THE SUPREME COURT

Keane C.J.
Denham J.
Murray J.
McGuinness J.
Hardiman J.
Geoghegan J.
Fennelly J.

109/02 & 108/02

BETWEEN

D.L, J.L, A.L, (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, D.L.), L.L. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, D.L.) J.L. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, D.L.) AND K.L, (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, J.L.)

APPLICANTS/APPELLANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT/RESPONDENT

BETWEEN

A.O. AND O.J.O. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, F.O.)

APPLICANTS/APPELLANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT/RESPONDENT

JUDGMENT delivered the 23rd day of January 2003, by Keane C.J.

Introduction

The facts in these two cases, which were heard together in the High Court and this court, are not in dispute.

The first and second named applicants in the first case (hereafter "Mr. & Mrs. L") arrived in the State on March 31st 2001 with their three children. All of them are nationals of the Czech Republic. At the time of her arrival, Mrs. L was pregnant. An application having been made for asylum in this State, the applicants were informed by letter dated 24th July 2001 that a decision had been reached in accordance with Article 8 of Dublin Convention to transfer their application for asylum to the United Kingdom. An appeal was brought to the Refugee Appeals Tribunal from that decision and was rejected on the 29th August, 2001. Representations having been made by a solicitor on their behalf to the respondent (hereafter "the Minister") that Mr. and Mrs. L and their children should not be deported because the applicant was in an advanced state of pregnancy, severely anaemic and unable to travel, they were informed on the 3rd October 2001 that they were required to present themselves to the gardaí on the 4th October 2001 to make arrangements for their removal from the State.

The present proceedings were begun on October 5th 2001. The sixth named applicant was born on the 2nd November 2001 in Galway. The proceedings were then adjourned in order to enable the applicants to make submissions to the Minister as to why the remaining applicants should not be deported in the light of the birth of the sixth named applicant in the State. By letter dated 20th December, they were informed that the Minister had decided to refuse the application for the reasons set out in a memorandum by Mr. John Lohan, a Principal Officer in the Immigration Division of his department dated the 19th December (hereafter "the Lohan Memorandum").

While it will be necessary to refer in more detail to that document at a later stage, it is sufficient at this point to say that the reasons given in the memorandum for recommending that the application be refused were:-

> *"- the length of time the family had been in the State – only nine months,*
>
> *- the L. family and K. L. can adapt to the family's return to the United Kingdom and the Czech Republic and that their lives or well being would not be endangered,*
>
> *- the application of the Dublin Convention to which Ireland is a party,*

- *the overriding need to preserve respect for and the integrity of the asylum and immigration systems."*

The first named applicant and the next friend in the second case are Nigerian nationals who arrived in the State with their daughter, E., on May 6th 2001. The first named applicant made an application for refugee status on May 15th in which he denied having resided in any country other than Nigeria or having claimed asylum in any country other than Ireland. This was not, in fact, the case: he had entered the United Kingdom on September 15th 1999 and sought asylum there on September 23rd 1999, which claim was refused on March 17th 2001. That refusal was not appealed.

The first named applicant arrived in Ireland approximately three weeks after having been refused asylum in the United Kingdom. Thereupon the staff of the Refugee Appeals Commissioner requested the authorities in the United Kingdom to receive the first named applicant and the next friend and their daughter in the United Kingdom in accordance with the provisions of the Dublin Convention, which those authorities agreed to do. The first named applicant having been notified of this, appealed the decision which was considered by the Refugee Appeals Tribunal and rejected by them on August 29th 2001. A deportation order was then made in respect of the first named applicant

and, by letter dated October 2nd 2001, he was informed of that fact and asked to present himself to make arrangements for his removal from the country.

On October 4th 2001, the next friend gave birth to the second named applicant in Castlebar. These proceedings were issued on the 5th October 2001 and were adjourned in order to enable a similar application to be made to the Minister as was made in the first case. That application was refused by the Minister on the 19th December 2001, again on the basis of the memorandum prepared by Mr. Lohan. The reasons given for recommending that the application be refused were identical to those given in the first case, save that there was no reason corresponding to the second reason given in the first case.

In the case of Mr. and Mrs. L.'s application, the Lohan memorandum said that, in view of the fact that the deportation of the family could result in the removal of the minor applicant from the state in circumstances which could be interpreted as "a constructive deportation", the Minister should weigh up the rights of that Irish citizen against the needs of the common good. It said it was accepted that he was an Irish citizen and "may have rights to reside in the State". It also said that it would appear that the minor applicant had the protection of the

Constitution in terms of guaranteeing him the right to the company, care and parentage of family/ parents. The memorandum went on

> "*However, against those factors are the need for the Minister to preserve the integrity of and respect for the State's asylum and immigration laws. The L. family have not been in the State for a lengthy period – they arrived in March 2001, a period of nine months. They applied for asylum in the State even though [the applicants other than the minor applicant] had already applied for asylum in the UK. That asylum claim in the UK was refused".*

Having referred to the fact that the State's right to expel or deport non-nationals was regarded as an aspect of the common good "related to the definition, recognition and protection of the boundaries of the State", the memorandum went on to state again that the maintenance and integrity of the immigration and asylum systems was a factor which the Minister was entitled to have regard to in this case. The memorandum continued

> *"In this context, the Minister is entitled to take into account the manner in which the family entered the State. The fact that the actions of the applicants in the proceedings are designed to circumvent the operation of the Dublin*

> *Convention, to which the State is a party, and to which it is the policy to apply the provisions, (sic) is a factor which the Minister should take into account."*

Having said that the deportation orders should not be revoked, but should be enforced, the memorandum stated that

> "*It should be presumed that the applicants will preserve the family unit on enforcement of the orders by taking [the minor applicant] with them, thereby preserving his right to the care and protection of his family as per article 41 of the Constitution."*

The memorandum then went on to set out the reasons for the recommendations, which have already been quoted. A similar approach was adopted in the second case.

The proceedings, as originally instituted in the second case and as amended following the birth of the fifth named applicant in the first case, took the form of an application for leave to apply by way of judicial review for *inter alia* an order quashing the deportation order on the ground that the fifth named applicant in the first case and the second named applicant in the second case were minors and citizens of Ireland

who were entitled to the company, care and parentage of their parents and siblings in the State, and that, in the result, the Minister was not entitled to deport the other members of his family. In addition, declarations were claimed that the Dublin Convention (Implementation) Order 2000 SI 343/2000 was *ultra vires* the Refugee Act 1996 as amended, but that challenge was not pursued in the appeal to this court.

By agreement, the application for leave to apply for judicial review was treated in the High Court as the application for judicial review itself. It was heard by Mr. Justice T.C. Smyth and on the 8th April 2002 he delivered judgment in both cases rejecting the applicants' claim. From his judgment and order, an appeal has now been brought to this court and, in view of the fact that a number of other cases in which the same issues arise are pending in the High Court, the appeal was given an expedited hearing in this court.

The Judgment in the High Court

In his judgment, the learned High Court judge summarised the contention on behalf of the applicants in both cases as being that they were a family recognised by the Constitution by virtue of one of them being a citizen of Ireland and that, as such a family, they enjoyed the rights acknowledged by the Constitution to exist in the case of the family

and were entitled to the benefit of the guarantee in the Constitution by the State to protect and vindicate such rights. That guarantee, it was urged, would be meaningless if the State could deport the parents of Irish citizens who were still minors.

In considering that contention and the response on behalf of the Minister, the trial judge referred to the provisions of the Constitution concerning the family and a number of authorities of this court in which they had been considered. He then went on to consider in more detail the decision of the High Court and this court in **Fajujonu –v- Minister for Justice** [1990] 2IR 151. That case was also a case in which the rights of non- national parents and their children to continue to reside in the State, where three of the children had been born in Ireland and were in the result Irish citizens, were considered. He concluded, however, that **Fajujonu** was distinguishable from the instant cases, in that the family in that case had been resident in the State for what Finlay CJ described as "an appreciable time" and that in the instant cases, unlike **Fajujonu,** there was evidence of careful consideration having been given to whether the factors referred to in the Lohan Memorandum were of such a nature that the Minister was entitled to hold that they outweighed the constitutional rights of the Irish born children.

The trial judge was satisfied as a result that the Minister in both cases was entitled as a matter of law to reach the conclusion that he did and to make the deportation orders in question.

Submission of the Parties

On behalf of the applicants, Mr. Gerard Hogan SC submitted that the fifth named applicant in the first case and the second named applicant in the second case (hereafter "the minor applicants") had an unqualified right to reside in the State. That right arose by virtue of, and was protected by, Articles 2, 9, 40.1 and 40.3 of the Constitution. It was a fundamental, absolute and imprescriptible right of citizenship and it followed that, as Walsh J had observed in **Fajujonu,** citizens of the State, including the minor applicants, could not be deported.

Mr. Hogan further submitted that the minor applicants also had the right to the care and company of its parents in the State if, in the case of children of tender years, such a right was asserted on their behalf by its parents.

Mr. Hogan submitted that, while the minor applicants were citizens, they would be unable in practical terms to enjoy their right of residence in the State and their right to the care and company of the other

members of the family in the State, unless their parents were also resident in the State. The deportation of the other members of their family, in those circumstances, constituted an attack on the rights of minors as members of a family identified in the judgments in this court in **In Re: JH, an Infant, (1985)** IR 375 and **North Western Health Board –v- HW and CW** [2001] 3 IR 622.

Mr. Hogan further submitted that it had been authoritively decided by this court in **Fajujonu** that the parents of Irish citizens who were minors could only be themselves deported in exceptional circumstances associated with the common good. He urged that a general desire to maintain the integrity of the immigration system could not, on any view, constitute such a circumstance: there would have to be some specific factor associated with the parents concerned which could reasonably be regarded as rendering their continued presence in the State inimical to the common good, eg., the fact that they were likely to indulge in some criminal or anti-social activity. He said that this clearly emerged from the judgments of both Finlay CJ and Walsh J in that case: in the words of Finlay CJ it had to be a "grave and substantive reason associated with the common good."

As to the Dublin Convention, Mr. Hogan and Mr. Shipsey SC submitted that this could only be operated by the Minister in a manner which observed the rights of citizens acknowledged in the Constitution. In any event, it was not the case that the State was obliged by virtue of the convention to transfer the applicants, or any other person, to another convention country, although the State might well be obliged to accept the transfer of an individual from another convention country.

Mr. Hogan further submitted that the length of time for which the minor applicants or their parents had resided in the State could not be relevant for the purpose of determining whether they had the constitutional rights asserted on their behalf in the present proceedings. The reference by Finlay CJ in **Fajujonu** to the plaintiffs having resided for "an appreciable time" afforded no basis for the proposition that only citizens whose parents had resided in the State for an appreciable time were constitutionally entitled to reside there in the care and company of their parents. Any other view would lead to the startling and anomalous conclusion that an individual's rights of citizenship could be dependent, not on the fact of citizenship itself, but on the circumstances of other individuals.

On behalf of the Minister, Mr. Paul Gallagher SC accepted that the minor applicants were entitled to claim Irish citizenship. The issue which arose for determination in the High Court and this court was as to what extent the fact that a child is entitled to Irish citizenship necessarily confers an automatic right of residence in the State on the parents and siblings of that child.

Mr. Gallagher submitted that it was clearly established that the rights of individual citizens acknowledged by or conferred by the Constitution must, on occasions, yield to the requirements of the common good, which requirements were reflected in the fundamental right of the State itself to protect its boundaries, citing the decisions of the High Court in **Osheku –v- Ireland** [1986] IR 733 and **Pok Sun Shun –v- Ireland** [1986] ILRM 593 and of this court in **Laurentiu –v- Minister for Justice** [1999] 4IR 27 and **In Re Article 26 of the Constitution and the Illegal Immigrants (Trafficking) Bill, 1999** [2000] 2IR 360. He said that it was clear from the those decisions that the right of the State to deport non-nationals who had entered the State illegally and whose claim to be afforded asylum as refugees had been rejected was unaffected by the fact that their deportation might, in practical terms, have as its consequence the departure from the State of members of their family who were Irish citizens.

Mr. Gallagher further submitted that decision in **Fajujonu** was clearly distinguishable. In that case, the plaintiffs had been resident in the State for eight years at the time the case was heard in this court, during which time three children had been born to them, each of whom were Irish citizens. The judgments of Finlay CJ and Walsh J in this court all laid stress, he said, on the particular circumstances which had arisen in that case. The statutory context, moreover, in which the present cases fell to be decided, was entirely different: a corpus of law affecting immigrants and refugees had appeared on the statute book to which the Minister was obliged to have regard in reaching his decision.

Mr. Gallagher also submitted that the jurisprudence of the European Court of Human Rights was of no assistance to the applicants: it was clear that the cases decided by the Commission and the court clearly recognised that the family rights acknowledged by the European Convention of Human Rights and Fundamental Freedoms might, on occasions, have to yield to the right of the State to control the entry of non-nationals into its territory. He cited in support the decisions of the Commission in **Poku –v- United Kingdom** [1996] 22 EHRRCD 94 and of the English Court of Appeal in **The Queen (ex parte Mahmood) –v- Secretary of State for the Home Department** [2001] UKHRR 307.

Mr. Gallagher further submitted that the Minister was entitled, and indeed obliged, to take into account the obligations of the State under the Dublin Convention in determining whether to make the deportation orders now being challenged. The convention had been entered into by the states concerned to ensure that applicants for asylum were not referred successively from one member state to another without any acknowledgement by the member states of their competence to deal with the applications, resulting in the phenomenon sometimes called "refugees in orbit".

The Applicable Law

(a)The rights of the minor applicants as Irish citizens

Section 6 of the Nationality and Citizenship Act, 1956 provided as follows:

> *"(1) Every person born in Ireland is an Irish citizen from birth.*
>
> *(2) Every person is an Irish citizen if his father or mother was an Irish citizen at the time of that person's birth or becomes an Irish citizen under subsection (1) or would be an Irish citizen under that subsection if alive at the passing of this Act.*

(2) In the case of a person born before the passing of this Act, subsection (2) applies from the date of its passing. In every other case, it applies from birth.

(3) A person born before the passing of this Act whose father or mother is an Irish citizen, under subsection (2), or would be alive at its passing, shall be an Irish citizen from the date of its passing.

(4) Subsection (1) shall not confer Irish citizenship on the child of an alien who, at the time of the child's birth, is entitled to diplomatic immunity in the State."

This legislation was in force at the time when the minor applicants in these proceedings were born and is still in force. It is, accordingly, clear beyond argument, and accepted on behalf of the Minister, that they were and are Irish citizens and are entitled to whatever constitutional and legal rights flow from that status.

I am satisfied that, in these circumstances, Article 2 of the Constitution is of no relevance in these proceedings. As amended, it provides that

"It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to

be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage."

It is unnecessary, for the purposes of this case, to determine what the effect, in purely legal terms, is of the amendment thus effected to Article 2 of the Constitution. It is difficult to conceive of any legislation which, prior to its enactment, could have been validly enacted by the Oireachtas purporting to deprive persons who were already Irish citizens of their citizenship. It is sufficient to say that the minor applicants in this case are and were Irish citizens and their constitutional and legal rights as such citizens are no greater and no less than those enjoyed by all Irish citizens, whether born in Ireland or otherwise qualified in law to be Irish citizens, prior to the amendment of Article 2 of the Constitution.

Our law of nationality and citizenship, it will be seen, is based in part on what has been called the *jus soli,* a principle traditionally associated with common law countries under which nationality is based on birth within the state territory. . This is in contrast to the civil law countries where the *jus sanguinis*, based on descent from a national has

traditionally been of more significance. It is clear, however, that the two principles are not mutually exclusive and that the legal systems of some countries, including Ireland, incorporate both principles.[1]

Every citizen, including the minor applicants in the present case, enjoys, in general terms, the right not to be expelled from the State. It would seem, however, that, like so many other rights acknowledged by or conferred by the Constitution, this is not an absolute right. Irish citizens, as a matter of law, may be extradited to other countries to undergo trial on criminal charges where an extradition treaty exists between Ireland and the requesting country. The voluminous jurisprudence of recent decades on the topic of extradition gives no support to the proposition that the extradition by the State of its own citizens to other countries unconstitutionally abridges the right of those citizens to remain in the State. It is, however, clear and again accepted on behalf of the Minister that the State has no right to deport any Irish citizen, including the minor applicants in the present case.

In the case of adult citizens, it is, of course, a corollary of the right of citizenship that they are also entitled to, although not obliged to, reside in Ireland. The position of the minor applicants in the present case is,

[1] Brownlie, Principles of Public |International Law, 5th edtn, pp 391/2.

however, significantly different. At the time the claim was first made in these proceedings that they were entitled as a matter of legal right to reside in Ireland by virtue of their citizenship, they had only just been born. Infants of that age are incapable of making, still less articulating, any decisions as to where they will reside. The decision as to where they will reside will inevitably be taken by those in whose care they are at the relevant time, normally, of course, as in this case, their parents.

That consideration is of paramount importance when one is determining the nature of the rights claimed in this case on behalf of the minor applicants to have been infringed by the making of the deportation orders. Irish citizens who are adults, and not subject to any unusual constraints, can exercise a choice as to whether they will reside in Ireland or some other country. If, however, they are under a legal constraint which effectively prevents them from exercising that right – as where they are in prison – the right is, at best, one that is in abeyance. [2] The position of children of the age of the minor applicants is significantly weaker than that of adult citizens who are in prison or otherwise constrained from exercising a choice of residence, since the children have never been capable in law of exercising the right and in practical terms, as

[2] Thus, in Murray and Murray v Ireland (1991) ILRM, 465, the right of a married prisoner to beget children, although recognised by the court as an unenumerated right , was described by both Finlay CJ and McCarthy J as being suspended or in abeyance while they were in custody.

distinct from legal theory, it may reasonably be regarded as a right which does not vest in them until they reach an age at which they are capable of exercising it and, it may be, of asserting a choice of residence different from that which their parents would desire.

A constitutional right which the minor applicants in this case undoubtedly enjoy is the right to be in the care and company of the other members of their families, including their parents and siblings, and that right is not contested in these proceedings. What is in contest is whether they have the constitutional right to that care and company in the State in circumstances where their parents have no legal right to reside in the State and can lawfully be expelled from the State. If there were no authority to the contrary, I would have little difficulty in reaching a conclusion that children in the position of the minor applicants in this case have no automatic constitutional entitlement to the care and company of their parents in the State for an indefinite period into the future simply by virtue of their having been born in the State.

Thus, it would seem to me that it cannot be said, as a matter of law, that, in a case such as the present, the parents of the minor applicants can assert a choice to reside in the State on behalf of the minor applicants, even if that could be said to be in the interest of the minor applicants.

That presupposes that the minor applicants are, in law, entitled to choose where they reside. They are both factually and in law incapable of making such a choice and, if their parents were lawfully entitled to choose to reside in Ireland rather than in Nigeria or the Czech Republic - which they are not – the right of the minor citizens to reside with them in Ireland would derive, not from the fact that they are Irish citizens, but from their constitutional right to be in the care and custody of their parents.

I think it is helpful to consider in this context the approach adopted by Finlay P, as he then was, to the somewhat analogous right to travel as it affected young children in **The State (M) –v- The Attorney General** [1979] IR 73. In that case, an unmarried woman and citizen of Ireland who had given birth in Ireland to a female child in October 1977 wished to go to Nigeria. The father of the child was a Nigerian national and both he and the mother were in agreement that it would be in the best interests of their child if she were to go to Nigeria where her grandparents were willing to provide a home for her. The mother's application, however, for a passport enabling the child to travel to Nigeria for that purpose was refused by the Minister for Foreign Affairs and the learned President was satisfied that the reason for the refusal was that, if the passport were granted, the Minister considered that he would effectively be aiding and

abetting a breach of the adoption laws then in force. He went on to hold, however, that the right to travel outside the State was one of the unenumerated personal rights of the citizen guaranteed under Article 40 of the Constitution. The learned President continued as follows:-

> "*In the instant case, where I am dealing with a child who is under the age of one year and is, therefore, under the age of reason, such a personal right must be construed, in my view, in the same way as the courts have consistently construed the right of liberty of such child, that is to say, as being a right which can be exercised not by its own choice (which it is incapable of making) but by the choice of its parent, parents or legal guardian, subject always to the right of the courts in appropriate proceedings to deny that choice in the dominant interest of the welfare of the child. So construed, the right of travel constitutionally arising for this particular child on the existing legal provision for its welfare consists, in my view, of the right to travel with the approval or consent of its mother provided that such travelling, and the purpose of it, do not appear to conflict with the welfare of the child.*"

The learned President in that passage laid significant emphasis on the fact that the child in that case could not choose to travel to Nigeria. That fact, the constitutional right of her mother to travel to Nigeria and the absence of any challenge on the ground that it would not be in the welfare of the child to travel to Nigeria led him to the conclusion that the Minister had no right to frustrate the constitutional right of the mother to travel with her child to Nigeria by refusing to grant a passport to the child.

The contrast with the present case is clear. Not merely are the minor applicants incapable in law and in fact of choosing whether to reside in Ireland, Nigeria or the Czech Republic: their parents are incapable in law of choosing to reside in Ireland rather than the Czech Republic or Nigeria, a choice which would have as its necessary consequence the minor applicants residing in Ireland.

This view of the law – that adult non-nationals threatened with deportation cannot in general acquire a right to remain indefinitely in the State by purporting to decide on behalf of their minor children born within the State that they should reside in the State – has also been taken by the courts in the United States. Arguments to the contrary were rejected in **Perdido –v- Immigration and Naturalization Service**

[1969] US App. : (United States Court of Appeals for the Fifth Circuit);**Acosta –v- Gaffney** [1977] US App.: (United States Court of Appeals for the Third Circuit); and **Schleiffer –v- Meyers** [1981] US App. : United States Court of Appeals, for the Seventh Circuit).

In the second of these cases, two immigrants to the United States, who were natives and citizens of Colombia, and had been married in the United States, but had overstayed the period of their authorised visits, were the subject of deportation orders. The wife, who was pregnant at the time, was unable to travel, but following the birth of their daughter, the couple were found to be liable to deportation. They then applied for a stay of the deportation order asserting *inter alia* that its implementation would result in their daughter being unconstitutionally deprived of the equal protection of the laws which, it was said, was her right as a United States citizen. That claim succeeded in the District Court, but was rejected when an appeal was brought to the Court of Appeals for the Third Circuit. Delivering the opinion of the court, Judge Maris said:

> *"The constitutional right upon which [the daughter] relies, is somewhat broader than she describes it. It is the fundamental right of an American citizen to reside wherever he wishes, whether in the United States or abroad, and to engage in the consequent travel. (**See Schneider –v- Rusk**,*

> *377 US163; **Kent –v- Dulles**, 357 US116125). It is the right to exercise a choice of residence, not an obligation to remain in one's native country whether one so desires or not, as is required in some totalitarian countries. In the case of an infant below the age of discretion, the right is purely theoretical, however, since the infant is incapable of exercising it. As the Court of Appeals for the Fifth Circuit pointed out in **Perdido –v- Immigration and Naturalization Service,** a minor child who is fortuitously born here due to his parents' decision to reside in this country, has not exercised a deliberate decision to make this country his home, and Congress did not give such a child the ability to confer immigration benefits on his parents. It gave this privilege to those of our citizens who had themselves chosen to make this country their home and did not give the privilege to those minor children whose non-citizen parents make the real choice of family residence…."*

The learned judge went on to point out that, as had been observed in the **Perdido** case, an infant of tender years cannot make a conscious choice of residence, whether in the United States or elsewhere, and merely wishes, if he or she can be thought to have any choice, to be with

his or her parents. He said that, while it was true that the infant's parents could decide that it would be best for her to remain in the United States with foster parents, if such arrangements could be made, that would be the decision of the parents, involving the custody and care of their child, taken in their capacity as her parents, and not an election by the child herself to remain in the United States. He continued:

> "*The right of an American citizen to fix and change his residence is a continuing one which he enjoys through his life. Thus while today [the daughter], as an infant 22 months of age, doubtless desires merely to be where she can enjoy the care and affection of her parents, whether in the United States or Colombia, she will as she grows older and reaches years of discretion be entitled to decide for herself where she wants to live and as an American citizen she may then, if she so choose, return to the United States to live. Thus, her return to Colombia with her parents, if they decide to take her with them, as doubtless they will, will merely postpone, but not bar, her residence in the United States if she should ultimately choose to live here".*

I would also accept, unless I was constrained by binding Irish authority to hold otherwise, that the law is the same in this jurisdiction. In

particular, I would reject the proposition that the value of these decisions as persuasive precedents is significantly eroded by the absence of articles in the United States Constitution corresponding to those in our Constitution dealing with the rights of the family. Those rights are upheld by courts throughout the civilised world irrespective of whether they are embodied in written instruments and I see no reason to deny to courts in other jurisdictions an appreciation of the importance of children being in the care and company of their parents and siblings, unless the legitimate requirements of society, including the welfare of the children themselves, require otherwise.

Whether there is Irish authority which compels the court to hold in the present case that the parents were capable in law of asserting such a right on behalf of infants in the position of the minor applicants is another matter. It is true, however, that in **Fajujonu,** where three of the children of the plaintiff, who was a non-national, had been born in the State, Finlay CJ said:

> *"I am also satisfied that whereas the parents who are not citizens and who are aliens cannot, by reason of their having as members of their family children born in Ireland who are citizens, claim any constitutional right of a particular kind to remain in Ireland, they are entitled to assert a choice of*

residence on behalf of their infant children, in the interests of those infant children."

We were not invited by the Minister to overrule the decision of the Court in **Fajujonu.** Accordingly, if the dictum which I have just cited from the judgment of the learned Chief Justice formed part of the *ratio decidendi* of the decision in that case, this court would be obliged to give effect to it. As Geogehgan J points out in his judgment, it is not entirely clear that Finlay CJ was intending in that passage to indicate his assent to the proposition that the non-national parents of young children born within the State can, by their decision, confer on such children a constitutional right to remain in the State in the company of their parents and children. If that were the effect of the passage, then, for the reasons I have already given, I would, with the greatest respect, decline to follow it, if I were free to take that course. Whether the dictum did form part of the ratio in **Fajujonu** is a matter to which I shall return.

As I have already noted, the minor applicants enjoy the constitutional right to be in the care and company of the other members of their families, including their parents and siblings. The right was defined by Finlay CJ, speaking for this court in **In Re J.H., an infant.** as the right:-

"(a) to belong to a unit group possessing inalienable and imprescriptible rights antecedent and superior to all positive law(Article 41.s1);

(b) to protection by the State of the family to which it belongs,(Article 41.s2);

(c) to be educated by the family and to be provided by its parents with religious, moral, intellectual, physical and social education(Article 42.s1.)"

It was also said by Finlay CJ, giving the judgment of the court in **The Adoption No.2 Bill 1987** [1989] IR 656, that

"*the rights of a child who is a member of a family are not confined to those identified in Articles 41 and 42 but are also rights referred to in Article 40, 43 and 44."*

Those principles were the subject of further discussion and elaboration in the decision of this court in **North Western Health Board –v- H.W. and C.W.** Since it is properly acknowledged on behalf of the Minister that the minor applicants in this case enjoy these rights, it does not seem to me to be necessary to consider them in any greater detail. I would, however, reiterate that, in my view, these rights are universal and not the preserve of any particular legal system. The articles in question

reflect a philosophy which treats them as existing independently of the existence of civil society itself and as not being at the disposal of such societies.

(b) <u>The Right of the State to Control Immigration</u>

The inherent power of Ireland as a sovereign State to expel or deport non-nationals (formerly described in our statute law as "aliens") is beyond argument. In **<u>Pok Sun Shun –v- Ireland</u>**, Costello J, as he then was, said

> *"(the) State ..... must have very wide powers in the interest of the common good to control aliens, their entry into the State, their departure and their activities within the State."*

In **<u>Osheku –v- Ireland</u>** [1986] IR 733, Gannon J said at p. 746:-

> "*the control of aliens which is the purpose of the Aliens Act, 1935 is an aspect of the common good related to the definition, recognition and protection of the boundaries of the State. That it is in the interest of the common good of a State that it should have control of the entry of aliens, their departure and their activities and duration of stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State*

itself as well as fundamental rights of the individual citizen, and the protection of the former may involve restrictions in circumstances of necessity on the latter. The integrity of the State constituted as it is for the collective body of its citizens within the national territory must be defended and vindicated by the organs of the State and by the citizens so that there may be true social order within the territory and concord maintained with other nations in accordance with the objectives declared in the preamble to the Constitution."

This statement of the law by Gannon J was expressly approved of in this court in **Laurentiu –v- Minister for Justice**.

However, while the power to expel or deport non-nationals inheres in the State as a sovereign State, and not because it has been conferred on particular organs of the State by statute, it has, almost from the foundation of the State, been regulated by statute. In recent times, the relatively brief and draconian Aliens Act 1935 has been replaced by a new corpus of legislation which was a response by the Oireachtas to a number of new factors which had arisen: the greatly increased volume of immigration, the finding by the High Court, upheld on appeal by this Court, in **Laurentiu** that certain provisions in the Aliens Act 1935 had

not survived the enactment of the Constitution and the necessity for the State to meet its obligations under international conventions dealing with the giving of asylum to refugees i.e., under the Geneva Convention and the Dublin Convention. There now exists an elaborate statutory framework under which non-nationals, such as the applicants, are entitled to have their claims for asylum status given fair consideration, which embodies an appeal procedure to an independent tribunal and which preserves the right of the applicants to have the relevant decisions judicially reviewed in the High Court, albeit subject to particular provisions designed to ensure the more expeditious processing of such applications.

It was suggested on behalf of the applicants in this case that, as there was no evidence in the High Court as to the numbers of illegal immigrants or the numbers of persons at present, or in recent years, claiming asylum as refugees, neither the High Court nor this court was entitled to have any regard to the factual context in which the relevant legislation was enacted and administrative decisions taken in the implementation of that legislation. However, Mr. Lohan, in an affidavit sworn by him in these proceedings said that applications for asylum in the State had increased from 424 in 1995 to 10,924 in 2000.

Even if that evidence were not available to the High Court and this court, I would have no hesitation in rejecting that argument. It cannot be right that this court should approach this case on the assumption, totally at variance with the facts known to us, that conditions in Ireland are as they were in the 1980's when there was a relatively high level of unemployment, many Irish people were emigrating to seek work abroad and there were relatively few immigrants or persons seeking asylum as refugees. I think it would be wrong for this court to approach the important issues which have arisen for resolution without having regard to the major changes in Ireland which have occurred over the past decade in this whole area and which have led, not merely to the enactment of the legislation to which I have referred, but to an ever increasing volume of litigation in the High Court solely concerned with the legal entitlements of illegal immigrants, many of whom, as they are entitled to do, pursue applications through the statutory machinery to which I have referred claiming asylum as refugees.

The respective roles of the Oireachtas, the executive and the courts in this whole area must also be borne in mind. The manner in which States exercise their power to control immigration can range across the spectrum from an "open door" policy which would impose no restrictions whatever on the entry of non-nationals to a rigid policy of excluding wide

ranges of non-nationals from entry, sometimes on an overtly racist basis. Ireland, in common with other member states of the European Union, has opted for neither of these extreme positions and the legislature and the executive have the difficult task of achieving a balance between the different interests and values which have to be taken into account. Many would wish to see the development in Ireland of a tolerant and pluralist society capable of accommodating immigrants from diverse ethnic and cultural backgrounds, because that is a desirable objective in itself, recognises the openness and generosity with which Irish emigrants in times past were received in other countries and, on a purely economic level, remedies serious shortages in the skilled and unskilled labour markets. At the same time, the legislature and executive cannot be expected to disregard the problems which an increased volume of immigration inevitably creates, because of the strains it places on the infrastructure of social services and, human nature being what it is, the difficulty of integrating people from very different ethnic and cultural backgrounds into the fabric of Irish society. The resolution of these complex political, social and economic issues which, it need hardly be said, are not in any sense unique to Ireland, is entirely a matter for the Oireachtas and the executive. The function of the courts is to ensure that the constitutional and legal rights of all the persons affected by the legislation in question are protected and vindicated.

The effect of legislation regulating the exercise by the State of its power to expel non-nationals or refuse them entry on the constitutional rights of Irish citizens was considered in three important cases, all of which were decided at a time when the Aliens Act 1935 was the only legislation in force in this area.

The first of these cases is **Pok Sun Shun & Others –v- Ireland & Others**. The plaintiff in that case was a native of China who arrived in Ireland in 1978 and worked in a restaurant. As a result of what was described as a "serious incident" in 1979 he was informed by the Department of Justice that he would have to leave the country. Later that year he married the second named plaintiff: they had three children and, at the time of the hearing in the High Court, his wife was expecting a fourth child. No steps were taken by the authorities on foot of the earlier indication that he should leave the country and, on the contrary, he was given permits by the Department of Labour allowing him to continue to work. However, when, in 1981, he applied to the Minister for a certificate of naturalisation and also made an application for permission to carry on business as a self employed person, both applications were refused. He was informed that he would have to leave the country, but a stay of a further three months was allowed to enable to let him wind up his affairs.

In the proceedings, a number of declarations were claimed on behalf of the plaintiffs, including declarations that the wife had a right under Article 41 to have her family unit protected and that the second named plaintiff, who was an Irish citizen, was entitled to have her family unit protected in its constitution and in particular to be allowed to cohabit with her husband and to reside within the State. A declaration was also sought that the first named plaintiff, as the lawful spouse of the second named plaintiff and father of the third and fourth named plaintiffs (the children), was entitled to the protection of the Constitution and in particular the provisions of Articles 9, 40, 41 and 42.

It was submitted on behalf of the plaintiffs that the statutory instruments purportedly made on foot of the Aliens Act 1935, as implemented by the Minister, could not validly trench upon the constitutional rights claimed on behalf of the parents and the children in that case. Costello J, as he then was, in holding that the plaintiffs were not entitled to the declarations sought, said:-

> "*I do not think that the rights given to the 'family' are absolute, in the sense that they are not subject to some restrictions by the State and, as [counsel for the State] has pointed out, restrictions are, in fact, permitted by law, when husbands are imprisoned and parents of families are*

imprisoned and, undoubtedly, whilst protected under the Constitution, these are restrictions permitted for the common good on the exercise of its rights".

In **Fajujonu**, Walsh J commented that

"*In **[Pok Sun Shun]** Costello J held that the rights given by the Constitution by the family are not absolute in the sense that they are subject to some restrictions by the State. He took as an example the fact that when a husband is imprisoned, or the parents of families are imprisoned, that these are restrictions permitted for the common good in the exercise of the State's rights, while admitting that the family still retains the protection of the Constitution. It does not appear to me that the comparison made by Costello J is a valid one. Imprisonment whether for a short or a long period of a parent or parents of families is in respect of crimes committed by the parent or parents as the case may be. The prosecution of and punishment for crime is indeed envisaged by the Constitution itself and it is applied irrespective of whether the offender is a citizen of Ireland or an alien and does not depend on whether the person resides in Ireland or not."*

I have considerable doubt as to whether Walsh J intended in that passage to convey that the constitutional rights of the family were absolute and could not under any circumstances be restricted by the State. That clearly is not the law and did not form part of the ratio of the decision in **Fajujonu**, since elsewhere in his judgment Walsh J makes it clear, as did Finlay CJ., that in that case a husband and wife could have been lawfully deported, giving rise to the possibility that the family unit would be broken up, if the Minister had given proper consideration to the factors referred to in the judgment. I do not read the reference by Costello J in **Pok Sun Shun** to imprisonment as being anything more than the citing of an instance in which the State are unarguably entitled to restrict the rights of the family by depriving the other members of the society of a parent, leading inevitably to the conclusion that the family rights in issue are indeed not absolute.

The second case is **Osheku & Others –v- Ireland**. The plaintiffs in that case were a husband and wife and their infant son. The husband was born in Nigeria and was not an Irish citizen. The wife and her infant son were. The husband arrived in Ireland in 1979 and informed an immigration officer at Dublin airport that he had come on holiday, that he would not stay in Ireland for more than a month and that he would not take up residence or undertake employment in Ireland. In the event, he

remained in Ireland up to the time of the hearing in the High Court in 1986, having married the second named plaintiff on the 26th June 1981. The infant was born on 4th June 1982. The husband had taken up employment in Dublin from time to time and attended night classes as a student.

The Gardaí appear to have become aware of the husband's presence in the State as an illegal immigrant in September 1981. In the course of correspondence which subsequently passed between the Department of Justice and the plaintiff's solicitor, it was stated on behalf of the plaintiffs that the husband was a night student in Bolton Street and that he was in receipt of unemployment assistance. In response, it was stated on behalf of the Minister that permission would not be given to the husband to remain unless he produced documentary proof of his ability to maintain himself and any dependants from his own resources. No such proof was, it would seem, furnished by the husband: the response to the Department's letter was the issuing of the proceedings in which a claim was made *inter alia* for a declaration that the Aliens Act 1935, the statutory instruments made thereunder and the Nationality and Citizenship Act 1956 were invalid having regard to the provisions of the Constitution. The plaintiffs also claimed an order restraining the Minister from deporting the husband from the State.

Gannon J rejected the claim for a declaration that the Aliens Act 1935 and the statutory instruments made thereunder were unconstitutional. It may be noted in passing that the submission subsequently successfully advanced in **Laurentiu** that the range of delegated legislation permitted to the Minister under the terms of the 1935 Act, was, in constitutional terms, impermissibly wide was not advanced in **Osheku.** However, as I have already noted, the statement of the law by Gannon J as to the inherent right of the State to control immigration into its territory was approved in **Laurentiu**. As to the claim made that, even assuming the validity of the legislation, the deportation of the husband from the State would violate the guarantees in the Constitution for the protection of marriage and the family, deriving in the case of the wife and infant from their Irish citizenship, the learned judge had this to say:-

> "*The constitutional guarantees for the protection of the marriage and the family are relied upon by all three plaintiffs, by the second and third named plaintiffs [the wife and son] by virtue of their citizenship, as the basis for their challenge to the authority conferred on the Minister for Justice by the legislature in his discretion to deport the first named plaintiff. The Constitution does not impose on the citizens a duty or obligation to remain resident within the*

State, nor does it impose on the State a duty to provide a place of residence within the State for every citizen."

"*The essential basis for the declarations and orders sought in this action is the withdrawal by letter of 15th March 1983 of permission for Mr. Osheku's remaining in the State, thus rendering him liable at the discretion of the Minister for Justice to deportation. It is conceded that if and so long as Mr. Osheku remains resident in the State there is no interference with any of the constitutional rights asserted. It follows that if, in his discretion, the Minster should decide against deportation, (whether or not a prosecution for penalties should be taken) the question of whether the Aliens Act and orders are or are not consistent with the Constitution does not arise. Whether Mr. Osheku and his family will, if permitted lawfully so to do, remain in the State is so dependent upon many factors, including social and economic ones not yet fully considered, that their present declared intentions are not a sound basis for court proceedings and declarations."*

He went on to hold that

" An order made by the Minister for Justice deporting Mr Osheku, the first plaintiff, if made by him in the due exercise

of the discretion vested in him by the Aliens Act, 1935, and the statutory orders made thereunder , would not infringe the constitutional rights of any of the plaintiffs,"

Gannon J, in the course of his judgment, also cited the passage I have already quoted from the judgment of Costello J in **Pok Sun Shun**.

Mr. Hogan SC in the present case submitted that the first passage I have quoted from the judgment of Gannon J in **Osheku** was disapproved of by Walsh J in **Fajujonu**. In **Fajujonu**, Walsh J, having also cited the same passage, went on:

"the conclusions of the learned Judge were to the effect that the parties would only enjoy the benefits of the protection and guarantees of the Constitution for so long as the Minister chose not to deport them, and if they were deported they would cease to have the benefit of the constitutional rights on the grounds that the Minister in making such an order would not be infringing their constitutional rights.
It is not necessary for me in this case to offer any view on these expressions of opinion as to the constitutionality of the matters arising in ***Osheku –v- Ireland*** *for the reason that the learned judge was of opinion that so many factors, including*

social and economic ones, were not as yet fully considered, that the present declared intentions of the parties were not a sound basis for court proceedings and the making of the declaration sought. It appears to me, however, that different considerations arise in the present case."

I do not think that Walsh J, in that passage, was disapproving, either expressly or by implication, of the passages I have cited from **Osheku**. In **Fajujonu**, in contrast to **Osheku**, the first named plaintiff had been offered employment and it was his prospective employer's application for a work permit in order to enable him to take up that offer which brought him to the attention of the Minster for Justice and led to the possibility of his being deported. Walsh J was clearly of the view that this was in contrast to the situation dealt with in **Osheku** where the husband was not employed and had declined to comply with a request from the Department of Justice for evidence as to his prospects of gaining employment.

There remains the decision in **Fajujonu**. The first plaintiff in that case was a citizen of Nigeria and was married to the second plaintiff, a Moroccan citizen. They came to live in Ireland at the end of March 1981 and it was accepted that they were at all stages illegal immigrants. In the

High Court, Barrington J said that he was satisfied that, at all material times since he came to Ireland, the husband had been anxious and willing to work. The third named plaintiff was the first child of the marriage who, having been born in this country on 24th September 1983, was an Irish citizen.. In December 1983, Dublin Corporation offered the husband and wife a house in Ballyfermot, Dublin where they were still residing at the date of the proceedings. They were popular members of the local community and the husband was offered employment with the Ballyfermot Sports and Leisure Complex. His prospective employers sought a permit for him to work as an alien from the Minister for Labour. At this stage the husband found himself in a situation, which, to use a well worn expression, could be described as Kafka like. The Minister for Labour, having consulted with the Department of Justice, informed the plaintiff that he could not be given a work permit, because he was an illegal immigrant. The Minister for Justice refused him permission to reside in the State, thereby confirming his status as an illegal immigrant, because he had been refused permission to work.

No deportation order had as yet been made, but, faced with this dilemma, the husband, wife and daughter instituted proceedings against the Minister for Justice, Ireland and the Attorney General in which they claimed orders restraining their deportation and declarations that they

were entitled to reside in the State and that such of the provisions of the Aliens Act 1935 as purported to empower the Minister to deport them from the State were inconsistent with the Constitution.

In the High Court, Barrington J, having referred to the decision of Finlay P in **The State (M) –v- The Attorney General** went on:

> "*The present case appears to me to raise much more complex issues. I am prepared to accept that the child has, generally speaking, a right, as an Irish citizen, to be in the State. I am also prepared to accept as a general proposition that the child has the right to the society of its parents. But does it follow from this that the child has the right to the society of its parents in the State? If, for instance, the parents were to decide that they wish to emigrate to Australia could the child, as a general proposition, be heard to say that it did not wish to go to Australia and that, moreover it wished to have the society of its parents in Ireland".*

Having referred to the arguments advanced by counsel for the plaintiffs based on Article 41 of the Constitution, which were broadly

similar to those advanced on behalf of the applicants in the present case, the learned judge went on

> "*In the present case the parents never had a right to live or to work in Ireland. The child clearly has a certain right to be in Ireland. She also has the right to the society of her parents. But it does not follow from this that she has a right to the society of her parents in Ireland. I do not think that the parents can by positing on their child a wish to remain in Ireland in their society confer upon themselves a right to remain in Ireland, such as could be invoked to override legislation passed by the Irish parliament to achieve its concept of what the common good of Irish citizens generally requires. I think this distinguishes the present case from* ***The State (M) –v- The Attorney General****. There the paramount issue was what the welfare of the child required. But the present case does not turn merely upon the rights of the child, it also raises the powers of the Oireachtas to control the immigration of aliens into the country."*

Barrington J then went on to point out that the arguments advanced by counsel for the plaintiffs in that case had been rejected by Costello J in **Pok Sun Shun** and Gannon J in **Osheku –v- Ireland** and declined an

invitation from counsel to treat those authorities as wrongly decided. He accordingly held that the plaintiffs were not entitled to any of the reliefs claimed.

I should point out, parenthetically, that the proceedings in that case had been commenced by plenary summons in 1984 and were heard and determined by the High Court in November 1987.

An appeal was brought from the decision of the High Court and heard by this court on the 10th and 11th October 1989. It appears from the judgments in this court, which were delivered on 8th December 1989 that, since the institution of the proceedings in the High Court, two further children had been born in Ireland to the first and second named plaintiffs.

Judgments were delivered by Finlay CJ and Walsh J. Griffin J agreed with both judgments and Hederman and McCarthy JJ also expressed their agreement.

Finlay CJ, having set out the facts, said that it was clear from the pleadings in the High Court and the judgment of Barrington J that the plaintiff's case in the High Court was confined to a single issue, i.e., an assertion that the third plaintiff as a citizen of Ireland was entitled as an

absolute right to remain resident within the State and have preserved for her the family of which she was a member as a unit of society within the State and to be parented by her parents within the State and that this was a right which could not be defeated by any order made by the Minister pursuant to the Aliens Act 1935. Having referred to the determination by Barrington J that the family and other constitutional rights of the third plaintiff were not absolute and could be restricted by the proper exercise by the Minister for Justice of the powers conferred on him under the Act of 1935, the learned Chief Justice went on:

> "*When the matter came before this court on appeal the case really made on behalf of the plaintiff……. was not an assertion of the absolute right incapable of being affected by the provisions of the Act of 1935, but rather the assertion of a constitutional right of great importance which could only be restricted or infringed for very compelling reasons."*

Having said that the court had decided in the interests of justice to allow this case to be made, although not made in the court below, the learned Chief Justice summed up his conclusions as follows:

> "*I have come to the conclusion that where, as occurs in this case, an alien has in fact resided for an appreciable time in the State and has become a member of a family unit within*

the State containing children who are citizens, that there can be no question but that those children, as citizens, have got a constitutional right to the company, care and parentage of their parents within a family unit. I am also satisfied that prima facie and subject to the exigencies of the common good that that is a right which those citizens would be entitled to exercise within the State.

"I am also satisfied that whereas the parents who are not citizens and who are aliens cannot, by reason of their having as members of their families children born in Ireland who are citizens, claim any constitutional right of a particular kind to remain in Ireland, they are entitled to assert a choice of residence on behalf of their infant children, in the interests of those infant children.

"Having reached these conclusions, the question then must arise as to whether the State acting through the Minister for Justice pursuant to the powers contained in the Aliens Act 1935, can under any circumstances force the family so constituted as I have described, that is the family concerned in this case, to leave the State. I am satisfied that he can, but only if, after due and proper consideration, he is satisfied

> *that the interests of the common good and the protection of the State and its society justify an interference with what is clearly a constitutional right."*

He went on to say that *"in the particular circumstances of a case such as this"* the Minister's power could only be exercised

> *"in the light of a full recognition of the fundamental nature of the constitutional rights of the family"*

He was also of the view that the reason which would justify the removal of the family *"three of whom are citizens of Ireland"* from the State would have to be

> *"a grave and substantial reason associated with the common good."*

The learned Chief Justice then pointed out that there was no finding by the trial judge that the existence of *"important family rights in the children of this marriage"* had been ignored nor any finding that would support a careful consideration of those rights or

> "*a particular importance attached to them by reason of their constitutional origin."*

He added:

> "*In any event the position of the family itself, the exercise by it of its rights to remain as a family unit and the exigencies of the common good which may be affected by the continued residence in the State of the first and second plaintiffs, are all matters which must, of necessity, have been subject to at least the possibility, if not the probability, of very substantial change since this matter was investigated in 1984."*

The learned Chief Justice went on to say that, in those circumstances, he was satisfied that the protection of the constitutional rights which arose in the case required fresh consideration by the Minister of the question as to whether the plaintiffs should be permitted to remain in the State. He added:

> *"I am, however, satisfied also that if, having due regard to those considerations and having conducted such inquiry as may be appropriate as to the facts and factors now affecting the whole situation in a fair and proper manner, the Minister is satisfied that for good and sufficient reason the common good requires that the residence of these parents within the State should be terminated, even though that has the necessary consequence that in order to remain as a family*

> *unit the three children must also leave the State, then that is an order he is entitled to make pursuant to the Act of 1935."*

The learned Chief Justice when on to say that he would dismiss the appeal but would give the plaintiff liberty to apply to the High Court in the action if they wished to challenge any further act or omission on behalf of the Minister with regard to the granting or refusing of a permit to them to remain in the country.

In his judgment, Walsh J, having said that it was abundantly clear that Irish citizens could not be deported said

> *"In my view, the first two plaintiffs and their three children constitute a family within the meaning of the Constitution and the three children are entitled to the care, protection and the society of their parents in this family group which is resident within the State. There is no doubt that the family has made its home and residence in Ireland."*

Having discussed the decisions in **Pok Sun Shun**, **Osheku** and **The State (Bouzagou) –v- Station Sergeant Fitzgibbon Street,** [1985] IR 426, Walsh J went on to refer to the particular facts of the instant case. Having observed that one of the reasons advanced for refusing the

husband permission to stay in the country was that he was unable to support his family without assistance from the State, the learned judge went on:

> "*The reason he was unable to support his family was precisely because he was refused permission to work. Therefore in effect he was not being permitted to support his family within the State because he was not permitted to work. Such a position could not arise in respect of the support of his family if the parents were citizens and therefore to that extent the members of the family who were Irish citizens were suffering discrimination by reason of the fact that their parents were aliens. The question which arises therefore is, whether a family, the majority of whose members are Irish citizens, can effectively be put out of the country on the grounds of poverty. The dilemma posed for the parents by this attitude is that they must choose to withdraw their children, who are Irish citizens, from the benefits and protection of Irish law under the Constitution, or, alternatively, to effectively abandon them within this State, which would then be obliged to support them.*
>
> *"In view of the fact that these are children of tender age who require the society of their parents and when the parents*

have not been shown to have been in any way unfit or guilty of any matter which makes them unsuitable custodians to their children, to move to expel the parents in the particular circumstances of this case, would, in my view, be inconsistent with the provisions of Article 41 of the Constitution guaranting the integrity of the family."

Having expressed his agreement with the opinion of the Chief Justice that the matter would have to be reconsidered by the Minister, bearing in mind the constitutional rights involved, he added

"*In my view, he would have to be satisfied, for stated reasons, that the interests of the common good of the people of Ireland and of the protection of the State and its society are so predominant and so overwhelming in the circumstances of the case, that an action which can have the effect of breaking up this family is not so disproportionate to the aim sought to be achieved as to be unsustainable.*

"In the result, having regard to the considerations raised in the judgments delivered in this court, it is my opinion that no order need be made against the Minister and I would therefore dismiss this present appeal."

Finally, I should refer to the provisions of the Dublin Convention which was implemented in Ireland by the Dublin Convention (Implementation) Order 2000 SI. No. 343/2000 made by the Minister for Foreign Affairs pursuant to the powers vested in him by S.22 of the Refugee Act 1996. The convention is described as a convention

> "*determining the State responsible for examining applications for asylum lodged in one of the member states of the European Communities."*

The preamble recites that the heads of State had regard to the objective of harmonising their asylum policies and that they had also considered the joint objective of an area without internal frontiers in which the free movement of persons should be ensured. The preamble recited that they were aware of the need, in pursuit of that objective,

> *"to take measures to avoid any situation arising with the result that applicants for asylum are left in doubt for too long as regards the likely outcome of their applications and [were] concerned to provide all applicants for asylum with a guarantee that their applications will be examined by one of the member states and to ensure that applicants for asylum are not referred successively from one member state to*

another without any of these States acknowledging itself to be competent to examine the application for asylum."

Article 8 of the Convention provides that:

"*Where no member State responsible for examining the application for asylum can be designated on the basis of the other criteria listed in this convention, the first member State with which the application for asylum is lodged shall be responsible for examining it."*

As already noted, it is not in dispute that Mr. L. and Mr. O. both applied to the United Kingdom for asylum before they travelled to Ireland and that the United Kingdom authorities have agreed to accept responsibility for Mr. and Mrs. L. and their children and Mr. and Mrs. O. and their children.

Conclusions

In effect, the case made on behalf of the applicants is that, where a married couple arrive in Ireland in circumstances which render them illegal immigrants and the wife gives birth to a child, the entire family are entitled to remain in Ireland at least until such time as the child reaches his or her majority, that this right derives from the Irish citizenship of the

newly born child and the constitutional rights of such a child to the society and care of its parents and that it arises irrespective of the length of time which elapses between their arrival in the State and the birth of the child. It is claimed that the only qualification to which the exercise of those rights is subject is the liability of the non-national members of the family to be deported from the State where the Minister is of the opinion on reasonable grounds that they are engaged in activities inimical to the common good or are likely to be so engaged.

For the reasons I have already set out in the previous section of this judgment, I am satisfied that this submission rests on a misconception of the constitutional rights of the minor applicants and that I would not be prepared to accept it as being the law unless I was coerced by binding authority so to hold. It is strenuously contended, however, on behalf of the applicants that this is indeed the effect of the decision of this court in **Fajujonu**.

As Hardiman J observes in his judgment in this case, there is some difficulty in ascertaining the ratio of that decision. In his judgment, Finlay CJ undoubtedly laid emphasis on the constitutional rights of a family some of whose members were children and Irish citizens. He also, however, appears to have attached significance to the fact that the

plaintiffs had resided for an appreciable time in Ireland. Walsh J, on the other hand, while clearly attaching importance to the fact that three of the children were Irish citizens treated the question for resolution as essentially being whether a family, the majority of whose members were Irish citizens, could be effectively expelled on the grounds of poverty.

It is also a notable feature of the judgments of Finlay CJ and Walsh J in **Fajujonu** that they contain no expression of disapproval of the statement of the law by Gannon J in **Osheku**: it is simply referred to in passing in the judgment of the learned Chief Justice and Walsh J confined himself to pointing out that different considerations arose in **Fajujonu** from those that arose in **Osheku**. As to **Pok Sun Shun –v- Ireland and Others,** it is again simply referred to in passing in the judgment of the learned Chief Justice. Walsh J, as I have already noted, questioned the validity of the use by Costello J in his reasoning of the imprisonment of a member of a family, but as I have already indicated, there must be considerable doubt as to whether he was suggesting that the view taken by Costello J – that the family rights relied on were not absolute – was wrong. Since that was clearly the basis on which Costello J reached his conclusion in that case that the family rights in question could not override the constitutional right of the Minister to deport the applicant, I

am satisfied that the judgments in **Fajujonu** cannot be read as questioning the correctness of the decision in **Pok Sun Shun**.

This is clearly of considerable importance since the statements of the law in those two cases are clearly irreconcilable with the legal proposition on which the applicants in this case have founded their argument, i.e., that the claimed right of the minor applicant to enjoy the society of their parents in Ireland cannot be infringed by the deportation of the other members of the families, unless there are specific reasons arising in their particular cases which would render the continued residence of the other members of the family in the State inimical to the common good. It is true that in **Pok Sun Shun**, there had been an incident in the past which might have provided a specific reason of that nature for the husband's deportation, but I do not infer from the judgment of Costello J that that played any part, let alone a decisive part, in the conclusions at which he arrived. In **Osheku**, Gannon J found that the conduct of the husband in relation to his continuing stay in Ireland had been deceitful in nature. Again, however, that does not appear to have been a decisive factor in the conclusions arrived at by the learned judge in that case and the judgments in **Fajujonu** also proceeded on the basis that the first and second named plaintiffs had knowingly acted in breach of the regulations governing the arrival in the State of immigrants.

Even more striking, however, is the fact that not merely is there no disapproval in the judgments of Finlay CJ and Walsh J of the comprehensive statement of the law on the precise issues which have arisen in this case by Barrington J at first instance: the appeal from his judgment was unanimously dismissed.

In these circumstances, I am satisfied that **Fajujonu** is not an authority for the proposition advanced on behalf of the applicants in these cases. It is, however, an authority of this court for the proposition that, in the particular circumstances that arose in that case and which might, of course, similarly arise in other cases, the Minister was obliged to give consideration to whether, in the light of those circumstances, there were grave and substantial reasons associated with the common good which nonetheless required the deportation of the non-national members of the family, having as its inevitable consequence, either the departure of the entire family from the State or its break-up by the departure of the non-nationals alone with the consequent infringement of the constitutional rights of the Irish citizens who were members of the family. Since there was no evidence as to whether the Minister had taken those factors into consideration, the plaintiffs were given liberty to apply to the High Court in the event of his deciding to proceed with their deportation.

It can reasonably be inferred from the judgments that there were specific circumstances to which the court thought the Minister should have regard in **Fajujonu**, together with the constitutional rights of the family and any other matters relevant to their continued stay in the State which might come to the Minister's attention, i.e.

(1) the "appreciable time" (approximately eight years at the date of the hearing in this court) for which they had resided as a family in Ireland;

(2) the fact that the family had made its "home and residence" in Ireland;

(3) the fact that the first plaintiff had been offered employment, that the relevant authority was prepared to issue him a work permit and that the only ground on which a permit would not be issued was that the Minister in that case had refused to grant him permission to stay in Ireland.

Not one of those three factors is present in either of these cases. I am satisfied that, as found by the learned High Court judge, the decision in **Fajujonu** is, accordingly, entirely distinguishable and has no application to the facts of the present case.

I am, moreover, satisfied that, if the court in that case intended to lay down the proposition of law contended for by the applicants in these cases, it would have followed inevitably that, far from the appeal against the judgment of Barrington J being dismissed, the appeal would have been allowed and the Minister would have been restrained from deporting the non-nationals. As in this case, there was no indication in the judgments in either the High Court or this court that there were any specific grounds, peculiar to the plaintiffs, which could have led the Minister reasonably to form the opinion that their continued presence in the State would be inimical to the common good. No such evidence was adduced and no such argument to that effect was advanced on behalf of the Minister.

I am also satisfied that the decision in **Fajujonu** is distinguishable on another ground. As I have already noted, both the factual and statutory context in which the Minister is required to decide whether a deportation order should be made has altered radically since that case was decided. The executive are entitled to take the view, it being entirely a matter for them, that in the public interest immigrants seeking to make their home in this country should not be allowed to bring about a situation in which their applications are dealt with in priority to other applications (to the possible detriment of later applicants), by entering the State illegally and

instituting what prove to be unfounded applications for refugee status. In particular, they are entitled to take the view that the orderly system in place for dealing with immigration and asylum applications should not be undermined by persons seeking to take advantage of the period of time which necessarily elapses between their arrival in the State and the complete processing of their applications for asylum by relying on the birth of a child to one of them during that period as a reason for permitting them to reside in the State indefinitely. It must be emphasised that, whether the Minister is right in forming that view is not a matter for the courts: they do not exercise any appellate jurisdiction in respect of decisions by the Minister under the relevant statutory code. As in all applications by way of judicial review, the test for determining whether the Minister was entitled to make the orders of deportation in either or both of the present cases is whether the decision was so manifestly contrary to reason and common sense that it must be set aside by the High Court. I am satisfied in both cases that it was not.

I am reinforced in that view by some observations of Geoghegan J as a High Court judge in **Kweeder –v- The Minister for Justice, Ireland and The Attorney General** [1996] 1IR 381. In that case, the applicant was a Syrian national whose British wife had moved to this State and taken up employment. The applicant had been deported form

the United Kingdom for having breached the conditions of his student visa by taking up part time employment. His application for an Irish entry visa having been refused, he applied to the High Court for an order quashing that refusal. One of the grounds relied on by the respondents in resisting the application was that public policy required that the common travel area between the State and the United Kingdom should not be put in jeopardy. The applicant's wife admitted in her evidence that she and the applicant had a long term intention of returning to the United Kingdom.

In the course of his judgment, Geoghegan J said:

> *"I accept that the common travel area arrangements as between Ireland that the United Kingdom have been and are perceived by the general public to be of great advantage to this State. I therefore accept the submissions made on behalf of the Minister that this public policy is not merely legitimate but also fundamental…a single or individual instance of backdoor illegal immigration into the United Kingdom through initial entry into Ireland may not threaten the continuance of the common travel area, but an accumulation of such 'back door entries' would obviously threaten the continuance of the privilege. For that reason each individual*

instance of such backdoor illegal entry or probable backdoor illegal entry is a serious threat to the long-term continuance of the common travel area and it is a legitimate act of public policy to take the necessary steps to prevent each individual instance of it."

I would respectfully agree with that approach. While the Minister must consider each case involving deportation on its individual merits, he is undoubtedly entitled to take into account the policy considerations which would arise from allowing a particular applicant to remain where that would inevitably lead to similar decisions in other cases, again undermining the orderly administration of the immigration and asylum system. Those considerations did not arise to anything like the same extent (if indeed they arose at all) at the time the **Fajujonu** case was decided and, so far as the report of the case goes, were not relied on in any way by the Minister.

I am also satisfied that the Minister was entitled to have regard to the provisions of the Dublin Convention which was not, of course, in existence at the time of the decision in **Fajujonu**, in reaching his decision that the applicants should be deported. While it was suggested that the convention does no more than enable a member state, in a case where an

applicant for asylum has previously applied for asylum in another member state, to return the applicant to that other state so that his application for asylum may be considered by the State concerned, I am satisfied that this is an unduly reductive view of the convention. It is an important international instrument entered into by the contracting parties to ensure that a coherent system exists for the speedy processing of applications for asylum in the member states by specifying the particular states to which applications should be made in cases where an applicant has applied for that status in more than one member state. The State were unquestionably entitled, in my view, to apply the provisions of the Convention so as to ensure that the applications for asylum were dealt with by the country whose responsibility it was to deal with those applications and which had accepted that responsibility . I should, however, add that even if the Dublin Convention had not arisen for consideration in this case – if, for example, the applicants had come directly from Nigeria or the Czech Republic to Ireland - my conclusion, for the reasons I have already given, would be the same.

There remains for consideration the dictum of Finlay CJ in **Fajujonu** to which I referred at an earlier stage. I had already indicated that, if it does bear the meaning attributed to it in the arguments on behalf of the plaintiffs, I would not be prepared to treat it as correctly stating the

law unless it formed part of the ratio of the case... From the detailed summary which I have already given of the judgments in that case, it will be apparent that Walsh J – with whom Griffin J, McCarthy J and Hederman J agreed - did not rest his judgment in any way on the proposition that the first and second named plaintiffs were entitled to assert a choice to reside in the State on behalf of their children. I am satisfied that the law on that matter was in that case correctly stated by Barrington J in his judgment at first instance and that the dictum of Finlay CJ, to the extent that it suggests a different view, did not form any part of the ratio of the decision in this court. As I have already indicated, there must, in any event, for the reasons set out by Geoghegan J in his judgment, be some doubt as to whether that was what Finlay CJ intended to convey in that much debated passage.

I would dismiss the appeals in each case and affirm the order of the High Court.

ar L & O –v- Minister for Justice, Equality and Law Reform 23January 2003