THE SUPREME COURT

[S.C. No: 489/2006]

Murray C.J.
Denham J.
Fennelly J.
Kearns J.
Finnegan J.

Between/

Chuka Paul Oguekwe, Blessing Oguekwe,
Prince Roniel Oguekwe,
(a minor suing by his father and next friend,
Chuka Paul Oguekwe)

Applicants/Respondents

and

The Minister for Justice, Equality and Law Reform

Respondent/Appellant

and

The Human Rights Commission and the Attorney General
Notice Parties

Judgment delivered the 1st day May, 2008 by Denham J.

1.

Two Issues
There are two issues before the Court in this case. First, there is an appeal from the determination of the High Court to quash the decision of the Minister under the Irish Born Child 05 Scheme. Secondly, there is an appeal from the judgment of the High Court quashing the decision of the Minister to make a deportation order under s.3 of the Immigration Act, 1999, as amended.

2. First Issue
The first issue in this case is the decision of a Minister of the Government, made in an administrative scheme, established as an exercise of executive power, to deal with a unique group of foreign nationals. It was submitted, on the one hand, that, *inter alia*, in this scheme the Constitutional and Convention rights of applicants were required to be considered in accordance with law. On the other hand, it was submitted that neither Constitutional nor Convention rights arose to be considered. Thus the nature of the scheme is at the core of this aspect of the appeal, and, with it, the nature of any judicial review. Also, at the kernel of the matter is the fact that the position of a

foreign national, who failed in an application under the scheme, remains the same as it was prior to the application, Constitutional and Convention rights remaining yet to be considered. The central issue is the refusal by the Minister of the first named applicant's application under the IBC 05 Scheme. In this, and the related judgments, the term 'foreign national' means a national other than an Irish citizen.

3. Eight Cases
The Minister for Justice, Equality and Law Reform, the respondent/appellant, hereinafter referred to as 'the Minister', has appealed from the judgments of the High Court (Finlay Geoghegan J.) in seven cases where the High Court quashed the decision of the Minister to refuse applications for permission to remain in the State to foreign national parents of Irish born children under a scheme which he had introduced. In an eighth case, the Minister is appealing against the order for costs made in the High Court. No submissions have yet been on this latter case. In two cases, this being one of them, the High Court also quashed the decision of the Minister to make a deportation order, under s.3 of the Immigration Act, 1999, as amended, which the Minister has also appealed, and which is the second issue in this judgment.

4. These related cases are:

(i) Bode v. The Minister, Appeal No. 485/2006
(ii) Oguekwe v. The Minister, Appeal No. 489/2006
(iii) Dimbo v. The Minister, Appeal No. 484/2006
(iv) Fares v. The Minister, Appeal No. 483/2006
(v) Oviawe v. The Minister, Appeal No. 480/2006
(vi) Duman v. The Minister, Appeal No. 482/2006
(vii) Adio v. The Minister, Appeal No. 481/2006
(viii) Edet v. The Minister, Appeal No. 005/2007

The Minister was represented in all the cases by the same counsel. The same affidavit of Maura Hynes, a Principal Officer in the Department of Justice, Equality and Law Reform, was filed in all cases on behalf of the Minister. Similar written submissions were filed on behalf of the Minister in all cases.

5. Judgment on the appeals in **Bode**, **Fares**, **Oviawe**, **Duman** and **Adio** were delivered by the Court on the 20th December, 2007. The general facts and law relating to this first issue in all eight cases were set out in the **Bode** judgment. The particular facts, law, and decision of this case are set out herein.

6. Parties
In this case the first named applicant/respondent is Chuka Paul Oguekwe, hereinafter referred to as 'the first named applicant'. He is married to Blessing Oguekwe, the second named applicant/respondent, hereinafter referred to as 'the second named applicant'. Prince Roniel Oguekwe, the third named applicant/respondent, and hereinafter referred to as 'the third named applicant', was born in Ireland on the 9th June, 2003. The Minister for Justice, Equality and Law Reform is the respondent/appellant and is referred to as 'the Minister'. The Human Rights Commission was given leave to participate as *amicus curiae* on the appeal by order of 23rd day of March, 2007, and is referred to as 'the Commission'. The Attorney

General was joined as a Notice Party.

7. Particular Facts
The particular matter raised on the first issue in the case relates to the requirement of continuous residence under the IBC 05 Scheme, which issue was considered also in the **Bode** case.

The second named applicant entered the State in April, 2003 and applied for asylum. She gave birth to the third named applicant on the 9th June, 2003. The first named applicant is married to the second named applicant. The first and second named applicants are nationals of Nigeria. The first named applicant entered the State on the 3rd February, 2005. He stated in his affidavit that he came to Ireland so that he could apply for residency on the basis of the third named applicant's citizenship and reside with him. He made his application for residency under the IBC 05 Scheme on the 9th February, 2005.

By letter dated 10th March, 2005, the Minister stated that the application had been refused on the ground that the first named applicant had not shown that he had resided in the State with his Irish citizen son, or that he had played an active part in his upbringing, on a continuous basis since his birth.
The second named applicant also applied under the IBC 05 Scheme and was successful. She was informed of this decision on the 3rd May, 2005.

8. High Court Proceedings
The applicants brought High Court proceedings to challenge the refusal by the Minister of the first named applicant's application under the IBC 05 Scheme.

9. The High Court Order on the IBC 05 Scheme
The High Court held that the applicants were entitled to an order of *certiorari* in respect of the refusal of the first named applicant's application under the IBC 05 Scheme, for the reasons given in the judgment of the High Court in the **Bode** case.

10. Appeal
The Minister has appealed against the judgment and orders of the High Court.

11. Decision on IBC 05 Ministerial decision
I would allow the appeal of the Minister, on this issue. My general reasons are set out in the **Bode** judgment. In that judgment the nature of the IBC 05 Scheme was described in detail. It was an administrative scheme established by the Minister, exercising executive power, to deal with a unique group of foreign nationals in a generous way, on the criteria of the scheme. The parameters of the scheme were clearly stated and included the requirement of continuous residence.

The first named applicant entered Ireland on the 3rd February, 2005. (The third named applicant had been born in Ireland on 9th June, 2003). The first named applicant stated that he wished the third named applicant to grow up in Ireland. He averred that, 'I came to Ireland so that I could apply for residency on the basis of Prince's Irish citizenship and reside here with him.'

It was a manifest requirement of the IBC 05 Scheme that there be "Evidence of continuous residence in the State since the birth of the child (utility bills, lease/rental agreements etc.)" By letter dated 10th March, 2005, the first named applicant was informed that the Minister had decided to refuse his application under the IBC 05 Scheme. The reason given was:-

"The reason for the Minister's decision is that you have not shown that you have resided in the State with your Irish citizen son, or that you have played an active role in his upbringing, on a continuous basis since his birth."

On the evidence the first named applicant was not in the State when his son was born, or when the scheme was announced. He did not meet the criteria of the scheme because of his lack of continuous residence. Thus it was open to the Minister to find, indeed, I believe he could come to no other conclusion, that the first named applicant's application did not meet the criteria of the scheme.

Bearing in mind the analysis of the IBC 05 Scheme in **Bode**, and the extent of judicial review of such an administrative scheme, I would allow the Minister's appeal on this matter. The Constitutional and Convention rights of the applicants remain to be considered.

12. Second Issue, Deportation Order pursuant to s.3 Immigration Act, 1999, as amended

The second issue in this appeal is a review of the decision of the Minister on the 9th November, 2005, to make a deportation order, under s.3 of the Immigration Act, 1999, as amended, hereinafter referred to as 'the Act of 1999'.

13. History

The history of the first named applicant in Ireland is relevant. The first named applicant is a Nigerian national. He entered the State on the 3rd February, 2005 and applied for a declaration of refugee status on the 4th February, 2005. A letter was received by the Minister on the 8th February, 2005, stating that he wished to withdraw from the asylum process and to remain in the State on the basis of the IBC 05 Scheme. On the 9th February, 2005, the first named applicant was notified of the recommendation of the Office of the Refugee Applications Commissioner that the first named applicant should not be declared a refugee. The Minister received an application from the first named applicant to remain in the State under the IBC 05 Scheme on the 11th February, 2005. The Minister refused this application, for the reason set out earlier in this judgment. On the proposal to deport on the notification of refusal under the IBC 05 Scheme, the first named applicant was also notified that the 15 day period for response to the proposal to deport letter, issued on the 25th February, 2005, began from the date of notice of the said refusal, that is 15 days from the 10th March, 2005. Representations were received by the Minister from the first named applicant on the 9th March, 2005. He stated, *inter alia*,

"If I'm send (sic) back that will make our family be divided our we all both (sic) my Irish son will be forced to leave his country and that will be denying him of his right as a citizen and Nigeria is not safe for him and my wife. That's why I have come to stay with them. To play my fatherly role."

On the 24th May, 2005, the second named applicant, the first named applicant's wife, wrote to the Minister indicating that she had been granted residency.

14. Deportation Order Process

On the 28th September, 2005, a Clerical Officer in the Minister's department made an examination of the file under s.3 of the Act of 1999, and prepared a report. A short background description of the first named applicant's arrival in the State and his application and refusal under the IBC 05 Scheme was set out.
The report then considered s.5 of the Refugee Act, 1996, (the prohibition of refoulement). It was stated that, based on the information provided on file, a search had been made of the reference material available on information with regards to Nigeria and in relation to the circumstances of the case, and it was concluded that returning the first named applicant to Nigeria would not be contrary to s.5 of the Refugee Act, 1996, as amended.

The report then had a section entitled "Section 3(6) of the Immigration Act 1999, as amended." The first paragraph in this part of the report is headed 'Consideration regarding the Irish born child.' It was stated that the principle issue to be considered was the status of the third named applicant and the possibility that he would have to leave the State should his father, the first named applicant, be deported. Reference was made to this Court's judgment in **A.O. & D.L. v Minister for Justice** [2003] 1 I.R. 1. Rights of the Irish born child as referred to in judgments of that case were listed as also having been taken into account in the examination. Reference was made to article 8 of the European Convention on Human Rights (ECHR) and to the differing conclusions reached by Hardiman J. and Fennelly J. in **A.O. & D.L. v Minister for Justice**, and to the fact that the Convention was considered by this Court in those cases.

Reference was made to the Government decision of 18th July, 2003, and to the overall policy of dealing with Irish born children, which made clear that individual consideration will be given to all cases involving Irish born children. It was stated that this consideration had been fulfilled in this case. It was accepted that the third named applicant was born in the State and is entitled to citizenship. It was stated in the report that all the papers in the first named applicant's file had been read and that consideration had been given to each of the criteria set down in s.3(6) of the Act of 1999.

The report concluded with a recommendation, as follows:-
"[The first named applicant's] case was considered under Section 5 of the Refugee Act, 1996, as amended, and under Section 3(6) of the Immigration Act 1999, as amended. Refoulement was not found to be an issue in this case. In addition, no issue arises under Section 4 of the Criminal Justice (UN Convention Against Torture) Act, 2000. Therefore, on the basis of the foregoing, I recommend that the Minister, having also had regard to Section 3(1) of the European Convention on Human Rights Act, 2003, in making his decision, signs the deportation order in the file pocket opposite."

On the 29th September, 2005, an Assistant Principal Officer recommended that the Minister sign the deportation order in respect of the first named applicant.
The Minister signed the deportation order on 9th November, 2005. The deportation order was served with a letter dated 16th November, 2005. The letter stated, *inter alia*,

"The reasons for the Minister's decision are that you are a person whose refugee status has been refused and having had regard to the factors set out in section 3(6) of the Immigration Act, 1999 the Minister is satisfied that the interest of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweigh such features of your case as might tend to support your being granted leave to remain in this State."

15. Leave for Judicial Review of Deportation Order
By a consent order of the 3rd April, 2006, leave was granted to apply for judicial review seeking, *inter alia*, an order of *certiorari* quashing the deportation order dated the 9th November, 2005, in respect of the first named applicant.

16. The High Court - Grounds for Judicial Review
The applicants challenged the validity of the decision to deport the first named applicant on multiple grounds. The principal grounds were:-

1. The decision to deport was taken in breach of the third named applicant, the citizen child's rights under Article 40.3, and Article 41 of the Constitution in that
(i) it failed to give due consideration to the facts and factors relating to the personal rights, including the welfare rights, of the third named applicant; and
(ii) it failed to identify a grave and substantial reason for favouring deportation.
2. The decision to deport is in breach of the Minister's obligations under s.3 of the European Convention on Human Rights Act, 2003, as it was not taken in a manner compatible with the State's obligations under article 8 of the Convention.

Other grounds were also advanced, but the High Court considered the above issues initially.

17. On behalf of the Minister, Laurence Gradwell deposed belief that proper consideration of the first named applicant's representation made pursuant to the Act of 1999 was carried out. Documentation was exhibited which had been considered by the Minister in deciding to make a deportation order. It was deposed:-

"… That the position and status of the Third Named Applicant was considered in the examination of the First Applicant's file pursuant to Section 3 of the Immigration Act, 1999 and that there is no requirement to mention the Third Named Applicant in the arrangements letter sent to the First Named Applicant."

18. High Court Decision on deportation
The High Court considered the terms of s.3 of the Act of 1999, and the learned High Court judge held:-

"It is not in dispute that the discretion given to the [Minister] by s. 3 of the Act of 1999 is further constrained by the obligation to exercise that power, in a manner which is consistent with and not in breach of the constitutionally protected rights of persons affected by the order. It is further not in dispute that the power of the Minister is also constrained by the provisions of s. 3 of the European Convention on Human Rights Act 2003. It is proposed to consider each of these constraints separately."

Having considered the personal rights of the citizen child, the rights arising under s.3

of the European Convention Act, 2003, Irish case law and jurisprudence of the European Court of Human Rights, the learned High Court judge ordered that the applicants are entitled to an order of *certiorari* quashing the deportation order, in respect of the first named applicant, dated the 9th November, 2005.

19. <u>Grounds of Appeal on the deportation order</u>

The Minister has appealed from the order of the High Court quashing the deportation order. The relevant grounds stated in the Notice of Appeal are as follows:-

…

24. The learned High Court judge erred in law or in fact in the weight she attached to the rights of the Irish citizen child in the context of the [Minister's] responsibility in the formation, implementation and enforcement of the State's immigration policies and enforcement of its immigration laws;

25. The learned High Court judge erred in law or in fact by holding that the [Minister] was required to conduct an inquiry into the family circumstances of a proposed deportee beyond a consideration of the representations, documents and information submitted by the proposed deportee or already in the possession of the [Minister];

26. In particular, the learned High Court judge erred in law or in fact by holding that the[Minister] was required to inquire into and take into account the educational facilities and other conditions available to the Irish citizen child of a proposed deportee in the country of return in the event that that child was to accompany the proposed deportee;

27. The learned High Court judge erred in law or in fact in holding that in any case of the proposed deportation of a [foreign] national parent of an Irish citizen child, the [Minister] must carry out a detailed fact specific consideration of the child in relation to his age, current educational progress, development and opportunities within the State in the context of his family circumstances in the State as well as the educational and other relevant conditions and development opportunities that would be available for him in the country of return;

28. The learned High Court judge erred in law or in fact in holding that the [Minister] had not adequately considered the facts and circumstances concerning the applicants prior to making the deportation order;

29. The learned High Court judge erred in law or in fact in holding that the [Minister] had not adequately considered the third named applicant's rights prior to making the deportation order;

30. Furthermore, the learned High Court judge erred in law or in fact in failing to consider the departmental submission of the 28th and 29th September 2005 as a whole;

31. Further, or in the alternative, the learned High Court judge erred in law in holding that the [Minister] or his officers, prior to making a deportation order, must expressly record a consideration of the matters set out by the judge at pages 16-17 of her judgment, namely:

1. Whether or not the proposed decision will constitute an interference with the exercise of the applicants' or other family members' rights to respect for his or her private and family life.

2. Unless a conclusion is reached that the proposed decision will not constitute interference, as that term has been construed by the European Court of Human Rights, then:
i) Is the proposed decision being taken in accordance with law; and

ii) Does the proposed interference pursue a legitimate aim i.e. one of the matters specified in article 8.2

iii) Is the proposed interference necessary in a democratic society, i.e. is it in pursuit of a pressing social need and proportionate to the legitimate aim being pursued.

Issue of Proportionality
32. The learned High Court judge erred in law or in fact by holding that the [Minister] was required to carry out a decision-making process under which, prior to making a deportation order, he had to determine that the deportation was a reasonable and proportionate decision having regard to the personal rights of the Irish citizen child;

33. The learned High Court judge erred in law in holding that the [Minister] was required to demonstrate that deportation of the first and second named applicants was reasonable and proportionate by measuring the grave and substantial reason favouring deportation against the rights of the Irish citizen child;

Grounds relating to the European Convention

34. The learned High Court judge erred in law or in fact in holding that the [Minister] had failed to consider whether or not the deportation of the [first named applicant] would constitute interference with the applicants' family life or with the private life of the [third named applicant];

35. The learned High Court judge erred in law or in fact in holding that prima facie, the decision to deport the [first named applicant] was an interference with the right of the [third named applicant] to respect for his family or private life;

36. The learned High Court judge erred in law or in fact in holding that the [Minister's] decision to make the deportation order in respect of the [first named applicant] failed to identify any grave and substantial reason favouring his deportation;

37. The learned High Court judge erred in law or in fact in holding that the [Minister] had not considered the matters referred to in Article 8(2) of the European Convention on Human Rights either adequately or at all.
Thus the grounds of appeal raise several specific issues: the nature of the consideration required to be made by the Minister of the facts relevant to the rights of the citizen child; the type of consideration to be given to issues relating to the child including the education of the child in the State and in a prospective other country; the type of inquiry which is required of the Minister; the identification of a reason for the

deportation; whether the Minister should record specific considerations prior to making deportation orders; the issue of proportionality; and the European Convention on Human Rights

20. The Law and the Constitution

The law relevant to this appeal includes the Constitution of Ireland, statutory law, and the European Convention on Human Rights.

20.1 Statutory Law

The relevant statutory law on deportation referable to this case is to be found in s.3 of the Immigration Act, 1999, which provides:-

"**3.**—(1) Subject to the provisions of section 5 (prohibition of refoulement) of the Refugee Act, 1996 , 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.

… … …

(3) (*a*) Subject to subsection (5), where the Minister proposes to make a deportation order, he or she shall notify the person concerned in writing of his or her proposal and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language that he or she understands.

(b) A person who has been notified of a proposal under paragraph (a) may, within 15 working days of the sending of the notification, make representations in writing to the Minister and the Minister shall—

(i) before deciding the matter, take into consideration any representations duly made to him or her under this paragraph in relation to the proposal, and

(ii) notify the person in writing of his or her decision and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language that the person understands.

(4) A notification of a proposal of the Minister under subsection (3) shall include—

(*a*) a statement that the person concerned may make representations in writing to the Minister within 15 working days of the sending to him or her of the notification,

(*b*) a statement that the person may leave the State before the Minister decides the matter and shall require the person to so inform the Minister in writing and to furnish the Minister with information concerning his or her arrangements for leaving,

(*c*) a statement that the person may consent to the making of the deportation order within 15 working days of the sending to him or her of the notification and that the Minister shall thereupon arrange for the removal of the person from the State as soon as practicable, and

(*d*) any other information which the Minister considers appropriate in the circumstances.

(5) The provisions of subsection (3) shall not apply to—

(*a*) a person who has consented in writing to the making of a deportation order and the Minister is satisfied that he or she understands the consequences of such consent,

(*b*) a person to whom paragraph (c), (d) or (e) of subsection (2) applies, or

(*c*) a person who is outside the State.

(6) In determining whether to make a deportation order in relation to a person, the Minister shall have regard to—

(*a*) the age of the person;

(*b*) the duration of residence in the State of the person;

(*c*) the family and domestic circumstances of the person;

(*d*) the nature of the person's connection with the State, if any;

(*e*) the employment (including self-employment) record of the person;

(*f*) the employment (including self-employment) prospects of the person;

(*g*) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);

(*h*) humanitarian considerations;

(*i*) any representations duly made by or on behalf of the person;

(*j*) the common good; and

(*k*) considerations of national security and public policy,

so far as they appear or are known to the Minister.

(7) A deportation order shall be in the form prescribed or in a form in the like effect.

… … …

(11) The Minister may by order amend or revoke an order made under this section including an order under this subsection.

… … …"

20.2 <u>Constitution</u>
Article 40.3.1 of the Constitution of Ireland provides for the personal rights of citizens, which includes the third named applicant. It states:-
"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."

These rights include unspecified personal rights: **Ryan v. The Attorney General** [1965] IR 294. A non-exhaustive list of such personal rights embraces the right to live in the State, the right to privacy, the right to travel, the right to bodily integrity, the right to freedom from torture or inhuman or degrading treatment, the right to earn a livelihood, and the right of access to the courts.

Also relevant is Article 41 of the Constitution, which protects the family. It provides:

"1.1 The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

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."

In addition, while the third named applicant is a citizen to whom all the rights established by the Constitution apply, the first and second applicants, even though they are foreign nationals, are entitled to protection under the Constitution. As stated by this Court in **The Illegal Immigrants (Trafficking) Bill 1999** [2000] 2 IR 360, at p.410:-

"… a person who is not entitled to be in the State cannot enjoy Constitutional rights which are co-extensive with the Constitutional rights of citizens and persons lawfully residing in the State. There would however, be a constitutional obligation to uphold the human rights of the person affected which are recognised, expressly or by implication, by the Constitution, although they are not co-extensive with the citizen's Constitutional rights."

20.3 European Convention on Human Rights
Article 8 of the European Convention on Human Rights provides:-

"Right to respect for private and family life.
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."

The Convention was introduced into domestic law by the European Convention on Human Rights Act, 2003, s.3(1) of which provides:-
"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."

This imposes an obligation on the Minster to exercise his discretion in a manner compatible with the Convention provisions.

The Court was referred to cases of the European Court of Human Rights and of Ireland. Reference was made to **Cirpaci v Minister for Justice** [2005] 2 I.L.R.M. 547 where Fennelly J. at p.549 pointed out that:
"The legitimate interest of the State in the control of immigration frequently conflicts with claims of migrants based on family reunification. This has been recognised for more than twenty years by the European Court of Human Rights."

In that case a marriage took place in Romania between an Irish citizen wife and a Romanian citizen husband just over three months after the deportation of the husband from the State. The Minister refused to revoke his deportation order so as to enable the parties live together in the State, which decision was upheld by the High Court and this Court.

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

"From these decisions I have drawn the following conclusions as to the approach of the Commission and the European Court of Human Rights to the potential conflict between the respect for family life and the enforcement of immigration controls: (1) A State has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations. (2) Article 8 does not impose on a State any general obligation to respect the choice of residence of a married couple. (3) Removal or exclusion of one family member from a State where other members of the family are lawfully resident will not necessarily infringe art 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."

The above summary is addressed primarily to the issue of family reunification, whereas this case is centred on the issue of the Irish born child's rights, but the principles overlap and are helpful to the analysis.

At all times the State retains the right to control immigration. Thus in **Abdulaziz, Cabales and Balkandali v. United Kingdom** [1989] 7 EHRR 471 the European Court of Human Rights stated, at p.497:-

"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"
The approach of the European Court of Human Rights may also be seen in

Poku v. United Kingdom (1996) 22 E.H.R.R. C.D. 94, where it was noted at p.97:-

"However, the Commission notes that the State's obligation to admit to its territory aliens who are relatives of persons resident there will vary according to the circumstances of the case. The Court has held that Article 8 does not impose a general obligation on states to respect the choice of residence of a married couple or to accept the non-national spouse for settlement in that country (**Abdulaziz, Cabales and Balkandali** [1989] 7 E.H.R.R. 471, 497-498, para 68). The Commission considers that this applies to situations where members of a family, other than spouses, are non-nationals. Whether removal or exclusion of a family member from a Contracting States [sic] is incompatible with the requirements of article 8 will depend on a number of factors: the extent to which family life is effectively ruptured, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e.g. history of breaches of immigration law) or considerations of public order (e.g. serious or persistent offences) weighing in favour of exclusion."
Having considered the facts of that case, the Commission found that there were no elements concerning respect for family or private life which outweighed the valid considerations relating to the proper enforcement of immigration controls. It concluded that the removal did not disclose a lack of respect for the applicants' right to family or private life under article 3.

The connection between parent and child was a relevant fact in **Berrehab v. The Netherlands** (1989) 11 EHRR 322. In that case a Moroccan national was refused permission to reside in The Netherlands after his divorce from his Dutch wife. He and his daughter (who was represented by her mother) applied to the European Court alleging breach of article 8. The very close ties between father and daughter were noted by the court, and an expulsion of the father threatened to break those ties. It was held that in those circumstances a proper balance was not achieved between the interests of the State, which were limited to 'the economic well-being of the country', and respect for family life. It was held the expulsion was not 'necessary in a democratic society' and that it was a breach of article 8.

This Court was referred to many other cases of the European Court, including **Boujlifa v. France** [2000] 30 EHRR 419 which related to a Moroccan who arrived in France at the age of 5 and whose parents and 8 eight brothers and sisters were lawfully resident in France, but who had been convicted of two criminal offences and on whom an order of deportation was made. The E.C.H.R. reiterated that it was for the contracting states to maintain public order, in particular by exercising their right, as well established in international law and subject to treaty obligations, to control the entry and residence of aliens. To that end they have the power to deport aliens convicted of criminal offences. However, their decisions in this field must, insofar as they may interfere with a right protected under article 8(1), be necessary in a democratic society, that is to say, justified by a pressing social need, and, in particular, proportionate to the legitimate aim pursued. It is a question of striking a fair balance between the relevant interest, namely the applicant's right to respect for his private

and family life, on the one hand, and the prevention of disorder or crime, on the other. The Court held, by six votes to three, that there had been no breach of the Convention in the making of the deportation order.

Thus it is a matter of striking a fair balance in each case. In this case the balance sought is between the first, second and third named applicants' rights to respect for private and family rights, on the one hand, with particular reference to the rights of the Irish born child, and the public policy issues of the State on the other, as being necessary in a democratic society, justified by a pressing social or other public need, proportionate to the legitimate aim pursued.

21. Decision

I would dismiss the appeal of the Minister on this second issue and affirm the decision of the learned High Court judge to quash the deportation order made by the Minister, under the Act of 1999. My reasons are set out in this judgment.

The High Court stated:-

"It is not in dispute that the discretion given to [the Minister] by s. 3 of the Act of 1999 is further constrained by the obligation to exercise that power, in a manner which is consistent with and not in breach of the constitutionally protected rights of persons affected by the order. It is further not in dispute that the power of the Minister is also constrained by the provisions of s. 3 of the European Convention on Human Rights Act 2003."

I agree with the learned High Court judge, and would affirm this approach.

22. Personal Constitutional rights of the citizen child

The High Court identified personal rights of an Irish citizen child, within Article 40.3.1 of the Constitution, which the Minister was obliged to have regard to as:
"1. The right to live in the State.

2. The right to be reared and educated with due regard to his/her welfare including a right to have his/her welfare considered in the sense of what is in his/her best interests in decisions affecting him/her.

3. Where as in the case of the applicants herein the parents are married to each other the rights which as an individual, the child derives from being a member of a family within the meaning of Article 41."

I would affirm this non-exhaustive list of rights. However, the rights are not absolute, they have to be weighed and balanced in all the circumstances of the case.
The High Court referred to the judgment of this Court in **A.O. & D.L. v Minister for Justice** [2003] 1 I.R. 1, and stated that the Minister is bound to make his decision in accordance with these judgments. It was noted that the obligations were set out in differing ways in the judgments of the Court. While **A.O. & D.L. v Minister for Justice** is an important precedent, and is relevant, it must be considered in light of the facts of that case. The decision in this case is made on its own factual matrix.

Having considered judgments in **A.O. & D.L. v Minister for Justice**, in the context of Article 40.3.1 and the personal rights of the citizen, the High Court held that if the Minster was to take a decision to deport the parent of an Irish born citizen child which is consistent with the State guarantee in Article 40.3.1 'to respect' and 'as far as practicable … to defend and vindicate' the personal rights of the citizen child that the decision making process must include the following elements:-

"(i) It must consider the facts relevant to the personal rights of the citizen child protected by Article 40.3 of the Constitution, if necessary by an appropriate enquiry in a fair and proper manner; and
(ii) It must identify the grave and substantial reason at the relevant time, which requires the deportation of the non-national parent of the Irish citizen; and
(iii) It must demonstrate that the [Minister] considers deportation, having regard to each of the above, to be a reasonable and proportionate decision."

I would agree and affirm paragraph (i) above, though perhaps state it now in slightly different words:

"(i) It must consider the facts relevant to the personal rights of the citizen child protected by Article 40.3 of the Constitution, if necessary by due enquiry in a fair and proper manner."

As to paragraph (ii), I am satisfied that the decision making process should identify a substantial reason which requires the deportation of a foreign national parent of an Irish born citizen. The test is whether a substantial reason has been identified requiring a deportation order. The term 'grave' is tautologous, and while it reflects the serious nature of a 'substantial' reason, it is not an additional factor to 'substantial', and there is the danger that it could be so construed.

As to (iii), the Minister is required to make a reasonable and proportionate decision.

23. Facts relating to a citizen child
The High Court stated that the only submission of principle made on behalf of the Minister as to the facts in relation to the citizen child and his family, which he was obliged to take into account in deciding whether or not to make a deportation order, was that those matters must be determined in accordance with the representations, if any, made to the Minister, by or on behalf of the proposed deportee under s.3(3) of the Act of 1999. The High Court held that where, as in this case, the proposed deportee is the parent of a citizen child, that it would not be consistent with the obligations of the child under Article 40.3 to limit the Minister's obligation to have regard to those facts set out by the parent or parents under s.3(3) of the Act of 1999. I shall return to this matter later in the judgment.

24. Dispute
The real dispute between the parties is as to the nature of the consideration to be made by the Minister of facts relevant to the citizen child. That is at the core of this case.

25. Nature of consideration
The High Court held:-

"It is difficult to state in the abstract in clear terms the nature of the consideration which must be given by [the Minister], to the facts relevant to the rights of the citizen child to live in the state and to be educated and reared with due regard for its welfare and have its welfare, including what is in its best interest, taken into account in the decision making. It will always depend to some extent upon the factual circumstances of the citizen child and his parent or parents in the State."

I would affirm this analysis. There can be no exclusive list of factors for the Minister to consider. Each case should be determined on its own circumstances in accordance with law.

26. Specific educational and other factors

The High Court went on to hold that the consideration must:-

"(i) Be fact specific to the individual child in relation to his age, current educational progress, development and opportunities within the State in the context of his family circumstances in the State; and
(ii) It must include some factual consideration of the educational and other relevant conditions and development opportunities available for the citizen child in the country to which his parents are being deported."

The High Court continued:-

"As a matter of common sense, unless the factual matters considered are such as to give the [Minister] an understanding, of what in reality in most cases will be the lesser educational and other development opportunities for the citizen child in the country to which his parents are being deported, how can the [Minister] form a view (as appears to be required by the decision in **A.O & D.L. v. Minister for Justice**) that having regard to the identified grave and substantial reason and the child's constitutionally protected personal rights the decision to deport is proportional or reasonable."

I would affirm the decision that the consideration of the Minister should be fact specific to the individual child, his or her age, current educational progress, development and opportunities. This consideration relates not only to educational issues but also involves the consideration of the attachment of the child to the community, and other matters referred to in s.3 of the Act of 1999.

The extent of the consideration will depend on the facts of the case, including the age of the child, the length of time he or she has been in the State, and the part, if any, he or she has taken in the community. Thus, his or her education, and development within the State, within the context of his or her family circumstances, may be relevant. If the child has been in the State for many years, and in the school system for several years, and taken part in the community, then these and related facts may be very pertinent. However, if the child is an infant then such considerations will not arise.

However, I respectfully disagree with the learned High Court judge, and I believe the High Court erred, in holding that the Minister was required to inquire into and take into account the educational facilities and other conditions available to the Irish born child of a proposed deportee in the country of return, in the event that the child

accompany the deportee. I am satisfied that while the Minister should consider in a general fashion the situation in the country where the child's parent may be deported, it is not necessary to do a specific analysis of the educational and development opportunities that would be available to the child in the country of return. The Minister is not required to inquire in detail into the educational facilities of the country of the deportee. This general approach does not exclude a more detailed analysis in an exceptional case. The decision of the Minister is required to be proportionate and reasonable on the application as a whole, and not on the specific factor of comparative educational systems.

27. Convention Rights

The High Court stated that unlike the position in **A.O & D.L. v. Minister for Justice**, s.3 of the European Convention on Human Rights Act, 2003 applied to the decision of the Minister in this case. The High Court considered that this imposed similar but not identical obligations on the Minister when determining whether or not to deport the citizen child. The High Court held that the Minister is required to make his decision on deportation in a manner compatible to the Convention, and that rights of the applicants under article 8 of the Convention were relevant. I would affirm this approach.

The High Court referred to cases of this jurisdiction, the European Court of Human Rights, and to those of the United Kingdom. Relevant cases have been set out previously in this judgment. On the application of the European Convention on Human Rights Act, 2003 the High Court held:-

"The actual obligations imposed on the Minister by s. 3 of the Act of 2003 so as to act in a manner consistent with the State’s obligations under article 8 of the Convention, will depend upon the factual circumstances of the individuals and family concerned and the potential interference in the rights of the individual members of that family to respect for their private and family life.

Where, as on the facts of this application, there is an acceptance that the applicants enjoy a family and/or private life in the State so as to engage the rights to respect for private and family life under article 8(1) of the Convention, then the following appear to be the questions which must be addressed by a person, determining whether or not to recommend or make a deportation order under s. 3 of the Act of 1999.

1. Whether or not the proposed decision will constitute an interference with the exercise of the applicants’ or other family members’ rights to respect for his or her private and family life.
2. Unless a conclusion is reached that the proposed decision will not constitute an interference, as that term has been construed by the European Court of Human Rights then:

(i) Is the proposed decision being taken in accordance with law; and

(ii) Does the proposed interference pursue a legitimate aim i.e. one of the matters specified in article 8.2

(iii) Is the proposed interference necessary in a democratic society i.e. is it in pursuit of a pressing social need and proportionate to the legitimate aim being pursued."

I affirm the general approach proposed by the High Court. However, the issues and questions are interrelated and need not be addressed in such a micro specific format, as long as the general principles are applied to the circumstances of the case. In the exercise of his discretion the Minister is required to consider the Constitutional and the Convention rights of the parents and children and to refer specifically to factors he has considered relating to the position of any citizen children. The circumstances and factors will vary from case to case. The formal approach with specific questions as required by the High Court is not necessary, each case will depend on its own relevant facts.

28. Consideration of the first named applicant's situation

The recommendation of the Clerical Officer was the foundation of the Minister's decision. It was in the following terms:-

"[The first named applicant's] case was considered under Section 5 of the Refugee Act, 1996, as amended, and under Section 3(6) of the Immigration Act, 1999, as amended. Refoulement was not found to be an issue in this case. In addition, no issue arises under Section 4 of the Criminal Justice (UN Convention Against Torture) Act, 2000. Therefore, on the basis of the foregoing, I recommend that the Minister, having also had regard to Section 3(1) of the European Convention on Human Rights Act, 2003, in making his decision, signs the deportation order in the file pocket opposite."

This recommendation was based on the prior analysis in the department, and was considered by the Minister.

A submission was made that the decision fails to identify any 'grave and substantial' reason favouring deportation of the first named applicant. The High Court concluded that this objection had been made out. The only reasons given were:-

"Refoulement was not found to be an issue in this case. In addition, no issue arises under section 4 of the Criminal Justice (UN Convention Against Torture) Act, 2000".

The High Court held that these reasons were not the type of reasons contemplated in **A.O & D.L. v. Minister for Justice** as permitting the deportation of a parent with the consequence that the citizen child would probably have to leave the State, notwithstanding his right to reside in the State. For this reason alone the High Court concluded that the decision to deport the first named applicant was invalid and in breach of the third named applicant's rights under Article 40.3 of the Constitution and that the applicants were entitled to an order of *certiorari* of the decision to deport. As stated previously, I am satisfied that the appropriate test to apply is whether there is a substantial reason for deporting the first named applicant. However, I would affirm the decision of the High Court, which would conclude the issue.

29. Other Issues

However, the High Court also considered other issues which had been raised, as the case, on the High Court order, would be remitted for further consideration by the Minister.

The High Court considered that there was no adequate consideration by the Minister of the facts and factors affecting the citizen child and his family in relation to his personal rights. The High Court held that a "cursory analysis" would not constitute the type of consideration required under **A.O & D.L. v. Minister for Justice**.

The High Court held that the examination by the Minister did not contain considerations relevant to the welfare of the citizen child on the probable impact of the proposed decision to deport on such rights.

"Accordingly I have also concluded that the consideration undertaken by or on behalf of the Minister prior to making the decision to deport, was also in breach of the third named applicant's rights as a citizen of Ireland protected by Article 40.3 of the Constitution, in that it fails to consider relevant facts relating to the personal rights of the citizen child, Prince Roniel Oguekwe protected by Article 40.3 of the Constitution."

The High Court held, further:-

"I have separately concluded that the decision taken was invalid as it was in breach of the Minister's obligation under s. 3 of the European Human Rights Act 2003. (sic) The consideration given in the examination on file contains no substantive consideration of the questions which are required to be addressed, in accordance with article 8 of the Convention as set out above. Whilst the decision contains a reference to article 8, it is only in the context of an analysis of what is perceived by the Clerical Officer as having been determined by the Supreme Court in relation to the application of that article in the decision in *A.O. and D.L. v. Minister for Justice*."

In analysing the situation the High Court held:-

"This *prima facie* position does not of course mean that a decision to deport the first named applicant will necessarily be in breach of article 8 of the Convention. It does however mean that the applicants have discharged the onus of establishing that the [Minister] was obliged by article 8 of the Convention to consider and determine the questions set out earlier in this judgment if the decision is to be justified under article 8(2). Those questions were not addressed in the examination on file and accordingly the decision taken must be considered to be in breach of the citizen child's right to respect for his private /or family life under article 8 and the [Minister] in breach of s. 3 of the Act of 2003."

The High Court also noted that:-

"I have separately analysed the [Minister's] obligations having regard to the constitutional rights of the citizen child and those guaranteed by article 8 of the Convention by reason of the submissions made. However I do not wish to be taken as deciding that in practice that those separate obligations necessarily require separate and distinct consideration by the [Minister]. There is considerable overlap between the matters which are required to be considered and determined under each set of obligations such that the [Minister] and his officials could devise a decision making approach which would comply with both sets of requirements."

Consequently the High Court held that the applicants were entitled to an order of *certiorari* quashing the deportation order in respect of the first named applicant dated the 9th November, 2005.

30. Affirm

I would affirm the decision of the High Court as to the order for deportation. However, my reasons are, in part, as referred to herein, different to those of the learned High Court judge.

31. Relevant Matters

I set out a non exhaustive list of matters which may assist, and which relate to, the position of an Irish born child whose parents may be considered for a deportation order. Bearing in mind the Constitution, the Convention, the statutory law and the case law, I am satisfied that the following, while not an exhaustive list, includes matters relevant for consideration by the Minister when making a decision as to deportation under s.3 of the Act of 1999 of a parent of an Irish born citizen child.

1. The Minister should consider the circumstances of each case by due inquiry in a fair and proper manner as to the facts and factors affecting the family.
2. Save for exceptional cases, the Minister is not required to inquire into matters other than those which have been sent to him by and on behalf of applicants and which are on the file of the department. The Minister is not required to inquire outside the documents furnished by and on behalf of the applicant, except in exceptional circumstances.
3. In a case such as this, where the father of an Irish born child citizen, the mother (who has been given residency), and the Irish born citizen child are applicants, the relevant factual matrix includes the facts relating to the personal rights of the Irish born citizen child, and of the family unit.
4. The facts to be considered include those expressly referred to in the relevant statutory scheme, which in this case is the Act of 1999, being:-
(a) the age of the person/s;
(b) the duration of residence in the State of the person/s;
(c) the family and domestic circumstances of the person/s;
(d) the nature of the person's/persons' connection with the State if any;
(e) the employment (including self-employment) record of the person/s;
(f) the employment (including self-employment) prospects of the person/s;
(g) the character and conduct of the person/persons both within and (where relevant and ascertainable) outside the State (including any criminal convictions);
(h) humanitarian considerations;
(i) any representations duly made by or on behalf of the person/persons;
(j) the common good; and
(k) considerations of national security and public policy;

so far as they appear or are known to the Minister.
5. The Minister should consider the potential interference with rights of the applicants. This will include consideration of the nature and history of the family unit.
6. The Minister should consider expressly the Constitutional rights, including the personal rights, of the Irish born child. These rights include the right of the Irish born child to:-
(a) reside in the State,

(b) be reared and educated with due regard to his welfare,
(c) the society, care and company of his parents, and
(d) protection of the family, pursuant to Article 41.

The Minister should deal expressly with the rights of the child in any decision. Specific reference to the position of an Irish born child of a foreign national parent is required in decisions and documents relating to any decision to deport such foreign national parent.

7. The Minister should also consider the Convention rights of the applicants, including those of the Irish born child. These rights overlap to some extent and may be considered together with the Constitutional rights.

8. Neither Constitutional nor Convention rights of the applicants are absolute. They require to be considered in the context of the factual matrix of the case.

9. The Minister is not obliged to respect the choice of residence of a married couple.

10. The State's rights require also to be considered. The State has the right to control the entry, presence, and exit of foreign nationals, subject to the Constitution and international agreements. Thus the State may consider issues of national security, public policy, the integrity of the Immigration Scheme, its consistency and fairness to persons and to the State. Fundamentally, also, the Minister should consider the common good, embracing both statutory and Constitutional principles, and the principles of the Convention in the European context.

11. The Minister should weigh the factors and principles in a fair and just manner to achieve a reasonable and proportionate decision. While the Irish born child has the right to reside in the State, there may be a substantial reason, associated with the common good, for the Minister to make an order to deport a foreign national who is a parent of an Irish born child, even though the necessary consequence is that in order to remain a family unit the Irish born child must leave the State. However, the decision should not be disproportionate to the ends sought to be achieved.

12. The Minister should consider whether in all the circumstances of the case there is a substantial reason associated with the common good which requires the deportation of the foreign national parent.
In such circumstances the Minister should take into consideration the personal circumstances of the Irish born child and the foreign national parents, including, in this case, whether it would be reasonable to expect family members to follow the first named applicant to Nigeria.

13. The Minister should be satisfied that there is a substantial reason for deporting a foreign national parent, that the deportation is not disproportionate to the ends sought to be achieved, and that the order of deportation is a necessary measure for the purpose of achieving the common good.

14. The Minister should also take into account the common good and policy considerations which would lead to similar decisions in other cases.

15. There should be a substantial reason given for making an order of deportation of a parent of an Irish born child.

16. On judicial review of a decision of the Minister to make an order of deportation, the Court does not exercise and substitute its own discretion. The Court reviews the decision of the Minister to determine whether it is permitted by law, the Constitution, and the Convention.

32. <u>Conclusion</u>

On the first issue, the decision of the Minister made under the IBC 05 Scheme, for the reasons given, I would allow the appeal of the Minister, and reverse the decision of the High Court. The criteria of the IBC 05 Scheme included a requirement of continuous residence and the Minister was acting within the parameters of the Scheme in refusing residence to the first named applicant on that basis. The Constitutional and Convention rights of the applicants remained to be considered.

On the second issue, that is the decision of the Minister to make a deportation order under s.3 of the Immigration Act 1999, as amended, for the reasons given, I would dismiss the appeal. The Minister is required in this process to consider the Constitutional and Convention rights of the applicants. This includes express consideration of, and a reasoned decision on, the rights of the Irish citizen child. This was not done. Thus I would affirm the decision of the High Court quashing the deportation order in respect of the first named applicant dated the 9th November, 2005.