AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2022:000023
[2023] IESC 26

O'Donnell C.J.
Charleton J.
Baker J.
Woulfe J.
Hogan J.
Murray J.
Collins J.

Between/

GIDEON ODUM AND S C (AN INFANT SUING BY HER FATHER AND NEXT FRIEND GIDEON ODUM) AND R C A (AN INFANT SUING BY HIS FATHER AND NEXT FRIEND GIDEON ODUM) AND W O A (AN INFANT SUING BY HIS FATHER AND NEXT FRIEND GIDEON ODUM)

Applicants/Appellants

-and-

THE MINISTER FOR JUSTICE AND EQUALITY (No. 2)

Respondent

Judgment of Mr. Justice O'Donnell, Chief Justice delivered on the 14th day of November, 2023.

Factual Background

1. Gideon Odum applied for residency in Ireland through his solicitor in 2014. Consideration of his case resulted in a deportation order made on 21 June, 2016. He commenced judicial review proceedings to challenge the deportation order and is joined as an applicant by three children SC, RCA and WOA, who were born in 2008, 2010 and 2012 respectively and therefore, were aged approximately seven, six and four respectively at the time of the deportation order challenged in these proceedings.

2. The judicial review proceedings were placed in a *Gorry* holding list (*Gorry v. Minister for Justice* [2020] IESC 55 (Unreported, Supreme Court, O'Donnell and McKechnie JJ., 23 September, 2020) ("*Gorry*")) pending the resolution of that case which was seen as a test case in respect of claims based on interference with family rights both under Article 8 of the European Convention on Human Rights ("ECHR"), and Articles 40, 41 and 42 of the Constitution. In the aftermath of the decision of this Court in *Gorry*, a number of claims in the *Gorry* list were compromised by agreement. In a small number of cases, including this one, the State respondents did not concede the challenge to the deportation order but rather maintained that the orders made were valid and consistent with the law as set out in *Gorry*. Accordingly, the case proceeded. In the High Court, Tara Burns J. dismissed the applicants' claim in a judgment delivered on 21 November, 2021 ([2021] IEHC 747).

3. This Court granted leave to appeal on 29 June, 2022 ([2022] IESCDET 80). In its determination, the Court recorded its conclusion that the application met the requisite constitutional threshold at paragraphs 16-18:-

> *"Whether the Minister's consideration of constitutional family rights within a deportation decision ought to be expressly carried out, or whether it is sufficient that the underlying factual matrix of a case makes it clear that constitutional rights will not be breached by the deportation is an important question.*
>
> *The judgment in Oguekwe v. Minister for Justice makes it clear that constitutional rights arise in relationships between parents and children, regardless of citizenship status. The judgment in Gorry v. Minister for Justice emphasised that constitutional family rights, if arising, ought to be considered by the Minister when making deportation orders. How those rights are affected by the absence of a "meaningful involved relationship", and whether that is the correct test, or even a test at all, to be applied in deportation decisions are issues of general public importance.*
>
> *A deportation order may have a very significant impact on its subject. It is in the interests of justice that the correct approach to considerations of constitutional family rights in deportation decisions be clarified, or indeed identified".*

By order of this Court of 24 November, 2022, the Irish Human Rights and Equality Commission ("IHREC") was permitted to participate in the appeal as *amicus curiae*.

4. Subsequently, the first applicant was informed that he had been granted temporary leave to remain under the respondent's "Regularisation of Long Term Undocumented Migrants' Scheme" and the deportation order was revoked. The State respondents then contended that this rendered the appeal moot. This Court decided in *Odum and ors v. Minister for Justice and Equality* [2023] IESC 3 (Unreported, Supreme Court, O'Donnell C.J., 2 February, 2023) ("*Odum No. 1*") that while it inclined to the view the appeal was technically moot, it should

nevertheless be heard, the Court having determined that the appeal involved a point of general public importance.

5. The basic facts, upon which it will be necessary to elaborate later, are that the first applicant is a Nigerian national who claims to have arrived in Ireland in November, 2007, in circumstances which he accepts constituted an unlawful entry to the State. Very shortly thereafter, on 1 December, 2007 he claims to have married E A, also a Nigerian national, who had been residing in the State since 2002. He says the marriage was celebrated by a pastor of the Word of Life Bible Ministry at GAA Club House in Mungret, Co Limerick and photographs of the event have been produced. It is accepted that this itself did not constitute a valid marriage according to Irish law, and no marriage was registered. Accordingly, it is accepted that the first applicant and E A cannot be treated as having been lawfully married for the purposes of these proceedings.

6. E A gave birth to three children, being the second, third and fourth applicants in these proceedings. In the case of the oldest child S C, born in August 2008, the first applicant was named as her father on her birth certificate, with an address provided in Lagos, Nigeria. In the case of the third and fourth applicants, born in 2010 and 2012 respectively, no details of the children's father were registered. It was said that this was because the first applicant was not lawfully in the State. There was some dispute in the early part of the proceedings, in which it appeared that the respondent Minister was contesting the first applicant's status as father of the third and fourth applicants. However, the High Court judge held that in the light of the manner in which the application had been dealt with by the Minister, the Minister must be treated as having accepted

(or at least not denied) that the first applicant was indeed the father of all three children and that the case must therefore be approached on that basis.

The Minister's Assessment of Rights

7. The assessment of this case accepted by the Minister addressed the various factors set out in section 3(6) of the Immigration Act, 1999 (as amended) (the "1999 Act"), including the duration of the first applicant's residence in the State (section 3(6)(b)) and his family and domestic circumstances (section 3(6)(c)) and also contained a full analysis of the impact of the deportation upon his rights to a family life under Article 8 of the ECHR. The conclusion that the deportation of the first applicant would not violate Article 8 is not challenged here. However, the assessment contains no reference to the constitutional rights now asserted. The first applicant sought to contend that this in itself was a ground rendering the decision invalid. However, it was observed by the Minister that the representations made on behalf of the first applicant did not at any stage of the process make reference to the Constitution and did not assert any constitutional rights, and the Minister was not to be faulted for not referring explicitly to the Constitution. The fundamental question it was said was the correctness of the decision.

8. It may be understandable given the development of the law more generally in relation to entry to and deportation from the State by reference to the ECHR, that analysis by reference to the Convention would be readily invoked in challenges to ministerial decisions. It is also the case that here it appears to have been accepted that since the first applicant and E A could not be treated as married, that a claim of family rights may have been more readily advanced by

reference to the ECHR jurisprudence. However, it must be emphasised that the Constitution is the basic law of the State. It sets the standard against which legislation, statutory instruments and administrative decisions should be tested and also sets the standard which the courts are obliged to uphold. While in the area of fundamental rights, there is a significant overlap in the area of protection between the Constitution and instruments such as the ECHR, however, in some cases the Constitution will provide for a more extensive or at least different level of protection and in any event provides for a more powerful remedy. Applicants and their advisors should, therefore, be expected to consider and advance claims by reference to the Constitution when challenging departmental decisions which engage constitutional rights. As Hogan J. stated in *Middelkamp v Minister for Justice and Ors* [2023] IESC 2, [2023] 1 I.L.R.M. 277 ("*Middelkamp*") at paragraph 26, "… *legal professionals should, where possible, also ensure that constitutional issues are raised appropriately in conjunction with any corresponding ECHR issues as arise within the confines of the European Convention of Human Rights Act 2003*". Indeed, it is to be expected that the Constitution would merit separate consideration in advance of resort to the Convention even though the analysis will be similar under both instruments, and indeed under section 3(6)(c) of the 1999 Act.

9. In *Middelkamp*, Hogan J. also observed that "…*in some instances of this kind an issue may possibly arise in future cases as to the extent to which non-citizens can rely on the corresponding constitutional provisions*". This is such a case. The applicants, who are not citizens of Ireland, rely in these proceedings on the fact that the decision of the Minister did not refer to the Constitution or consider the constitutional rights of the applicants. However, as already mentioned, here

the applicants themselves did not mention the Constitution in the submissions made to the Minister and, therefore, cannot sensibly argue that a decision is invalid simply because no express reference was made to the Constitution in the Minister's decision. It is true that it was pointed out on behalf of the applicants that no reference was made to the Convention, but that issue was still assessed by the Minister. However, in my view, the applicants are not entitled to rely on the Minister's and her officials' diligence to make a point as formal and unmeritorious as this. Instead, the Court is, in my view, obliged to consider whether, on the basis of the factual matter advanced by the first applicant in respect of his relationship with the second to fourth applicants, the Minister's decision to nevertheless order his deportation, was flawed as being in breach of the constitutional rights of the applicants. This raises important questions.

Constitutional Rights

10. The constitutional issues raised in this case are not resolved by the decision of this Court in *Gorry*. That case involved a married couple, one of whom was an Irish citizen. The decision of the majority of the Court was, moreover, that Article 41 of the Constitution protected an area of family autonomy and decision making, but that did not give a right to decide where to live when such a decision involves entry into the State or removal from it. As Hardiman J. put it in *A.O. & D.L. v Minister for Justice and Ors* [2003] 1 I.R. 1, "*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.*" Further, the issue dividing the majority and minority in *Gorry* was as to whether Article 41 protected a right of a married couple to cohabit. That was an issue which did

not, and could not, arise on the facts here, since the first applicant and E A were not married and had, in any event, separated by the time of the making of the deportation order. Furthermore, E A and the first applicant were not at that stage cohabiting or asserting any right to cohabit. It should be emphasised that for the purposes of this case, it was not argued that the first applicant together with E A (an unmarried couple) and the children (or subsequent to the separation of the first applicant and E A, a unit consisting of the first applicant and the second to fourth applicants), should be treated as constituting a Family for the purposes of Article 41, and I express no view on that question which may arise for decision in another case. Thus, none of the complex issues debated with in *Gorry* arise in this case.

11. However, it is argued that the second to fourth applicants have a constitutional right to the care, company, and companionship of their parents (including, here, the first applicant), irrespective of the marital status of their parents. In this respect, they rely on the consistent jurisprudence of this Court to the effect that children enjoy constitutional rights irrespective of the marital status of their parents, which are to be vindicated by their parents and thus parents and children irrespective of marital status will have a bundle of constitutional rights and duties. As early as *Re M (an infant)* [1946] I.R. 334, Gavan Duffy P. stated at page 344 of the report:

> "*It is now universally recognised that the paramount consideration on such an application as this must be the welfare of the child, the word "welfare" being taken in its widest sense. Under Irish law, while I do not think that the constitutional guarantee for the family (Art. 41 of the Constitution) avails the mother of an illegitimate child, I regard the innocent little girl as having the same "natural and imprescriptible*

rights" (under Art. 42) as a child born in wedlock to religious and moral, intellectual, physical and social education, and her care and upbringing during her coming, formative years must be the decisive consideration in our judgment".

12. That statement of principle was endorsed by this Court in *G v An Bord Uchtála* [1980] I.R. 32, (at page 67 per Walsh J. and at page 87 per Henchy J.), with Henchy J. stating as follows at pages 86-87:

"*... all children, whether legitimate or illegitimate, share the common characteristic that they enter life without any responsibility for their status and with an equal claim to what the Constitution expressly or impliedly postulates as the fundamental rights of children*".

13. As the rather dated language of these passages might suggest, these statements were all made prior to the Status of Children Act, 1987 and the introduction of Article 42A into the Constitution in 2015. What the Court in *G. v An Bord Uchtála* considered to be implied in the Constitution, was then put beyond doubt. In *IRM v Minister for Justice* [2018] IESC 14, [2018] 1 I.R. 417, this Court at paragraph 223 of its judgment explained:-

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

14. It follows, therefore, that Article 42A.1, under which the State recognises and affirms the natural and imprescriptible rights "*of all children*", makes it clear that all children have the same rights to the care and company of their parent,

irrespective of marital status. There is no doubt, therefore, that citizens in a similar situation to the applicants here have constitutional rights. The question that arises is whether non-citizen children are entitled to assert a right to the care and company of a non-citizen parent and whether a non-citizen parent may assert the constitutional rights (and duties) of a parent, such as to preclude the deportation of the non-citizen parent by the Minister.

The Non-Citizen and Constitutional Rights

15. The question does not arise in this way in the context of the European Convention on Human Rights Act, 2003 because under the Convention the contracting states guarantee the rights enumerated in the Convention not just to their own citizens and the citizens of other contracting states, but to all persons coming within the territory of each contracting state. However, that question does arise in the context of the Irish Constitution. It is one with which constitutional jurisprudence has struggled because the text of the Constitution does not expressly address the question, and the language and terminology of the provisions in the Constitution protecting rights is not necessarily consistent and does not follow any clear pattern.

16. The question of the entitlement of non-citizens to invoke constitutional rights, has, since the middle of the 1960s, from time to time surfaced in the case law, most famously in *State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567. That case demonstrates both the uncertainty generated by the use of the noun '*citizen'* in Article 40.1 and 40.3, and the intuitive discomfort experienced in suggesting that those who were not citizens – although affected by reason of their presence in the jurisdiction, or otherwise, by actions of the State – were disentitled from

asserting constitutional rights in challenges to the legality of decisions that adversely affected them. In *Nicolaou*, counsel for the Attorney General declined to advance any argument that the prosecutor's rights were "*any less than the rights of a citizen properly so called, whatever that may mean*" (at page 592). In the High Court, Murnaghan and Teevan JJ. were prepared to proceed accordingly (the latter expressing some scepticism at the proposition that protection of at least some rights enshrined in the Constitution would be denied to non-citizens on the ground of non-citizenship) with the Supreme Court similarly noting, but not deciding the issue (at page 645 of the judgment of Walsh J.).

17. The other member of the Divisional High Court, Henchy J. – notwithstanding the position of the Attorney General – felt it necessary to confront the issue. In his view, the purpose of Article 40.3 was to state a constitutional right "*which attaches to citizenship and falls as a duty on the State*". It was only a citizen who could claim that right "*as a constitutional incident of his citizenship*". Henchy J. explained that that conclusion had a clear theoretical foundation in Article 9.2 which posited as fundamental political duties of all citizens fidelity to the nation and loyalty to the State. This, he felt, was reflected in the Preamble and the declaration that the "*people of Éire … adopt, enact, and give to ourselves this Constitution*". That was a Constitution of the Irish people, for the Irish people, the State in consequence "*is concerned primarily only with its citizens, who owe it this loyalty*" (at page 617).

18. The question has been addressed in a number of recent judgments commencing with *N.H.V. v. Minister for Justice* [2017] IESC 35, [2018] 1 I.R. 246 ("*N.H.V.*")

and was further discussed in both *Gorry* and *Middelkamp*. The latter two cases consider the question of constitutional rights being raised in the context of decisions on entry to and removal from the State. It was explained in *N.H.V.* that non-citizens could invoke constitutional rights by reason of the guarantee of equality before the law contained in Article 40.1. It followed, however, that such an entitlement can only arise if a non-citizen was entitled to be treated the same as a citizen, in the words of Article 40.1, as human persons:-

> "*For present purposes, I would be prepared to hold that the obligation to hold persons equal before the law "as human persons" means that non-citizens may rely on the constitutional rights, where those rights and questions are ones which relate to their status as human persons, but that differentiation may legitimately be made under Article 40.1 having regard to the differences between citizens and non-citizens, if such differentiation is justified by that difference in status. In principle therefore I consider that a non-citizen, including an asylum seeker, may be entitled to invoke the unenumerated personal right, including possibly the right to work which has been held guaranteed by Article 40.3, if it can be established that to do otherwise would fail to hold such a person equal as a human person. However, it is necessary to consider first what exactly is guaranteed by that right to citizens; second whether the essence of the guarantee relates to the essence of human personality and thus must be accorded to some or all non-citizens who in that regard are entitled to be held equal before the law; third, whether even so a justifiable distinction may be made under Article 40.1 between citizens and lawful residents, and non-citizens and in particular asylum seekers; and finally, whether if*

any such distinction can be made, such differentiation may extend to encompass the complete ban on employment of asylum seekers contained in s. 9(4) of the 1996 Act."

19. *Gorry* concerned the rights of a married couple one of whom was a non-citizen. At paragraphs 29-31 of my judgment in that case, I said the following:

> *"29. The Constitution does protect the rights and interests of non-citizens in some, indeed many, respects (see, in this regard, the decision of this court in N.H.V. v. The Minister for Justice ...*).*That does not mean, however, that the difference between citizenship and non-citizenship is not relevant in a number of important and, indeed, fundamental respects: the constitutional right to vote is perhaps the clearest example of a valid distinction between citizens and non-citizens recognised by the Constitution. One basic incident of citizenship is the right to reside in Ireland, even if that right is not absolute since the State can extradite an Irish citizen or surrender him or her to another country. But a fundamental distinction between a citizen and non-citizen is that a citizen has the general right to reside here, the right to travel with the protection of the State, and with the benefit of its good offices, and to re-enter the country. A non-citizen has none of these rights. These are basic consequences of citizenship, nationality, and, ultimately, sovereignty.*
>
> *30. Another essential feature of sovereignty, and which permits indeed the conferral of rights upon citizens, is the State's capacity to maintain territorial integrity and control its own borders. Originally, indeed, that was a core function of the executive and one of the indicia of an independent sovereign State, which this country once sought so tenaciously to assert and establish in the early years of the State.*

> *31. There is, therefore, a basic and unavoidable distinction between an Irish citizen and his or her non-citizen spouse; that distinction is that the Irish citizen has an a priori right to reside here, to form relationships, to be employed, to work and to pursue his or her life here, to participate in the democratic process as a voter or candidate and that a non-citizen does not. This basic distinction precedes questions of interference with family life or cohabitation and is the starting point for the analysis of any decision either to refuse entry to this country or to remove someone from it".*

See also the discussion at paragraph 36 of *Middelkamp*, to similar effect, in the context in that case of two non-citizen spouses.

20. In its helpful submissions on this issue, IHREC referred to census data for 1936 showing that of a total population of approximately 3 million, only 65,496 could be said to be non-citizens, the vast majority of whom were from England, Wales, and Scotland, and contrasted that situation with April 2022 data where it was estimated that more than 700,000 (13.89% of the population) were non-Irish nationals. While this does set a background to the discussion in this case and explains why the issue arises more often and is more significant, it cannot however, in my view affect the interpretation to be given to the Constitution in respect of a fundamental question of the scope of the Constitution, and those entitled to invoke it. If in 1937 the People of Ireland had made a deliberate decision to limit the fundamental rights protected by the Constitution to citizens, then it would be for the People and not the Courts to change that.

21. IHREC's submission also referred to the State's obligations under international law. As was pointed out, Article 29.3 of the Constitution provides that Ireland accepts the generally recognised principles of international law as its rule of

conduct in relations with other states. However, this provision cannot be treated as a portal to introduce the provisions of international agreements into Irish law, and more fundamentally, into Irish constitutional law. The question of the extent to which deportation decisions infringe rights guaranteed by the Irish Constitution is not one which raises any question of relations with other states or the difficult question to whether and/or to what extent the Government's conduct of foreign relations under Article 29.4 is subject to review in the courts. Nor would I accept, at least without considerably more developed argument, that the content of international instruments to which Ireland is a signatory or a party, may be used to assist in the interpretation of the Constitution merely on the basis that the Constitution is said to be a living instrument. Under Article 29.5, the Constitution makes express provision as to the manner in which international agreements become binding upon the State and may become part of Irish law. The dangers in treating international agreements as a direct interpretive source in Convention cases were discussed in *Donnelly v Minister Social Protection Ireland and Others* [2022] IESC 31, [2022] 2 I.L.R.M. 185 at paragraph 153. While it may be useful to have regard to international instruments, particularly where they are referred to, or sought to be implemented, in or by legislation, any interpretation of the Constitution must respect its express terms, and the right of the People to decide to amend the Constitution under Article 46 if they consider it no longer represents the values the People wish to have upheld.

22. There is no logical reason to regard the manner in which international rights protecting instruments treat the question of the capacity of non-citizens of contracting states to benefit from their terms, as helpful in answering the

separate question of the rights of non-citizens to benefit from the terms of the Irish Constitution. International agreements operate on a different plane and although they do not always give a right of individual petition, it is relatively common in modern times that they will commit the contracting parties to respect and uphold certain rights whether of their own citizens or of any other person within their territorial boundaries. It is not at all surprising that obligations under international agreements would, therefore, extend beyond the citizens of contracting states and often include all persons within that state. But that is of no assistance in the quite different context of a national constitution, which operates on a different plane. Such a constitution is made by the people of a state for themselves and sets out provisions concerning the structure and government of that state and the rights which the state will recognise and protect. There is no necessary reason in principle why those rights should not be confined to the citizens establishing the state and adopting the constitution (and in some cases they are).

23. In the Irish context, it is clear from the decision *In Re The Electoral (Amendment) Bill 1983* [1984] I.R. 268 ("*In Re The Electoral (Amendment) Bill 1983*"), that the then applicable provisions of Article 16.1.2° of the Constitution confined the right to vote at Dáil elections to citizens (and by extension, the right to vote for the President contained in Article 12.2.2°; the right to vote at a Referendum under Article 47.3; and eligibility for election to the Dáil and to the Presidency under Articles 16.1 and 12.4.1° respectively). This was so even though the Court acknowledged at page 276 that there was a clear distinction between the provisions of the Constitution which provide the mechanism by which the people may choose and control their rulers and their legislators and

those provisions such as Articles 40 and 44 which grant to individuals particular rights within society and in relation to the organs of State, and which had been interpreted as "*... having the effect, at least in certain circumstances, of not excluding the existence or the granting of similar or identical rights to persons who are not citizens*" and who could establish a sufficient connection with the State.

24. In any event, the survey of relevant international instruments does not lead to a different conclusion to that which has been deduced from the Irish Constitution. The Office of the UN High Commissioner for Human Rights' report, "The Rights of Non-Citizens" states that international human rights law is founded on the premise that "[a]*ll persons should, by virtue of their essential humanity enjoy all human rights. Exceptional distinctions, for example between citizens and non-citizens, can be made only if they serve a legitimate State objective and are proportional to the achievement of that objective*." Similarly, Article 2(1) of the International Covenant on Civil and Political Rights provides that each state party undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant without distinction of any kind including national origin. The Covenant also recognises a limited exception under Article 13 in respect of the expulsion of an "alien" lawfully on a state party's territory.

25. These distinctions and exceptions should not be surprising and should not be elided. An essential attribute of sovereignty, which enables a state to adhere to international agreements, guarantee rights, and provide for the status of citizenship, is the ability to maintain borders, and to control entry to and removal from the state. Even within the context of international agreements guaranteeing

rights, the concept of the state, and the internal sovereignty of that state remains central. Thus, the ECHR was made between contracting states who themselves agreed in Article 1 to "*secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention*". In each case in which a complaint is made to the European Court of Human Rights, the respondent is a state, which, it is contended, has failed to comply with their obligations under the ECHR. This is also why statelessness is something which international law leans against. A person who is stateless lacks the protection of any state, and the rights that go with citizenship. The state is, therefore, the vehicle for the protection of rights whether as a result of its international obligations or adopted under its own Constitution. Sovereignty, territory and citizenship ("we the people") are essential elements of a state, without which it might be said that a state cannot exist. Citizenship, therefore, remains an essential status, and it necessarily follows that there will be permissible distinctions, particularly in relation to entry to and removal from the State, based upon that status.

26. It is important therefore, that neither comparison to international agreements which require contracting states to afford rights to any person within its territory, nor the fact that Irish constitutional law is understood to permit non-citizens to assert constitutional rights based on the essential equality of such persons as human persons, should be allowed to obscure those areas where differential treatment between citizens and non-citizens is permissible because those differences are relevant to the provision in issue. This means that non-citizens cannot simply challenge the validity of a decision which affects them *as if* they were Irish citizens. Any Irish citizen has rights and entitlements as a result of citizenship. Furthermore, where a non-citizen challenges a decision in

relation to entry to, or removal from, the State, the State is able to rely on considerations such as the entitlement of the State to maintain an immigration system, which simply would not apply in the case of a citizen.

27. However, there are a number of circumstances in which a non-citizen who can establish a sufficient connection to the State is *the same* as a citizen, and where, therefore, the Article 40.1 guarantee of equality as human persons before the law, entitles them to rely on the same rights as a citizen would have. There is a particular connection between the fundamental rights provisions of the Constitution and the reference in the Preamble to securing the dignity of the individual, which adds force to this conclusion. In this case, the second to fourth applicants would be able to rely through the mechanism of Article 40.1 on the constitutional guarantees in respect of family life and education and rights to liberty, free speech, and fair procedures and more, but cannot rely upon their essential equality as human persons, to argue that they should be treated in the same way as Irish citizen children would in respect of an Irish citizen parent when it comes to attributes of citizenship, such as voting, the right to enter and remain in the State, and receiving the assistance of the State when abroad. As this Court noted in *In Re The Electoral (Amendment) Bill 1983*, non-citizens are in that respect different to citizens and Article 40.1 does not require that they be treated the same in those respects.

28. In a case such as this, this means that the children do have relevant constitutional rights, to the care and company of their parent which must be respected, and which may be affected by any deportation decision. These rights are essentially akin to the rights which they would have under Article 8 of the Convention, and

any analysis in that regard is likely to be very similar to the analysis that would be made under the Constitution not least in the light of the provisions of Article 42A.1.

29. In this case, the first applicant's residence in Ireland was, in the language of the European Court of Human Rights, precarious. It would be exceptional for such residence alone to amount to a consideration of such weight as to mean that a deportation decision was invalid as breaching the rights of the individual. Nevertheless, the fact of a relationship and the rights of the children involved must be taken into account in the deportation decision. It would require exceptional considerations of particular weight to prevent the State from requiring a non-citizen, whose presence in Ireland was unlawful, to leave the State having regard to the weight that must be accorded to the fundamental interests of the State in maintaining its capacity to control entry to and exit from the State.

30. It is, however, conceivable, that the facts of a particular case including considerations such as the duration of residence, the particular nature of the relationships established, or created, and particular circumstances in such relationships as well as the specific circumstances and needs of any children involved might mean that an otherwise lawful deportation decision would be a breach of the constitutional rights of the children. In such circumstances, it is necessary to consider the particular facts of the individual case. This is particularly so where the individual subject to a deportation order is no longer living with the members of the family whose collective rights are said to be breached by removal from the State. As observed at paragraph 74 of my

judgment in *Gorry*, this may involve a more intensive consideration of the facts and evidence. But, to repeat ,and as indeed is the case under the decisions of the ECtHR, the factors of this kind that would operate to preclude the deportation of a non-citizen who had no legal right to be in this jurisdiction would have to be unusually weighty and, by definition, wholly exceptional.

A Meaningful Relationship

31. Here, the High Court judge conducted an intensive analysis of the evidence provided and found that there was no evidence of any meaningful relationship between the first applicant and the second to fourth applicants. The nature and extent of any relationship between the first applicant and the second to fourth applicants was a relevant, indeed critical, consideration and the conclusion of the trial judge in that regard was, in my view, amply justified on the evidence.

32. The entirety of the sworn evidence in this case is contained in a single affidavit of the first applicant running to nine paragraphs and exhibiting a very limited amount of documentation. The affidavit was clearly drafted by lawyers and might therefore be taken as putting the first applicant's case at its strongest and as marshalling all relevant evidence in this regard. Although stated to be sworn on behalf of his wife (as she was described) and in her presence and as recording his own and his wife's "…*express view that irreparable harm will be visited upon the second, third and fourth applicants*…", no supporting affidavit was sworn by E A who, after all, might be thought to be a witness who could give the most detailed evidence of the relationship between the first applicant and the children, and the impact on them of separation. The affidavit merely states that deportation would "*effectively sunder*" his relationship with the children. This

is a conclusion framed in language which is familiar from a number of judicial decisions, but no supporting detail is provided. What that relationship was, is not explained. Since the first applicant's separation from E A in November, 2014 it was said baldly, that he had been continually involved in his children's lives, saw them every week, either cooked for them or took them for something to eat and brought them out in the city, and was in regular contact with them by phone during the week. No further detail is provided. In particular, no evidence, either professional or anecdotal, of the nature of the relationship with the three children or the anticipated impact of any deportation on those children, was provided.

33. Despite the fact that there was extensive correspondence between the Department of Justice and the first applicant's solicitors between 2014 and the deportation order in June, 2016, the information supplied by the first applicant remained limited, fragmentary, and contradictory. As already set out, the first applicant contended that he had entered the State in November, 2007, and went through a ceremony of marriage on 1 December, 2007 with E A who had been resident in Ireland since 2002. While he produced a number of photographs of this wedding, and a purported certificate from the Word of Life Bible Ministry, no independent evidence of the marriage, or the date of its celebration, either from E A, or the officiating celebrant, or either of the witnesses recorded on the certificate, or indeed any person present, was ever produced. It is acknowledged that the first applicant is not named on the birth certificate of the third and fourth applicants and permitted an address in Nigeria to be entered on the birth certificate of the second applicant in respect of her birth in August, 2008. If, as the first applicant now contends, this address was false, then that casts doubt on

the veracity of his account more generally. If, on the other hand, the address was his true address at that time, it contradicts his assertion that he was present in Ireland since November, 2007, a date which is not otherwise verified. Nor is the difference of approach between the first birth certificate and the second and third, adequately explained by a concern that the first applicant's presence in the State was unlawful.

34. Furthermore, the address given for E A on the birth certificate of the third applicant does not seem to match with any of the addresses given in a Garda vetting application submitted by the first applicant in 2016. By the same token, some of the addresses on the correspondence supplied by the first applicant did not match with the Garda vetting form, or the birth certificates. It is, of course, the case that addresses on correspondence, particularly from entities such as mobile phone companies, may not be entirely accurate, but these aspects only illustrate the fragmentary nature of the evidence advanced, and the lack of any detailed narrative.

35. In June, 2015, in the course of the application, the first applicant did submit an order of the District Court appointing him as joint guardian of the three children. However, that order merely records that it was made on consent, and that access was "*per the consent attached*". However, the only consent provided was one agreeing that the first applicant could be appointed guardian and making no provision for access. Again, no supporting account was provided.

36. All these matters were pointed out in correspondence by the officer in the residence division of the Irish Naturalisation and Immigration Services ("INIS"). In particular, on 8 January, 2015, it was said that the correspondence

had "*failed to indicate where your client is currently residing, despite a request to do so. It is important to know both where (i) your client and (ii) his children currently live in order to allow us to identify the level of contact and dependency involved. Please provide both your clients and his children's current addresses*". If any specific response was provided to this, it is not exhibited and indeed, yet one further address for the first applicant is recorded in the District Court guardianship order. Furthermore, the letter from the residence division of the INIS pointed out that although it was stated that the parties had lived together as a family unit until October 2014, when the first applicant and E A separated, it had been indicated by the Department of Social Protection that E A had been claiming "*lone parents' allowance since 2013*". The first applicant and his lawyer were invited to comment on this apparent discrepancy. Again, it does not appear that this was addressed. Finally, when all these matters had been raised and were relied upon in the deportation decision, the affidavit of the first applicant grounding the application for judicial review is, if anything, even less forthcoming on these matters.

37. The requirement for detail was apparent on the face of the correspondence and the many questions it raised. The importance of addressing such matters in a comprehensive manner was well explained in a judgment of Cooke J. in *S(F) & ors v. Minister for Justice, Equality and Law Reform* [2010] IEHC 433 (Unreported, High Court, 7 December, 2010) where he addressed a contention that the deportation of the second applicant would be damaging to the interest and welfare of an individual who was contended to be a member of a household and in the care of the applicants. At paragraphs 30-31 of the judgment Cooke J. said:-

> "*Apart from the fact that P. has lived with the family since March 2008, and has developed a close relationship with the children and goes to the same school as the third named applicant, nothing by way of evidence is given as to the reality of family life in question. What is the daily routine? Who brings the children to school? Who collects them from school? In particular, nothing is said as to the nature of the bond, if any, which has developed between the second named applicant and P.. Does he help with her homework? Does he attend teacher/parent meetings? Does he take the children on outings together? Nothing is said as to how she participates in the normal everyday life of the family.*
>
> *In the judgment of the Court, if a case is to be made that the removal from the State of the second named applicant (who was, when the application to revoke was made, at most, a foster parent of two years standing to an otherwise unrelated child,) will constitute such grave interference as to infringe the right to family life under Article 8 or some personal right of the citizen under the Constitution, it is necessary* ***that detailed evidence be given to the decision-maker as to the nature, quality and character of the family life in question.*** *Nothing of that nature has been done in this case..."* (Emphasis added).

38. Much the same can be said in this case. The first applicant entered the State unlawfully. His presence thereafter was precarious, and he could have had little if any expectation of being entitled to remain. If it was to be said that there were exceptional circumstances whereby the enforcement of an order removing the first applicant from the State would be an infringement of the rights not of the first applicant personally, but of the three children, then it is to be expected that it would have been possible to give details, supported by the evidence of others of the nature and extent of the first applicant's engagement with the second to fourth applicants to such an extent that removal of the first applicant from the State would be an impermissible interference with the rights of the second to

fourth applicants, and perhaps the first applicant's duty towards them. That evidence ought to have been readily available. The absence of any such evidence is telling. It should be recalled that the applicants' case was that for more than eight years the first applicant had been part of a family unit with E A and the three children. The "reality of family life" in such a case should leave a considerable mark which could be readily attested to if, as the first applicant maintains, the relationship between the first applicant and the three children was of such closeness that his deportation would cause the three children irreparable harm.

Conclusions

39. The High Court judge was fully justified in concluding that there was no evidence of a real meaningful relationship such as to give rise to even the possibility that the deportation would be an impermissible interference with family and private life under Article 8 and the same considerations must lead to the same conclusion in the case of the second to fourth applicants' rights to the care and companionship of their parents under the Constitution.

40. In the circumstances the appeal must be dismissed, and the order of the High Court affirmed.