity to uphold the common good and the integrity of the asylum system may well supply that justification, it is nonetheless imperative that the respective rights of the applicants and the interests of the State must be fairly weighed by the Minister."

Are Article 41 Rights Engaged? General Case Law

155. The Minister argues that the positive duties identified by the Court of Appeal as arising from Article 41 are inconsistent with the text and case law on that provision. The family's rights thereunder, he says, are essentially negative in character. He has argued that the primary – if not indeed the only – concern of Article 41 is to preserve the decision-making primacy of the family over internal matters. In support of this he points to decisions such as *North Western Health Board, Re Article 26 and the Matrimonial Homes Bill 1993*, *AO and DL* and *PH v. John Murphy and Sons.*

156. An early judgment which grappled with the meaning of Article 41 was that of Kenny J in the High Court in *Ryan v. Attorney General* [1965] I.R. 294. The learned judge rejected the argument that the fluoridation of drinking water constituted a violation of Article 41.1.2°:

> "Not one of the counsel in this case has attempted to state what the inalienable and imprescriptible rights of the Family are and, as the Constitution gives little help on this, I am in some difficulty in dealing with this argument. 'Inalienable' means that which cannot be transferred or given away while 'imprescriptible' means that which cannot be lost by the passage of time or abandoned by non-exercise. … Some clue to the ambit of the rights of the family referred to in Article 41 is to be found in sub-s. 2 of section 1 where there is a reference to a guarantee by the State to protect the family in its constitution and authority. It seems, therefore, that the rights referred to in section 1, sub-s. 1, of Article 41 relate to the constitution and authority of the family. It was argued by the plaintiff's counsel that the addition of the fluoride ion to drinking water affected the authority of the family to decide what drink and food the members of the family should consume and that the Act of 1960 was, therefore, an attack on the authority of the Family. … In my opinion, legislation dealing with the contents of food or drink does not in any way affect the authority of the Family and the Act of 1960 is not an interference with the rights guaranteed to the family by Article 41." (pp. 308-309)

In the Supreme Court, Ó Dálaigh C.J. held at p. 350 of the report that "[t]here is nothing in the Act which can be said to be a violation of the guarantee on the part of the State to protect the family in its constitution and authority", without delving into the contours of the constitutional provision.

157. Also relevant in this regard is *McGee v Attorney General* [1974] I.R. 284. This of course concerned Mrs McGee's challenge to the constitutionality of the section providing that it would not be lawful for any person to sell, or import into Ireland for sale, any contraceptive. She argued that this deliberately frustrated a decision made by she and her husband on behalf of the family and touching a matter of vital importance to the family, and therefore attacked the family in its "constitution and authority". The argument was that the rights of the family under Article 41 must include the right to make the kind of decision that

she and her husband had made. Though she was successful in this Court, three of the four judges in the majority based their judgment on Article 40.3. The fourth, Walsh J, went extensively into the argument based on Article 41, and as always it is worth having regard to what the learned judge had to say:

> "It is a matter exclusively for the husband and wife to decide how many children they wish to have; it would be quite outside the competence of the State to dictate or prescribe the number of children which they might have or should have. In my view, the husband and wife have a correlative right to agree to have no children.
>
> ... It is a fundamental point ... that the rights of a married couple to decide how many children, if any, they will have are matters outside the reach of positive law where the means employed to implement such decisions do not impinge upon the common good or destroy or endanger human life ... It is outside the authority of the State to endeavour to intrude into the privacy of the husband and wife relationship for the sake of imposing a code of private morality upon that husband and wife which they do not desire.
>
> In my view, Article 41 ... guarantees the husband and wife against any such invasion of their privacy by the State. It follows that the use of contraceptives by them within that marital privacy is equally guaranteed against such invasion and ... that it cannot be frustrated by the State taking measures to ensure that the exercise of that right is rendered impossible."

It is of course instructive in its own right, however, that the majority dealt with the claim pursuant to Article 40.3.1°, rather than Article 41.

158. *Murray v. Ireland* was another case canvassed in the course of the submissions. The plaintiffs were a husband and wife who were found guilty of murder and sentenced to penal servitude for life. They commenced proceedings seeking declarations of their entitlement, whilst serving their sentences, to have the opportunity to exercise conjugal rights in order to beget children. The High Court dismissed their claim ([1985] I.R. 532). At pp. 535-539, Costello J (as he then was) discussed whether the asserted right to procreate was protected by Article 40 or Article 41. He expressed the view, on the basis of the judgment of Kenny J in *Ryan* and the majority judgments of this Court in *McGee*, that there are "strong reasons for supposing" that the right of spouses to beget children is constitutionally protected by Article 40 rather than Article 41. He went on to state, however, that the right "should not be devalued" merely because it happens to be a 'personal' right" protected by Article 40.3.1°, without the benefit of the more expressive and explicit language employed in Article 41, and felt that the argument did not hinge on where the right was situated. Ultimately, he took the view that the right might be validly restricted by the State in certain circumstances and that in the instant case, the restriction on the plaintiffs' right to beget children was a reasonable consequence of the State's power to imprison and was therefore constitutionally permissible.

159. The plaintiffs appealed against this decision. In the Supreme Court ([1991] I.L.R.M. 465), Finlay CJ summarised the decision of Costello J into seven findings, including the following:

(1) The Constitution by explicitly recognising and protecting the concept of the institution of marriage implicitly recognises and protects the right of each spouse in marriage to beget children.

(2) That right obtains its protection from Article 40 of the Constitution and not, as was contended by the plaintiffs, from Article 41.

At p. 472 he expressed his "complete agreement" with these principles. However, as appears from the judgment of McCarthy J at p. 474, while the plaintiffs did challenge the High Court's preference for recognition under Article 40 in their grounds of appeal, they did not in fact pursue that ground of appeal. Also of note is the following comment of Finlay CJ at p. 472:

> "I accept 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 to privacy within the marriage: privacy of communication and of association. It is quite clear that as an inevitable practical and legal consequence of imprisonment as a convicted person that a great many of these constitutional rights arising from the married status are for the period of imprisonment suspended or placed in abeyance." (Emphasis added)

160. *P. H. v John Murphy & Sons Ltd* [1987] I.R. 621 is another relevant decision of Costello J. The plaintiffs' father had been very seriously injured in an industrial accident as a result of the defendants' negligence, and the plaintiffs sought damages for the alleged infringement of their constitutional rights under Articles 41 and 42. The learned judge analysed the former Article in the following terms (pp. 625-627):

> "Whilst this paragraph [1.1°] contains a 'recognition' by the State of the Family's 'imprescriptible' rights it makes no attempt to define or otherwise enunciate what these rights are. Instead, it goes on in the next paragraph to impose specific and clearly defined duties on the State in relation to the Family. Arising from the nature of the Family, which is acknowledged in the first paragraph of Article 41, and as a consequence of it, its second paragraph provides that the State 'guarantees to protect the Family in its constitution and authority' and explains that it is doing so because the Family is 'the necessary basis of social order' and because it is 'indispensable to the welfare of the Nation and the State'. It will be noted that this sub-section (Article 41.1.2) imposes duties on the *State vis-à-vis* the Family. The *rights* which the Family enjoys vis-à-vis the State are those which are correlative to the duties imposed by the sub-paragraph and can be ascertained by reference to those duties. … in this case the basis for such a claim should be sought in Article 41.1.1 rather than in Article 41.1.2 which relates to *the State's* obligations towards the Family. But the undefined rights which obtain constitutional protection by virtue of the provisions of the first sub-paragraph must be the same as those which obtain protection under Article 41.1.2 for it would be an unreasonable construction of the Constitution to suggest that the rights which obtain protection from the State's 'recognition' in Article 41.1.1 are either more extensive or more restricted than those which the State 'guarantees to protect' in Article 41.1.2.

…

> The guarantee which the State gives in Article 41.1.2 is a guarantee to protect the Family 'in its constitution and authority'. So, if it could be shown that the Oireachtas had *enacted a law* which in some way failed to protect the 'constitution' of the Family or the 'authority' of the Family (as defined in the Constitution) then the State's guarantee would have been breached. Again, the State would have failed in its obligation to protect the Family if one of its officials *deliberately acted* so as to attack or impair the 'constitution' or the 'authority' of the Family and an action for damages would lie unless the impugned acts could in some way be justified under some other provision of the Constitution. But the 'constitution' and the 'authority' of the family unit could be impaired, indeed, destroyed, by the negligent and careless act of a State official — for example, by the negligent driving of an army lorry which killed the parents of young children and which resulted in the dispersal of the children into different foster homes. Could it be said that the State had then broken its Article 41.1.2 guarantee? I do not think so. It must be remembered that the court is construing a constitutional document whose primary purpose in the field of fundamental rights is to protect them from unjust laws enacted by the legislature and from arbitrary acts committed by State officials. It would require very clear words to construe the State's constitutional obligations (as distinct from its common law obligations) as including a duty to ensure that its officials would not drive carelessly. I do not think that the words employed in Article 41 are apt to do so, and the State's guarantee of protection does not, in my judgment, include a guarantee that its officials will drive State vehicles without negligence.
>
> It follows that the rights which are conferred by Article 41.1.2 are (a) the right to protection from legislation which attacks or impairs the constitution or the authority of the Family and (b) the right to protection from the *deliberate* acts of State officials which attack or impair the constitution or authority of the Family. It would also follow that a private person whose *negligent* act had so seriously injured the head of a Family that the constitution of the family unit was fatally impaired had not thereby infringed any constitutional right enjoyed by members of the affected Family under either paragraph of Article 41, section 1. In the light of these conclusions I must hold that the defendant in this case had not been guilty of any breach of a constitutional duty imposed on them by this Article." (Emphasis in original)

While this interesting analysis pays particular attention to the wording of the relevant constitutional provisions and is notable in that regard, I would not regard all of the cited extract as being consistent with subsequent authority concerning the application of Article 41.

161. The *North Western Health Board* ([2001] 3 I.R. 622) case is well known to many as the case concerning the PKU test or "heel prick" test. The plaintiff applied for an order permitting it to carry out a PKU screening test on the infant child of the defendants notwithstanding the fact that the defendants had refused to give their consent. The said test was not provided for by legislation nor was it mandatory. The order was refused by the High Court and, on appeal, by a majority of this Court. In the course of his judgment, Murray J said the following in respect of Article 41 of the Constitution:

> "Article 41 of the Constitution, in recognising the family as a moral institution possessing inalienable and imprescriptible rights, does not purport to establish the

family as an institution but recognises its inherent status as such with rights which are 'antecedent and superior to all positive law'. In doing so it reflects, as I have mentioned, a shared value of society and places it within, what Finlay C.J. described in *Webb v. Ireland* [1988] I.R. 353 at p. 383, as '… the framework of the society sought to be created and sought to be protected by the Constitution …'.

One of the inherent objects of the Constitution is the protection of liberties. Article 41.2 in providing that 'The State, therefore, guarantees to protect the Family in its constitution and authority …' provides a guarantee for the liberty of the family to function as an autonomous moral institution within society and, in the context of this case, protects its authority from being compromised in a manner which would arbitrarily undermine the liberty so guaranteed."

162. In the earlier judgment in the Article 26 reference in respect of the *Matrimonial Home Bill* ([1994] 1 I.R. 305), Finlay C.J., giving the judgment of the Court, stated as follows at pp. 326-327:

"Having regard to the extreme importance of the authority of the family as acknowledged in Article 41 of the Constitution and to the acceptance in that Article of the fact that the rights which attach to the family including its right to make decisions within its authority are inalienable and imprescriptible and antecedent and superior to all positive law, the Court is satisfied that such provisions do not constitute reasonably proportionate intervention by the State with the rights of the family and constitute a failure by the State to protect the authority of the family.

The Court accepts, as it has indicated, the advantages of encouraging, by any appropriate means, joint ownership in family homes as being conducive to the dignity, reassurance and independence of each of the spouses and to the partnership concept of marriage which is fundamental to it. It is not, however, satisfied that the potentially indiscriminate alteration of what must be many joint decisions validly made within the authority of the family concerning the question of the ownership of the family home could reasonably be justified even by such an important aspect of the common good."

163. The Minister has also placed reliance on the decision of this Court in *AO and DL v Minister for Justice* [2003] 1 I.R. 1. This concerned a deportation order made in respect of the non-national parents of an Irish born child. The majority of this Court held that the constitutional right of the Irish born applicant to the company, care and parentage of its parents within the State was not absolute and unqualified and that the Minister was obliged to consider whether, in the circumstances of the case, there were "grave and substantial reasons associated with the common good" which required the deportation of the non-national applicants. The Minister is correct to state that the outcome of the case means that the constitutional right of the child to the care and company of its parents did not impose a positive duty on the State to implement or give effect to the decisions of the parents that such care and company should be provided within the State; of course, the argument is not made in the within appeal that there is any obligation on the Minister to give effect to the choice made. The issue is as to the requirement on the Minister to take the choice into account when weighing the opposing interests, and the weight to be attributed to it.

164. The Minister further relies on the comment of Hardiman J at p. 159 of *AO and DL*, where in distinguishing *North Western Health Board* he stated that "[a] decision about a child's medical treatment is, *prima facie*, within the authority of his family. A decision about an alien parent's desire to live in the State is not." This comment must, I think, be seen in the context of the surrounding discussion regarding imputing a choice by the non-national parent onto the citizen child. In any event, in context I read the learned judge's comment not as saying that Article 41 is not engaged at all but rather that the choice cannot be decisive, in the sense that the Minister is not obliged to give effect to it.

Application of Article 41 on this Appeal

165. It is correct of the Minister to point out that many of the seminal cases concerning Article 41 have centred upon this particular aspect of the "authority" of the family, i.e. they involve situations where an external party purported to act as the primary decision-maker for the family. This certainly is an important facet of the protection afforded by Article 41, and one inherent in the provision's guarantee that the State will protect the family in its constitution and authority. This aspect of the measure has been the most-frequently litigated; given its wording and the case law, one can understand the readiness of plaintiffs to invoke its protection in circumstances where another entity – most likely the State or an emanation thereof – seeks to make for the family a decision which they believe should be theirs to decide.

166. In my view, where the Minister is in error is in suggesting that the application of Article 41 is in some way limited to such scenarios. Merely because this is not a situation where the State is asserting primary authority over the family's decision-making entitlements does not mean that the Applicants have *no* Article 41 rights which must be included in the evaluative mix by the Minister. While much of the case law relied upon have focussed on the State acting as decision-maker for the family, these authorities do not state that this is the full extent of the provision, or its sole application, nor do they foreclose on the conclusions of the Court of Appeal in this case. I do not, therefore, regard the judgments of that Court as being in any way inconsistent with the case law concerning this provision. Rather, I would regard such as being rooted firmly in the text of Article 41 itself.

167. At the risk of repetition, Article 41.1.1° of the Constitution refers to the Family, *inter alia*, "as a moral institution possessing *inalienable and imprescriptible rights*, antecedent and superior to all positive law" (emphasis added). That sub-Article does not, however, define in any way what those rights are. This raises the obvious question of how to figure out what rights are being referred to. At the broadest level of analysis, one could theoretically seek to identify such rights from some source external to the Constitution or, much more likely, from within its text. Reservations about the former approach would be well justified: any approach which sought to import rights which are neither explicitly referred to in the Constitution, nor which arise as an implicit or implied consequence of the text of the Constitution, would be contrary to decades of established jurisprudence and the separation of powers. That can safely be ruled out.

168. Nonetheless, there must be some way to identify the "inalienable and imprescriptible rights" referred to, if they are to be given any effect. The only alternative approach to ascertaining the identity of these elusive rights is by reference to the associated text of the Constitution; most obviously, to the rest of Article 41 itself and, perhaps to a lesser extent, Article 42. In this respect, Article 41.1.2° is instructive insofar as it provides that "[t]he State, *therefore*, guarantees to protect the Family in its constitution and authority …"

(emphasis added). The italicised word "therefore" suggests an interconnectedness between Articles 41.1.1° and 41.1.2° which may, in any event, be self-evident from the numbering of the sub-paragraphs. Thus, on a cohesive reading of the provision, it may be said that as Article 41.1.1° recognises that the Family possesses certain (unspecified) rights and Article 41.1.2° imposes a correlative duty on the State to protect the Family "in its constitution and authority", the rights referred to in Article 41.1.1° must therefore be rights relating to the "constitution and authority" of the Family. This is compatible with the analysis of Costello J in *P. H. v John Murphy & Sons Ltd* (para. 160, *supra*) and seems to me to be an appropriate reading of the provisions.

169. If this is the correct approach to interpreting the Article, the question then logically arises as to what is meant by the Family "in its constitution and authority": what rights are protected? Whilst O'Donnell J. and I are in broad agreement that the inalienable and imprescriptible rights referred to in Article 41.1.1 are the correlative rights arising from the State's duty to protect the Family "in its constitution and authority", we differ on precisely what rights this entails. For my own part, I would consider that it must surely be the case that, as regards two married Irish citizens, a right of cohabitation can be regarded as one of the rights of the marital family protected by Article 41 of the Constitution. I could not regard the right of the married citizen couple to live together as anything other than fundamental to Article 41's protection of the family "in its constitution and authority". The right to live together flows from the protection of the family in its "constitution" – I agree that such term must be understood, in this context, to refer to the composition, or structure, of the family. O'Donnell J (at para 49 of his judgment) posits that cohabitation could go only to the *type* of family life enjoyed by a married couple, with the result that because cohabitation does not bear on whether a couple constitute a family, cohabitation does not come within the constitutional guarantee to protect the Family *in its constitution*; I do not read that guarantee so restrictively, but rather consider that it is capable of applying not only to the marital status of the couple and the number of children that they have, but also to its physical composition in the sense of the Family, the "natural primary and fundamental unit group of society", in fact living together as a unit (subject to lawful limitation, such as where one spouse is imprisoned). This, it seems to me, accords not only with the ordinary meaning of the word "constitution" but also with Article 41.1's positioning of the Family as the fundamental unit group of society, which would seem to entail something more than protection merely for the legal status of a marriage. So read, I could not agree with any suggestion that Article 41 does not contain a right of marital cohabitation for two Irish citizens, given this express guarantee to protect the composition of the family. Similarly, the right of such a couple to decide to live together is one which must be taken as stemming from the guarantee to protect the family in its "authority", which, for these purposes, I would interpret as meaning its capacity to make decisions. I would therefore express the view, though *obiter*, that Irish citizens married to one another have a right of cohabitation which is firmly anchored in the text of Article 41 of the Constitution, in addition to Article 40.3.

170. Even on the more specific approach favoured by O'Donnell J, whereby the substantive protection afforded by Article 41.1.1° *"is not expansive or unlimited but, rather, specific and derived"* (para. 14 of his judgment), with the consequence that the rights therein referred to be understood by reference to the rest of Articles 41 and 42 as originally drafted and since amended, and particularly the reference to the "constitution and authority" of the Family in Article 41.1.2°, there is in my view still to be found in Article 41 a constitutional right to cohabit with one's spouse. I do not understand O'Donnell J to say that the reference to the "constitution" of the family is to be read solely in light of the subsequent sub-Articles

containing (originally) the prohibition on, and (subsequently) the criteria for, divorce, though I hope that I do no disservice to his judgment when I suggest that it does appear that the meaning to be attributed to the term "constitution" is, in his view, largely to be understood in this light. In my view, however, the literal meaning of the protection of the "constitution" of the Family, howsoever read, extends to the recognition of a constitutional right to cohabit. To be sure, Article 41 itself does not contain an explicit reference to such a right, but I am satisfied that it is itself derived from the plain meaning of the word "constitution", used in that context. As such, I do not consider that one is required to stretch beyond the borders of the Constitution and pluck such a right from the ether in order for it to find its way into the document. This, in my view, is inherent in the literal meaning of the word and nothing in the remainder of the text of Articles 41 and 42 detracts from this conclusion or compels me to any other.

171. This is not to say, of course, that such right could ever be regarded as absolute, even for two citizens. That is certainly not the case. It could not feasibly be argued that the State may not lawfully imprison a spouse convicted of a serious crime because to do so would violate that person's right to live with their spouse – or the corresponding right of their partner to live with them. Article 41 plainly would not support any such conclusion, notwithstanding the stridency of its terms. However, merely because the right is not absolute and may have to yield to conflicting rights and interests does not mean that the right does not exist, or that it may not be a significant one in other contexts.

172. The situation is of course different where one of the spouses is a non-national. The State has an inherent and statutory power to control the entry of non-nationals into Ireland. As discussed above, such a person has no right to be in Ireland unless he or she obtains permission from the Minister. This is not automatically changed by the mere fact of their marriage: to hold otherwise would not be conducive to an orderly immigration system.

173. It seems clear from the case law, however, that some degree of protection arises under Article 41. The question is as to the extent of this protection and how the Minister must give effect to it. In *Gorry* Mac Eochaidh J, having reviewed the jurisprudence, concluded that an Irish national married to a non-Irish national has a *prima facie* (but not absolute) right to reside in Ireland with that other person, subject to lawful regulation. Not every set of circumstances (e.g. a wedding on a whim in Las Vegas) would engage the right. This seems largely in line with the *obiter* comments of Fennelly J in *Cirpaci* at para. 30 (see para. 151, *supra*). In *ABM*, Humphreys J preferred not to characterise this as a "*prima facie* right", saying instead that such a couple should receive "*prima facie* acknowledge and consideration of their status under Article 41", but this would not mean that a deportation decision has to be phrased in any particular way.

174. In the Court of Appeal, Finlay Geoghegan J took the view that the approach of Mac Eochaidh J went too far: given the power of the State to control immigration, it would be putting it too high to say that the couple have a *prima facie* constitutional right (even a non-absolute right) to live in Ireland under Article 41. As to the view expressed by Fennelly J in *Cirpaci*, she considered that this was better conceived of as a constitutional obligation which may be placed on the State in certain circumstances, rather than a fundamental right of the citizen.

175. Having stated that there was no right, as such, for the couple to reside in Ireland, Finlay Geoghegan J continued at paragraph 78 by setting out what is, in her view, the correct

position. She stated that the Applicants, as lawfully married couples and a Family within the meaning of Article 41 of the Constitution, have a constitutionally protected right to have the Minister consider and decide their application with due regard to:

(i) the guarantee given by the State in Article 41.1.2° to protect the family in its constitution and authority;

(ii) a recognition that they are a family, a fundamental unit group of society possessing inalienable and imprescriptible rights, which rights include a right to cohabit, which is also an individual right of the citizen spouse which the State must, as far as practicable, defend and vindicate (Article 41.1 and Article 40.3.1°);

(iii) 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 has guaranteed in Article 41.1 to protect; and

(iv) a recognition of the right of the Irish citizen to live at all times in Ireland as part his or her 'birth right … to be part of the Irish Nation' (Article 2) and the absence of any right of the State (absent international obligations which do not apply) to limit that right.

176. As the learned judge continued in the next paragraph, the Constitution places corresponding obligations on the Minister to take the decision as to whether or not to permit the non-national spouse to reside in Ireland with due regard to each of these constitutional rights.

177. This, in my view, is an accurate assessment of the considerations at issue. I agree with the Court of Appeal that, having regard to the State's power to control immigration, it would not be correct to regard the Irish citizen as having a *prima facie* right, even a non-absolute one, to reside in the State with a non-national spouse. It is clear on the basis of the case law, however, that Article 41 is engaged in the present context. Moreover, the considerations identified by Finlay Geoghegan J are firmly rooted in the text of the Constitution itself.

178. One might perhaps wonder what is the practical difference between a non-absolute, *prima facie* right (which is subject to regulations/limitations), which the Court of Appeal found does not exist, and the right to have the Minister take the above rights at (i) to (iv) into account when making his decision. After all, even on Mac Eochaidh J's formulation, the Minister was not obliged in every case to accept the choice of residence of the couple. This was still just one matter, albeit a particularly heavy one, which weighed in the balance against the contrasting interests of the State. I agree with the Court of Appeal, however, that such formulation goes too far, in that identifying such a *prima facie* right elevates the position of the applicant higher than is supported by the authorities and is inconsistent with the right of the State to control immigration. The Applicants, notably, have not contended on this appeal that Finlay Geoghegan J was incorrect in stepping back from the conclusions of Mac Eochaidh J in favour of the more nuanced position which she favoured. They are content to rest their case on what the Court of Appeal has prescribed as the right approach.

179. It is all a finely balanced exercise. Ultimately, the decision will be taken by the Minister on the recommendation of a Department official. A human being will be required to weigh the various factors in support of both sides and to come to a conclusion. It is difficult to know with certainty how much more, or less, weight a given individual will give the applicants' rights depending on whether they are framed as non-absolute *prima facie* rights, or an entitlement to an acknowledgement of their status under Article 41, or as requiring the

Minister to have regard to, but not necessarily to give effect to, the constitutional rights identified by the Court of Appeal. Nonetheless, the Court of Appeal was careful in its analysis, and I am satisfied that it has correctly identified the rights at play and properly positioned them within the balancing framework.

180. The Minister submits that "the positive duties which the [Court of Appeal] identifies as arising from Article 41 are inconsistent with the text and caselaw relating to that provision". It is not entirely clear, however, why this is said to be so. On my reading of the judgment of the Court of Appeal, the constitutional obligations or duties on the Minister are to correctly identify, and then appropriately weigh, the constitutional rights of the Applicants when conducting the balancing exercise which is called for when considering an application to revoke a deportation order, or to grant a visa to enter and reside in the State. I do not understand the Applicants to contend for any greater obligation on the Minister than to do just this, nor do I see the Court of Appeal as having directed the Minister to do any more than this.

181. Much of the thrust of the Minister's submissions on this appeal proceeds from the erroneous premise that the judgment of the Court of Appeal in some way imposes a duty on the State to "promote" or to "facilitate" the decision of the family to live in Ireland. To similar effect, he has argued that the judgment of the court below requires him to afford some manner of "presumptive priority" to the Applicants' rights over those of the State. I must say that I have considerable difficulty identifying anything in the judgments of the Court of Appeal which might convey this impression. As Finlay Geoghegan J quite rightly made abundantly clear at paragraphs 79 and 92 of her judgment, and Hogan J at paragraph 25 of his, though the Minister must proceed from a starting point of recognising that the decision of the family to live in Ireland is one which they have a right to take and which the State has guaranteed in Article 41.1 to protect, this does not oblige the Minister to give effect to that decision. In other words, while the family's right to decide to live in Ireland is one that must be recognised and appropriately weighed in the mix, this is far from saying that it must automatically prevail over legitimate countervailing State interests.

182. The Applicants quite wisely have not contended on this appeal for any absolute constitutional right (or even *prima facie* constitutional right) of Irish citizens to have their non-national spouses reside with them in Ireland. Evidently no such right could be absolute and will always have to be balanced against the interests of the State in, *inter alia*, maintaining an ordered immigration system. At their height, the Applicants' submissions are to the effect that, in certain circumstances, the facts may be such that the only reasonable, proportionate and lawful conclusion to the requisite balancing exercise will be that a deportation order is quashed, or that the non-national spouse will be given the desired permission to enter/reside in the State, as the case may be. They say that as part of this exercise, the Minister must appropriately acknowledge and weigh their rights under Article 41, even if this does not give rise to a right to reside. They do not argue for an absolute right to reside regardless of the circumstances of the case and marriage, but rather that on occasions the facts may be such that the Minister, after having conducted the required exercise, will only have one lawful and proportionate answer open to him. Similarly, the judgments of the Court of Appeal go no further than this, and certainly do not oblige the Minister to promote or give effect to the family's decision as to where it will reside.

183. I consider it entirely appropriate that the Minister, when considering an application of the nature just mentioned, should first recognise and appropriately put in the balance the

rights of the Applicants. I do not see this as inconsistent with the text of Article 41; rather, it arises from it. It is entirely proper that these rights should be acknowledged by the Minister and weighed against the State interests which may militate against granting the application. Indeed, it is difficult to see how the Minister could propose to carry out the requisite balancing exercise without first identifying and weighing the relevant constitutional rights of the Applicants. I cannot therefore find fault with the approach of the Court of Appeal in finding that the Minister must appropriately identify the relevant constitutional rights of the Applicants in order that they may be weighed in the balance.

184. Thus, the position as arising from the judgments of the Court of Appeal is that the Minister is required to protect the right of the family to decide that it should live in Ireland, but is not obliged to give effect to it. However, the Minister takes issue with this. If initially his concern was that the Court of Appeal had elevated the rights of the Applicants too high by requiring him to give effect to their choice (which clearly is not the case), he argues that if all he is required to do is take account of the rights identified by Finlay Geoghegan J but not to give effect to them, this is to elevate an insignificant criterion to an unjustified position of prominence in the evaluative exercise. He asks how much practical significance or influence the identified rights may have if he is not required to give effect to them. He suggests that incorporating this as a criterion in the decision-making mix is wont to produce confusion rather than clarity and that what he calls the "limited scope" of this Article 41 entitlement does not support the pre-eminence given to it in the approach of the Court of Appeal.

185. These submissions seem to presuppose that if the Minister is not required to give effect to the couple's decision, then his obligation to protect their right to make that decision is not a meaningful one; in other words, that if the couple's right to decide where to reside does not have to be respected in substance, then it should not have been elevated to this position of prominence by the Court of Appeal. Respectfully, this is to underplay the significance in the balancing exercise of the positioning of this constitutional right and the corresponding obligations on the Minister. Of course, the couple's decision as to where to live is not binding on the Minister; it may be outweighed by other considerations and interests. But this does not mean that the Court of Appeal's declaration that the starting point of that balancing exercise should be the identification of the relevant constitutional rights and interests at play in any way elevates an insignificant consideration to too high a status.

186. What the court below was saying, quite simply, was this: these are the constitutional rights at play, this should be recognised from the outset, they must be considered and they will weigh in the Applicants' favour. The recognition that these rights are engaged and potentially affected by whatever decision the Minister should make is the starting point for the exercise required. These are important constitutional considerations and they should be accorded a weight which reflects this status. Clearly, however, they are not absolute. In no sense can it be supposed that they will necessarily prevail. While significant in their own right, they may be outweighed by similarly – or more – important interests on the State side. This does not detract from the fact that the jumping off point for the Minister's analysis has to be the recognition that these rights are engaged and will be impacted by the decision which he makes. He may very well still come down on the side of the countervailing interests of the State; nothing in the judgment of the Court of Appeal or this judgment requires him to give any presumptive priority, or *undue* weight, to the constitutional rights of the Applicants. What they do need to be accorded is their proper weight; this can only be done by acknowledging that they are engaged. In order to make a lawful, reasonable and proportionate decision, the Minister is required first to recognise the constitutional rights

which are engaged and to then give them their due weight. In this sense it is vital that the required balancing exercise starts with an acknowledgment of what precisely he is weighing against the State interests. That is what was decided by the Court of Appeal. In my view, that court neither elevated too high, nor relegated too low, the constitutional rights of the Applicants. It appropriately recognised them and noted that they are the appropriate starting point for the analysis that follows. The couple's decision does not have to be given effect, but it carries constitutional weight nonetheless – more so than the Minister was affording to it. This, in effect, is the *via media* that the Court of Appeal appropriately sought to achieve.

187. It appears to me that the practical difficulty perceived by the Minister stems from the fact that he seems to regard the issue of constitutional rights under Article 41 as something of a binary proposition: either (i) he is obliged to give effect to the family's decision as to where to live (i.e. the family's rights in this regard are absolute) or (ii) he is required to respect the fact of the decision but not its content (i.e. he is not obliged to give effect to the decision), which is an entitlement of such limited scope that it will not carry much weight in the balancing exercise. In other words, that the family's choice is either decisive or effectively meaningless. The former, the Minister regards as untenable; the latter, the Minister sees as carrying little practical significance or influence in his decision, and therefore does not support the prominence given to it by the Court of Appeal. Thus his position seems to be that if he is not required to give effect to the couple's decision, then it should not be to the forefront of the balancing exercise required, for to do so is to put undue weight on a consideration which cannot support it, resulting in confusion.

188. As stated, many of the Minister's submissions on appeal seem to be based on a misreading of the judgments of the Court of Appeal; or, at least, on a fear that they may be misread. What the judgments of that court require the Minister to do is begin his assessment by acknowledging the constitutional rights at play. This, I should think, is a relatively uncontroversial proposition. It is difficult to conceive of how the evaluative exercise called for can be carried out without acknowledging the factors which will weigh on either side, and no assessment of the factors in the Applicants' favour can begin without recognising the constitutional rights and interests that may be impacted by the Minister's decision. As stated by Finlay Geoghegan J, the rights and obligations identified by her at para. 78 of her judgment will always be engaged where the marriage is a lawful one: regardless of the factual circumstances of the case, these considerations will be at play. As stated in the court below, the Minister does not have to give effect to the couple's decision to live in Ireland but this does not mean that that decision is therefore a matter of no, or insignificant, constitutional value. That the couple have a right to take this decision is an important consideration in its own right and it should be afforded significant weight together with the other matters identified at para. 78 of the judgment of the Court of Appeal. Thus, the starting point of the Minister's balancing exercise must be that there are weighty constitutional interests on the Applicants' side which favour granting the decision (to, for example, issue a visa, or revoke a deportation order). This flows from the rights identified. While the Minister is certainly not bound by the family's decision as to where to reside, he must proceed from the position that there are significant constitutional interests on the Applicants' side which must be weighed in the balance.

189. As repeatedly stressed, however, the Applicants' rights in this regard are far from absolute. The countervailing interests which will be invoked by the State in favour of, for example, refusing to issue a visa, or refusing to revoke a deportation order, are themselves of significant weight in this exercise. These include the Minister's undoubted interest in

controlling entry to the State, in maintaining an orderly immigration system, in preventing disorder and crime, in ensuring the integrity of the social security and health systems, etc. None could deny the importance of these goals and nothing in this judgment should be perceived as downplaying them.

190. What is required, then, is to balance the considerations on each side: those that favour revoking the deportation order (or granting the visa etc.) and those that do not. What the Court of Appeal has done – correctly, in my view – is identify the constitutional rights and interests at play on the Applicant side. They are important and they must be taken into account by the Minister. Again, this does not mean that they are afforded ay presumptive priority relative to the considerations which will weigh against them. The task for the Minister is to balance these factors to reach a reasonable and proportionate decision. I do not think that it is helpful or wise to try to define the constitutional balancing exercise by reference to a particular test or formula of words. I do not, for example, consider that much is achieved by declaring that only in "exceptional circumstances" or where there are "compelling justifications" will a particular side prevail. What the Minister must do is take account of and duly weigh the relevant considerations – including the constitutional rights of the Applicants – in order to arrive at a lawful, reasonable and proportionate decision.

The Proper Approach

191. The Minister's other overriding concern arising from the judgment of the Court of Appeal is that it gives rise to a practical difficulty as to how it is actually to be applied when he is making decisions. He objects to what he describes as the bifurcated approach of Finlay Geoghegan J, which requires him to have regard in stage one to the Article 41 rights of the Family and then only at the second stage to take into account facts such as the circumstances or length of the marriage, the immigration record of the non-national etc. (see paras. 84-85 of the judgment of Finlay Geoghegan J). He says that there is no legal necessity or practical logic to separating the Minister's evaluation of the legality of the marriage from his evaluation of its circumstances. He says that a general and holistic approach, which has been how such decisions have been approached since *Oguekwe*, permits all of the relevant legal and factual considerations to be fairly balanced without according pre-eminence to any one of them. He says that the Court of Appeal's approach of according automatic status to a single consideration is inevitably liable to disfavour other rights or interests, even where they might be more relevant or pertinent to a particular application.

192. Again, the Minister's argument presupposes that the approach set out by the Court of Appeal requires an undue weight to be accorded to the rights of the Applicants. This is not the case. All that that approach indicates is that, where the marriage in question is a lawful one, the recognised constitutional considerations will weigh in the Applicants' favour. This does not mean that they will automatically prevail; it does not mean that they are accorded priority; it does not mean that they are given undue weight. All that it entails is that the Minister recognise from the outset that certain constitutional rights and interests will be engaged where there is a lawful marriage. I do not see how the requirement to proceed from a starting point of recognising the constitutional interests at play on the Applicants' side – something which, as discussed below, does not seem to have occurred in these cases – can be said to in some way tilt the balance in the Applicants' favour. One might perhaps question whether the approach proposed by the Court of Appeal is really a "two-stage test", given that the rights identified as arising in stage one are inherent in the fact of the lawful marriage and thus the fact that those rights are at play at all will not vary from case to case. The first stage is really no more than a recognition of this backdrop. The evaluative balancing part of the

exercise occurs in what is termed stage two. This is where the individual circumstances of the couple, their immigration history, the marriage etc. come into play. The fact that the rights identified in the so-called "stage one" are engaged will in no way prevent the Minister from concluding, on an assessment of all of the factors at play, that the interests of immigration control must prevail and that the non-national spouse should therefore by removed or excluded from the State.

193. So viewed, I do not consider that anything in the judgment of the Court of Appeal is inconsistent with the suggestion in *Oguekwe* that family rights issues need not be approached in a "micro specific format". That approach still permits of the relevant factors to be considered and appropriately weighed by the Minister in stage two, albeit against the backdrop of the constitutional rights which will have been recognised as being engaged during stage one.

194. It would be foolish to attempt to enumerate all of the matters which the Minister may properly have regard to in any given case. I do not intend the following to be in any way an exhaustive set of factors. Equally pertinently, the weight to be attributed to any given factor will vary considerably with the circumstances of the case. Just as the family rights of the applicants will tend to weigh in their favour, ever-present on the other side will be the interests of the State in immigration control. The circumstances of the marriage and of the underlying relationship will need to be considered, including the duration of the marriage and how long the couple had known each other beforehand: the "Las Vegas marriage on a whim" referred to at para. 42 of the judgment of Mac Eochaidh J in *Gorry* will understandably be treated very differently to the situation referred to by Fennelly J at para. 30 of *Cirpaci* whereby an Irish citizen, having worked his whole life, wishes to retire to Ireland with his or her foreign spouse of many years. As noted by Humphreys J at para. 43 of *ABM* and by the ECtHR in *Jeunesse* at paras. 104-105, the position of a settled migrant will be considerably stronger than that of someone with precarious status. The immigration status of the non-national spouse when the relationship was formed, and when the marriage was entered, will be relevant, particularly if that relationship/marriage was entered when said immigration status was precarious, or the non-national was unlawfully in the country. Knowledge by the Irish spouse of that precarious or unlawful immigration status will be taken into account. Regard will also be had to any history of breaches of immigration law and to any public order considerations (including any criminal record) which militate in favour of exclusion of the non-national spouse. Where children are involved, the best interests of the child will need to be considered, as of course will any constitutional rights of the child.

195. The Minister must balance the relevant considerations to arrive at a lawful, reasonable and proportionate decision. That the starting point is recognition of the constitutional rights at play does not mean that the Applicants' rights are afforded any presumptive priority or undue weight. The balance may well weigh in favour of the removal or exclusion of the non-national spouse. However, this conclusion cannot lawfully be reached if the relevant constitutional rights and interests of the Applicants have not been recognised by the Minister and weighed in the balance.

The Impugned Decisions – Treatment of the Article 41 and Article 8 ECHR Claims

196. The real difficulty which the Court of Appeal had with the impugned decisions of the Minister is that the Minister applied essentially the same approach to the State's obligations in respect of the constitutional rights of the Applicants as it did to their claim based on Article 8 ECHR. It was the wholesale adoption of this ECHR-analysis and its

application to the constitutional rights issue which was legally flawed, in the Court of Appeal's view. Thus, the failure to subject the constitutional claim to a detailed analysis, independent of that conducted in respect of the ECHR, was the problem. Central to this finding was that the starting point for each analysis is different: see paras. 92-94 of the judgment of Finlay Geoghegan J.

197. The Minister submits that he did, in fact, conduct the appropriate balancing exercise, as mandated by the Court of Appeal, in respect of each of the decisions at issue – perhaps not in the sequence required by that court, perhaps not using the bifurcated approach (as between Constitution and ECHR) prescribed by that court, but that the substance of what is required was in fact carried out. This seems to have been the view taken by Humphreys J in *ABM*, where at para. 46 the learned judge stated that "[i]t is a matter for the Minister to balance the interests involved. She has done so, and the balancing exercise is not unlawful or disproportionate. Article 41 of the Constitution was clearly considered."

198. I cannot agree with the Minister's submission or with the conclusion of Humphreys J. The decisions are described at paras. 24-27 (*Gorry*) and 48-50 (*ABM*), *supra*. Reading these decisions, one cannot but agree with the Court of Appeal that the Minister appears to have regarded the ECHR as the primary source of family rights at issue, with the constitutional claim treated as being, at best, identical in nature and substance, and perhaps even ancillary or subordinate thereto. For the reasons outlined above, this was not a legally accurate approach having regard to the content and strength of the rights protections under each provision and the status of the Constitution as the fundamental and primary source for the protection of rights in this jurisdiction.

199. Following long treatments of the jurisprudence of the ECHR and the Applicants' rights under that Convention, the constitutional claims are dealt with in short order in the brief paragraphs set out at para. 26 and 50, *supra*, respectively. Of course, many of the factual and legal considerations at play will be identical whether one is assessing the application by reference to the Constitution or the Convention. Sometimes there may well be total overlap. But that is not to say that the weight to be allocated to those considerations will be the same regardless of which lens they are being looked at through. Most pertinently, the very analysis which the Minister must undertake when evaluating those considerations varies as between the Constitution and the ECHR. In other words, he may be taking the same factors into account, but that does not necessarily mean that he will reach the same conclusion under the Constitution and under the Convention. What is absent from the decisions in question is any appreciation or recognition of the fact that the position of the Applicants is stronger under the Constitution, that their family rights derive greater protection thereunder, or that the starting point (and therefore, in a sense, the test that must be applied) is different under both provisions. Even if no separate factors were to be considered in respect of each Article, that does not mean that the two analyses will be the same. It does not, to me, seem possible to read the Minister's decision and reach any view other than that the Minister regarded the conclusion in respect of the constitutional analysis as following inexorably from the conclusion reached on the Article 8 claim. In substance there was, as noted by the Court of Appeal, no separate consideration of the constitutional rights of the Applicants. This was not the correct approach.

200. The error in the Minister's approach of conflating the Convention claim with the claim under the Constitution is perhaps best illustrated by the fact that he analysed the ECHR claim by applying the "insurmountable obstacles" test, concluding in each case that there are

no insurmountable obstacles to the families settling in Nigeria, nor any exceptional circumstances such as to render deportation a breach of Article 8 ECHR, and therefore that the applications would be refused. While this may have been appropriate approach to the Applicants' rights under the Convention, it is not the correct method for assessing their claim based on the Constitution. The rights of the marital family are stronger under the Constitution than they are under the Convention. The weighing of the constitutional claim calls for a careful balancing exercise between the above-identified rights of the Applicants, on the one hand, and the interests of the State, on the other. It may well be, and on many occasions will be, that the result of this balancing exercise comes down on the side of the State interests, thus favouring the removal or exclusion of the non-national spouse from the State. That, however, is nonetheless a different test from what is required pursuant to Article 8 ECHR, where the starting point seems to be to say that there is no requirement to respect the couple's choice of residence unless there are insurmountable obstacles (as properly understood per the case law) to the couple moving to the country of the non-national spouse. For all of the reasons discussed above, that is not the proper starting point for constitutional analysis – it is not correct, from a constitutional perspective, to say that the couple's decision to live in Ireland will be respected only if there exceptional circumstances or there are insurmountable obstacles to moving to the non-national spouse's home State.

201. Thus what is not permissible is to start with the Convention analysis, conclude that there are no insurmountable obstacles to the couple moving to the State of the non-Irish spouse, and therefore that removal or exclusion of that spouse will not infringe Article 8 ECHR – and then simply repeat that analysis in respect of Article 41 of the Constitution, effectively importing the same test into the Constitution even though the starting point of the constitutional balancing exercise is different (given that Article 41 rights are stronger) and therefore the exercise itself is going to be different. It is not correct, for constitutional purposes, simply to apply the ECHR test. It is, however, very difficult to avoid the conclusion that this is precisely what the Minister did.

202. While the Minister has argued that the Applicants have not identified any matters pertinent to Article 41 but not Article 8 ECHR which were not considered in the impugned decision, this is to miss the point: even if precisely the same factors were to be considered under both rubrics, the conclusion may well be different. The starting point of the analysis differs as between the provisions and the various factors will not have identical weight under both Articles (most notably, the family rights being stronger under Article 41). On any reading of the decisions, the Minister appears to have treated the constitutional claim as at best equivalent to – and perhaps subsidiary to – the Convention claim. There need not necessarily be separate factors in each test. The error was in carrying out an identical balancing exercise in respect of both provisions, treating them as though the factors carried equal weight in both.

203. Moreover, I reject the Minister's submission that his decisions were in full compliance with the decision of this Court in *Oguekwe*. That decision rightly acknowledges that there will be some overlap in terms of the factors to be considered. I do not accept, however, that it can be read as the Minister suggests here, that is, to obviate the need to conduct a thorough, detailed analysis of the position concerning the Applicants' rights under the Constitution. To the extent that that judgment states that Convention rights may be "considered together" with Constitution rights in the Minister's decision, I do not consider that this permits the Minister to perform a single analysis only, in the process relegating the stronger constitutional rights of the Applicants to the level of that provided by Article 8

ECHR. As noted above, it undoubtedly is the case that in many circumstances there will be considerable overlap in the factual considerations which must be taken into account in respect of the Constitutional analysis and those which must be considered in respect of the Convention analysis. I do not think that the judgments of the Court of Appeal can fairly be read to suggest that a decision by the Minister could successfully be challenged merely for failing to repeat *verbatim*, in respect of the ECHR analysis, those facts which are set out earlier in the document in respect of the consideration of the constitutional issue. Some internal cross-referencing in this regard seems logical and permissible. What is critical is that the analyses themselves are carried out in the proper manner. The considerations may largely be the same but the tests are not. Moreover, those considerations may not carry equal weight under both provisions. As stated above, Article 41 of the Constitution contains stronger guarantees of protection of family rights than does Article 8 ECHR; one would expect, therefore, that these rights will weigh more heavily in the Applicants' favour on the constitutional analysis than when the Convention is being considered. It may well be the case that circumstances will arise where an application to the Minister will be unsuccessful on the ECHR ground but successful by reference to the Constitution. In respect of a marital family, it seems at present unlikely, given what has been decided concerning the relative extent of the protection under both provisions, that the converse will often hold true (i.e. that the ECHR claim will succeed where the constitutional one fails), but I would not necessarily like to foreclose on that possibility, particularly as the jurisprudence in respect of both Article 41 and Article 8 ECHR will continue to develop and evolve, with the Irish courts being required to take due account of the principles laid down in the judgments of the European Court of Human Rights.

204. Accordingly, the decisions themselves do not bear out the Minister's contention that he did in substance everything that is required by the judgments of the Court of Appeal, even if the sequence and form of those decisions is different from that court's required approach. The Minister effectively addressed the claim under both provisions by reference to same metric: one test, one balancing exercise. In so doing, he erred in law.

Sequence of Decision

205. The Minister objects to the judgment of Hogan J insofar as it requires that the Applicants' rights under the Constitution and the ECHR must be considered not only separately but also in a specific sequence, i.e. with the Constitution being considered first. The Minister says that this favours abstract form over factual assessment. He submits that both provisions will bear to differing degrees on the rights and interests of particular applicants; in some cases there will be no logical reason to start with the Constitution. Provided he has regard to the requirements of both, a decision should not be regarded as unlawful just because of the order in which it is set out.

206. Hogan J, in prescribing this sequence, was cognisant of the primacy of the Constitution as the key source of protection for the fundamental rights concerned. This is apparent from the long title to the 2003 Act, explaining one of its objects as being "to enable further effect to be given, subject to the Constitution, to certain provisions of the [ECHR]" (emphasis added). He also pointed to section 5(1) of that Act and the principle that a plaintiff must first pursue his constitutional remedies, and that it is only where the same are inadequate or unavailable that the Convention issue should be determined.

207. He drew support for this point from the judgment of Murray CJ for this Court in *Carmody v. Minister for Justice and Equality* [2010] 1 I.R. 635. There the plaintiff brought a

challenge to the constitutional validity of section 2 of the Criminal Justice (Legal Aid) Act 1962 and also sought a declaration pursuant to section 5(1) of the 2003 Act that the said section was incompatible with the obligations of the State under the Convention. In the High Court, Laffoy J held, *inter alia*, that the issue of the compatibility of section 2 of the 1962 with the Convention ought to be determined before the constitutionality of that section was considered and, further, that section 2 was neither unconstitutional nor inconsistent with the obligations of the State under the Convention. The plaintiff appealed to this Court. This Court held that an issue as to the constitutionality of a statute should first of all be addressed by the court when the only other issue is a claim for a declaration pursuant to section 5 of the 2003 Act; the relevant paragraphs are set out at para. 7 of the judgment of Hogan J in the Court of Appeal. From these paragraphs the learned judge considered it necessarily implicit that where litigants make a claim that their constitutional rights have been infringed, "it is this claim which should be considered first by the Minister and it is only in the event that the constitutional claim should fail that the Convention issue should then be considered" (para. 8). Any other approach, in his view, detracts from the primacy of the Constitution as the principal repository for the protection of fundamental rights in this jurisdiction.

208. The Minister contends, however, that *Carmody* does not apply here. He submits that that decision was based on the differences in remedies under the Constitution and the 2003 Act. It is submitted that this Court's concern was that considering a declaration of incompatibility first would lead to such declarations being issued without considering the constitutional validity of the Act. The Minister submits that these concerns do not arise in other contexts, such as here, where the remedy which the Constitution and Convention could provide the Applicants is the same: a decision to accede to their application. A decision to grant the application on Convention grounds would not undermine the validity or force of the Constitution, or leave a constitutionally suspect Act in force. The Minister submits that if the decision-maker finds in favour of an applicant on Convention grounds, there may be no reason to move on to a constitutional analysis, whereas if the applicant fails on Convention grounds then the decision-maker will be obliged to consider the Constitution also.

209. I agree with the Minister that a decision should not be regarded as unlawful solely because it deals with the Convention first. The Minister must separately address the Article 41 and Article 8 ECHR claims, but no particular sequence is necessarily required. Provided a full and proper assessment is carried out in accordance with each provision, I would not consider such a decision infirm by virtue only of the order in which it is set out. I do not read *Carmody* as mandating that the Constitution must always be considered before the Convention in all contexts. Undoubtedly it is the principal source for the protection of rights in Ireland, but if the Convention provides the same remedy then there is nothing in principle to prevent the Minister from addressing the Convention first, *provided that the Constitution is also properly considered and addressed*. That is why the decisions impugned in these proceedings cannot be saved. The infirmity is not the sequence of the decisions but rather their substance: they do not adequately address the constitutional aspect of the Applicants' claims. Thus, while the Minister can address the ECHR first, this is predicated on the subsequent constitutional analysis being satisfactory, and not a mere repetition of the Convention assessment. In my view it is not necessarily correct to hold that the Minister erred in addressing the ECHR *first*: the error was that he merely applied the ECHR analysis directly to the Article 41 point, rather than treating them as distinct exercises with differing start points and with the factors carrying different weight under each.

210. I would add, however, that while I do not consider that it is necessary to be prescriptive as to the order or sequence of the decision, it does seem to make common sense to start with the constitutional aspect. As noted, the protection of family rights is stronger under the Constitution, and so there seems to be a practical logic to starting with that assessment.

Discretion

211. Some final points must be dealt with. The Minister has argued that even if this Court would otherwise dismiss this appeal, the reliefs sought by the Applicants should be refused on a discretionary basis in light of the clear illegality and wrongdoing on the part of the Applicants in breaching the immigration rules of this State. It is pointed out that Ms Gorry evaded deportation for a number of years and later travelled back to Ireland without a visa notwithstanding an extant deportation order against her. Mr Gorry is said to have been involved in arranging this illegal return. As regards Mr ABM, it is pointed out that he, too, evaded deportation and that he and Ms BA have provided false and misleading information to the Minister in their dealings with him. The Court has been referred, in this regard, to decisions including *AGAO v. Minister for Justice* [2007] 2 I.R. 492, *C(R) & M(GG) [Zimbabwe] v. The Refugee Applications Commissioner* [2010] IEHC 490 and *G.O. & ors v. Minister for Justice, Equality and Law Reform* [2008] IEHC 190.

212. Judicial review is, of course, a discretionary remedy. I considered the exercise of such discretion to refuse to grant relief in asylum cases in two recent judgments, one in *P.N.S. and anor v. The Minister for Justice* [2020] IESC 11 (paras. 93-99) and the other in *M.K.F.S. and ors v. Minister for Justice* [2020] IESC 48 (paras. 108-110). In the former case, Humphreys J.in the High Court had exercised his discretion to refuse relief by way of judicial review in light of the applicant's "massive abuse of the immigration system" both of Ireland and another EU Member State. Although it was not necessary for this Court to reach a definitive view on the discretion point raised in that case, I did note in the course of my judgment that while the court has jurisdiction to dismiss an application for judicial review under the International Protection Act 2015 for abusive conduct, the same should be exercised sparingly and only where that conduct can be considered serious and significant in the context of the system as a whole.

213. Having regard to the case law on the discretionary refusal of relief in cases of this nature, I would not be prepared to refuse the reliefs sought on this discretionary basis. This issue of unlawful behaviour is not addressed in any way in the judgments of the Court of Appeal. The purpose of granting leave to the Minister to appeal to this Court was to seek to clarify the points of constitutional principle, being matters of general public importance likely to affect a significant number of cases and citizens. It is inconsistent with the underlying purpose of this further appeal to seek to determine it on such narrow, case-specific grounds. Furthermore, the appeals in both cases are moot given that the Gorrys are separated and no longer wish to reside together in the State, and the circumstances of Mr ABM and Ms BA have moved on to the extent that a new application for revocation will be required. I would not, therefore, at this stage, refuse the Applicants the relief sought on this discretionary basis.

214. Moreover, if pushed, I would be inclined to agree with Mac Eochaidh J, who addressed this point in his judgment in *Gorry*. I do not consider that the conduct in question, viewed against the totality of the circumstances of the case, should be such as to disentitle those Applicants to relief. Humphreys J did not express a view on this point in *ABM* in light of his conclusions on the substance of that application for judicial review; again, however, I

do not consider that this immigration history crosses whatever notional threshold exists for refusing the application for judicial review, certainly not at this late stage of the proceedings. These breaches of immigration law may be something which the Minister takes into account in considering any fresh application, but they are simply one part of the overall evaluative mix. Finally, in the context of the *Gorry* case, it should be noted that Mac Eochaidh J also upheld their claim on irrationality grounds (see para. 30, *supra*); that finding was not addressed in any substantive way in the judgments of the Court of Appeal and was not debated before this Court so I will not express any decided view on the point, save to say that I see no obvious error with this conclusion and this further militates against refusing relief on a discretionary basis.

The Judgment of O'Donnell J

215. At this point and with obvious respect, may I refer again in a little more detail to the judgment of O'Donnell J, which I have had the benefit of reading before delivery of this judgment. While we have both reached the conclusion that the Minister erred, in the decisions under review, in conflating the constitutional assessment and the ECHR assessment (particularly by ostensibly making the former subsidiary to the latter), clearly there is a difference in approach as to how the Minister should in practice conduct his analysis of the constitutional issues arising. Whilst I immediately acknowledge the quality of this judgment, it is self-evident that my assessment is different: therefore, as there remains some distance between the two approaches it is appropriate that I should offer some thoughts on the judgment of my colleague.

216. O'Donnell J, as part of his approach which would view the issue through the prism of the lawfulness of the ministerial decisions rather than one of constitutional rights, states at paragraph 17 that it is *"strange to speak of individual rights … 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'"*. As stated by the learned judge, individual rights have value precisely because they are not subordinated to the interests of others. Moreover, in his view it is unusual for such rights to be overridden by such vague and general considerations.

217. I must respectfully disagree with the assessment that it is strange to see individual rights being restricted, or possibly indeed trumped, by general considerations in this manner. One frequently sees individual rights being balanced against general considerations such as morality, citizens' welfare, public order, the prevention of crime etc. It is not clear to me what is so unusual in recognising such rights but then balancing them against the preservation of the immigration system. To take only family rights, whether one sources them in Article 8(1) ECHR, Articles 7 and 9 of the Charter of Fundamental Rights of the European Union, Article 10 of the International Covenant on Economic, Social and Cultural Rights or Articles 12 and 16 of the Universal Declaration of Human Rights, one will find a corresponding provision permitting of the interference with or restriction of such rights on just such general bases (see Article 8(2) ECHR, Article 52(1) CFREU, Article 4 ICESCR and Article 29(2) UDHR, respectively). While I have pointed out, in this judgment, the particularly high level of protection which the Constitution affords to family rights, I do not see anything intrinsic in the nature of such rights which would render them immune or impervious to limitation in this same way. Fundamentally, the fact that such rights must be subject to restriction on this basis (and on this there can be no doubt: no one, plausibly, could argue that these rights are absolute) is not, in my view, a sound basis to contend therefore that they should not be conceived of as individual rights at all.

218. What I have sought to do, by my judgment, is to identify the source and status of the rights and interests engaged on both sides. The exercise should, in my view, be conceived as a balancing exercise involving the engagement of a right to decide to cohabit, although I appreciate that O'Donnell J does not feel that any such constitutional right is at play and conceptualises the task for the court on review as being concerned with the lawfulness of the ministerial decision to determine whether it 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, rather than any failure to respect a constitutional right. I agree that in most cases the ultimate outcome of the Minister's decision is unlikely to differ depending on which test is used, or indeed how it is characterised, but that aside, the route by which such outcome is reached is vitally important in its own right. This is because, first, the route one chooses may be determinative of the outcome in the rare "fringe" cases which could go either way and, more fundamentally, because there is a high constitutional value to an administrative decision-maker utilising the correct analysis even if there are multiple other analyses which may potentially lead him to the same conclusion. The result is important, but so too is the process.

219. I wish to emphasise that nothing in my judgment should be taken as creating any presumption in favour of the applicants in a case such as this, or of creating a default position where certain family rights must be overcome before deportation could be ordered. Rather I think that the rights and interests on both sides must be appropriately weighed and balanced. It certainly should not be thought that the family rights of the applicants, even so characterised, will automatically, or even usually, prevail. Indeed, I do not disagree with the general statement 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. However, I do not see why it should be that the analysis which I propose would lead to any decisions *"which might be considered damaging to the State's legitimate interests"*, as stated by O'Donnell J. If these interests are sufficiently weighty, they should prevail on any approach, for I do not suggest that the Minister would be constrained to reach a conclusion which is clearly contrary to these interests.

220. For these reasons, I do not consider that my judgment in any way suggests that a family decision could somehow "control" the decision as to who should be permitted to enter, or required to leave, the State (see para. 18 of the judgment of O'Donnell J). I also respectfully disagree with the learned judge that my approach will generate litigation, certainly not beyond the level which already exists in this arena. O'Donnell J states that on my approach *"the balance deemed correct can only be determined finally by a court"*: this assumes that all cases are the subject matter of judicial review: whilst a great number are, it is not true of every such case. In any event, I fail to see how that is any different in practice from the prevailing situation now.

221. Finally, I note that O'Donnell J considers my approach unsatisfactory insofar as it *"provides little guidance as to the weight to be afforded to the respective considerations"*. While mine undoubtedly is an approach which leaves a large element of discretion to the decision-maker, I do not consider that it would be appropriate for the Court to assign, in the abstract, specific weight to each of the various considerations which could feed into the test, each liable to arise in a multiplicity of different guises and circumstances. What weight should be assigned surely will vary from case to case; the potential circumstances are endless. Decision-makers at all levels, everywhere, frequently need to balance rights and interests in all manner of fora and across a whole range of areas of activity; they do not need to be told

specifically by a court how much weight each component factor must have, so that the evaluative exercise becomes essentially numerical, although, in fairness, I do not for a moment suggest that that is what O'Donnell J means by his commentary.

222. Perhaps more fundamentally, and with the greatest of respect, it might be observed that the approach of O'Donnell J similarly is light on detail as to how precisely the Minister is to make the required decision – and for the reasons just laid out, I do not consider that that is necessarily a criticism. Whether one speaks in terms of a rights-based balancing exercise or a review of the lawfulness of ministerial decision-making to determine whether the State failed to recognise the relationship or to respect the institution of Marriage, either way a court on review is going to have to engage to some degree in an assessment of the manner in which the Minister considered and weighed the various factors feeding into his decision.

223. On the issue of rights, and specifically whether a right to cohabit with one's spouse comes within the rubric of the "constitution and authority" of the Family and is, therefore, one of the "inalienable and imprescriptible rights" referred to in Article 41.1.1°, my view diverges from that of O'Donnell J. As he states in his judgment, "*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*" (para. 15; see also para. 46 of his judgment). While that may be so, it should be observed that on one view much of the jurisprudence on Article 40.3 of the Constitution and the rights derived therefrom (formerly "unenumerated rights": see the illuminating comments of Clarke C.J. in his recent judgment for this Court in *Friends of the Irish Environment v. The Government of Ireland* [2020] IESC 49) owes its origin to something akin to this exercise. To be sure, rights have been derived by reference to other constitutional provisions and the Constitution as a whole, including the amendments thereto, its preamble etc. rather than by reference to subjective personal notions of what is good, moral, right or humane. There are also, of course, significant textual differences between the sub-paragraphs of Article 40.3, on the one hand, and those of Article 41.1, on the other, which could legitimately be said to militate against any such approach to the rights referred to in Article 41. Nonetheless, however, I do not consider that it is to take an overly expansive view of Articles 41.1.1° and 41.1.2° to consider that a right to cohabit with one's spouse is protected therein. All appear to agree that the rights referred to in 41.1.1° are those associated with the State's duty to protect the constitution and authority of the Family, and it seems to me that a right to cohabit with one's spouse derives naturally from that protection.

224. Let me reiterate what I have previously said about the judgment of O'Donnell J, even if I do not agree with the approach proposed therein. In offering these clarificatory comments, my intention is to show that the consequences which O'Donnell J fears, may flow from my judgment will not in fact follow, unless it is significantly overread: certainly, I have not recalibrated the scales so that there is a presumption in favour of the applicants in cases such as these. Provided that that is understood, I am satisfied that the approach which I have suggested is one which properly identifies and sources the relevant rights and interests, thereby allowing the Minister to carry out the requisite balancing exercise. This continues to apply even when the constitutional foundation of the rights of the applicants is recognised.

Conclusion

225. At paragraph 105 of her judgment, Finlay Geoghegan J concluded as follows:

> "(1) The Minister did not consider the constitutional rights of the applicants, Mr. and Mrs. Gorry, in accordance with law.

(2) Mr. Gorry as an Irish citizen does not have an automatic right pursuant to the Constitution to cohabit with his non-national spouse in Ireland. Such a constitutional right would appear to be contrary to the inherent power of the State to control immigration subject to international obligations. This is so even if one considers that any such constitutional right is a prima facie right or is not an absolute right and may be limited.

(3) However Mr. and Mrs. Gorry, as a lawfully married couple and a family within the meaning of Article 41, and Mr. Gorry as an Irish citizen, have constitutionally protected rights to have the Minister consider and decide their application with due regard to:

(i) the guarantee given by the State in Article 41.1.2 to protect the family in its constitution and authority;

(ii) a recognition that Mr. and Mrs. Gorry are a family, a fundamental unit group of our society possessing inalienable and imprescriptible rights which rights include a right to cohabit which is also an individual right of the citizen spouse which the State must, as far as practicable, defend and vindicate (Article 41.1 and Article 40.3.1)

(iii) 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 has guaranteed in Article 41.1 to protect; and

(iv) a recognition of the right of the Irish citizen to live at all times in Ireland as part of what Article 2 refers to as his 'birth right … 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.

(4) The Constitution places corresponding obligations on the Minister to take the decision as to whether or not to permit the non-national spouse of an Irish citizen reside in Ireland with due regard to each of the above constitutional rights of the applicants. However, the Minister, in taking the decision, may also take into account other relevant considerations in accordance with the State's interests in the common good.

(5) The 'insurmountable obstacles' test set out by the European Court of Human Rights remains applicable to a consideration by the Minister (if necessary) of the application pursuant to his obligations under s. 3 of the European Convention on Human Rights Act 2003 having regard to Article 8 of the European Convention on Human Rights relating to deportation of the non-national spouse of an Irish citizen."

I express my complete agreement with these principles.

226. As the Court of Appeal made clear in its judgments, and as I have been at pains to emphasise in this judgment, nothing in the approach which the Minister must adopt requires him to give effect to the decision of the married couple to live in Ireland. The Minister does not have to "facilitate" that decision; he does not have to "promote" it; he does not have to

give it some form of "presumptive priority". He does, however, have to identify, consider and properly weigh the couple's constitutional rights and their Convention rights against the important countervailing interests on the State side when conducting the balancing exercise required of him. What is required is a case-by-case analysis – the outcome will hinge on the particular facts and circumstances of a given case. Where the Minister erred in the decisions challenged in these proceedings is that he did not elevate the constitutional rights of the Applicants to the position that he should have. They are the starting point for the balancing exercise required and they must be afforded considerable weight. This is not to say that, after conducting the evaluation called for, he may not nonetheless conclude in respect of a given application that the rights of the State must prevail. In so doing, however, he must pay due regard to, and afford adequate weight to, the constitutional rights of the family under Article 41. He did not do so in these decisions.

227. I would dismiss the Minister's appeals in both cases. The orders of *certiorari* granted by the High Court in *Gorry* and by the Court of Appeal in *ABM* will be upheld. In light of the fact that both matters are moot, the matters should not be remitted to the Minister for a further decision.