THE SUPREME COURT

[S.C. No: 485 of 2006]

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

Between/

Deborah Olarantimi Bode, (a minor suing by her father and next friend Folajimi Bode), Folajimi Bode, Caroline Ola-Bode

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 20th day of December, 2007 by Denham J.

1. Issue

At 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 is 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 the appeal, and, with it, the nature of any judicial review. Also, at the kernel of the case 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, with all relevant Constitutional and Convention rights yet to be considered. In this, and the related judgments, the term 'foreign national' means a national other than an Irish citizen.

At the core of the case is the refusal by the Minister of the second named applicant's application under the IBC 05 Scheme.

2. Eight Cases

The Minister for Justice, Equality and Law Reform, the respondent/appellant, hereinafter referred to as the '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 the eighth case the Minister is appealing against the order for costs made in the High Court. No submissions have yet been made on this latter case.

3. 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.

4. The general facts and law relating to the Minister's decision in the administrative scheme in the seven cases are set out in this judgment. The particular facts, law, and decision of this case are set out herein, and the other seven cases are addressed in separate judgments and orders.

5. In two cases, **Oguekwe v. The Minister** and **Dimbo v. The Minister**, there is a second issue relating to the Minister's decisions on orders of deportation. These matters will be considered and determined in the two relevant judgments.

6. Minister's IBC 05 Scheme
The Minister made revised arrangements for the consideration of applications for permission to remain in the State, on the basis of parentage of an Irish born child born before the 1st January, 2005. This was called the Irish Born Child 05 Scheme and is referred to as the 'IBC 05 Scheme'. This scheme was separate from the Minister's function under legislation, specifically under the Immigration Act, 1999. The scheme was described by Maura Hynes in her affidavit, which explanation was in identical terms in this and the related cases. There was no cross-examination of Maura Hynes. Maura Hynes was the officer in charge of the IBC 05 Scheme unit.

The following is a shortened version of the facts deposed to by Maura Hynes. The State began to experience mass applications for asylum for the first time in its history in the 1990s. Under Irish law a person born in Ireland was an Irish citizen from birth. Reference was made to **Fajujonu v. Minister for Justice** [1990] 2 IR 151.

The Minister adopted a policy under which he usually granted permission to remain in the State to foreign national parents of Irish born children. Occasionally the Minister did refuse some applications, when he deemed that it was necessitated by the common good. This occurred, for example, when a foreign national parent had been convicted of a criminal offence. The Minister granted leave to remain in the State, on the basis

of parentage of an Irish born child, to approximately 10,500 foreign nationals between 1996 and February, 2003.

The judgments in **L. and O. v. Minister for Justice, Equality and Law Reform** [2003] 1 I.R. 1, were delivered on 23rd January, 2003, when this Court held that a foreign national parent of an Irish born child did not have an automatic entitlement to remain in the State with the child. As a result of that case the Minister reviewed his policy. The Minister decided that the separate procedures for the consideration of residency applications based solely on parentage of an Irish born child should cease with effect from the 19th February, 2003. At that date a total of 11,493 applications, which had been made on this basis, were outstanding.

It was expected that the number births of children of foreign nationals in Ireland would drop significantly. However, this did not happen. The Government proposed an amendment to the Constitution. This was approved by the people in a referendum in 2004.

The effect of the amendment to the Constitution was to exclude from automatic Irish nationality and citizenship a child born to parents neither of whom was entitled to be an Irish citizen at the time of the child's birth. There were some exceptions. Legislative effect was given to the amendment by the Irish Nationality and Citizenship Act, 2004, which came into force on 1st January, 2005. From that date it was no longer possible for persons to bestow Irish citizenship on their children by arranging for their birth in Ireland. This law reduced the number of applications for asylum and reduced the proportion of asylum seekers who were pregnant at the time of arrival in the State. In this changing situation the Minister considered the 11,000 outstanding cases which it had been decided would be considered individually.

Maura Hynes explained that it was decided that, rather than engaging in a case by case analysis, as a gesture of generosity and solidarity to the persons concerned, a general policy would be adopted of granting those persons permission to remain in the State, provided that they fulfilled certain criteria which were designed to reflect the factors that had given rise to the decision to adopt a generous attitude toward these persons and to protect the public interest.

Criteria were established in formulating the IBC 05 Scheme. The following were described. (a) Criminal activity of an applicant would always be a factor and would weigh against the granting of permission to remain in the State. (b) Persons who had been resident in the State for some time (and especially since the birth of an Irish born child), were a special category due to their connection with the State. (c) To qualify for inclusion in the scheme an applicant should have been continuously resident in the State since the birth of the child. (d) If a parent was not part of the same family unit as the child, or not taking a role in the upbringing of the child, his or her claim to remain in the State on the basis of parentage was weakened. Thus under the IBC 05 Scheme applications might be refused if it appeared that an applicant was not living as part of a family unit with the child or otherwise not taking a role in the child's upbringing.

Maura Hynes deposed that the purpose of the IBC 05 Scheme was to confer a benefit on persons in the identified special category. It was not established in order to be a means of family reunification. It was decided that it should be made clear to

applicants that they should accept as a condition of their application, and of any grant of residency, that such a grant would not confer any legitimate expectation that any other person would be granted permission to remain in the State.

A two year initial permission to remain in the State was to be granted, which might be further extended at the Minister's discretion. Such a grant was subject to conditions, being: (a) that a person would obey the laws of the State and not become involved in criminal activity; (b) that the person would make every effort to become economically viable in the State by engaging in employment, business, or a profession; (c) that the person would take steps, e.g. training or language courses, to enable him to engage in employment, business or a profession; (d) that the person accepted that the granting of permission to remain did not confer any entitlement or legitimate expectation on any other person, whether related to him or her or not, to enter the State.

With a view to restricting the potential for abuse of the scheme, it was decided that applications should be accepted only from persons, who might come within the scheme, for a limited period of time. The scheme was introduced on the 15th January, 2005, and the closing date for the receipt of applications was the 31st March, 2005.

Maura Hynes deposed that the rationale behind the scheme was a measure of generosity towards the closed category of foreign national parents who were in an anomalous situation, which situation was not going to recur. The scheme was operated as an administrative scheme. The examination of individual applications did not entail any examination of the 'underlying merits' of a claim to residency. It did not entail any examination of rights of the Irish citizen child. The scheme simplified the Department's role of examining the cases. Rather than engaging in a substantive analysis of the legal rights and claims of the Irish citizen child and the foreign national parent, and all countervailing factors, it would enable the disposal of very many cases simply by verifying that the person qualified within the terms of the scheme and had submitted appropriate documentation.

On 14th December, 2004 the Minister announced that the Government had approved his proposals for the Scheme. An advertisement was placed in the national newspapers and the Department's website on 15th January, 2005, setting out details of the scheme. The closing date for receipt of applications was announced as 31st March, 2005.

7. Operation of the IBC 05 Scheme

A total of 17,917 applications under the scheme were received and processed. A total of 16,693 applicants were given leave to remain under the scheme and 1,119 were refused. (These figures are based on cases completed by 31st January, 2006.)

There were a variety of reasons for refusing and some applicants failed on several criteria, but in those cases only one reason for refusal was cited. The reasons were as follows:-

Reasons for Refusal	**Cases**
Continuous residence not proven	566
No identity proven	104

Granted refugee status	94
Criminality	78
No role in upbringing of IBC	71
IBC born in 2005	48
Not the parent	38
IBC & parent abroad	34
IBC abroad	33
Applicant abroad	21
Already had status	12
Withdrew	8
Statutory declaration not signed	7
Child not born in Ireland	3
Deceased applicants	2

Each application was considered taking into account the information supplied by the applicant on the form and the supporting documents. All applications received by the closing date were processed.

As a consequence of the IBC 05 Scheme it was submitted, on behalf of the Minister, that very many people obtained permission to remain in the State who would have been very unlikely to have been granted permission under an individual case by case analysis.

A person who applied under the IBC 05 Scheme, but whose application was rejected, was in no worse position than he was before the scheme was introduced. If an application was refused under the IBC 05 Scheme the applicant could still assert his rights and his entitlement to remain in the State.

8. Documents

On 14th December, 2004, the Minister announced, by publication in the national newspapers, revised arrangements for processing claims for permission to remain from parents of Irish born children. The terms of the announcement were:

> "Mr Michael McDowell TD, Minister for Justice, Equality and Law Reform, has announced that the Government have today approved his proposals to introduce revised arrangements for the processing of claims for permission to remain in the State from the foreign national parents of Irish born children with effect from early January 2005.
>
> Announcing the new arrangements, the Minister said 'The Irish Nationality and Citizenship Bill 2004 which will be commenced with effect from 1 January 2005, will enable me to deal with these claims in a decent, pragmatic and common sense way, as I had promised. Each case will be examined thoroughly and I intend to grant residence only to those people who can show that they have been resident in Ireland taking care of their Irish citizen children, have not been involved in

criminal activity, and that they are willing to commit themselves to becoming economically viable. They will be given the opportunity to work and to contribute fully to Irish society.'

The onus will be on applicants to show whey they should be granted residence. Applicants will be required to provide adequate proof of their identity, their period of residence in Ireland, and their relationship with the Irish citizen child. Details of the application procedure will be published early in January 2005 and application forms will be made available at that time. Applications must be returned by the end of March. In the meantime, people should prepare themselves by obtaining the necessary evidence of identity, including passports from their countries of origin and birth certificates. People who had previously applied for permission to remain on the basis of their Irish citizen child will be required to submit a new application on the new form.

The Minister added, 'The foreign national parents of Irish born children born before the enactment and commencement of the new legislation are in a unique position because of the citizenship legislation which has been in place to date. With our new legislation, it will no longer be possible for non-national parents to bestow Irish citizenship on their child solely on the basis of his or her birth on the island of Ireland. From now on, only children of non-national parents who have a genuine prior link to Ireland, evidenced by being resident here legally for three out of the previous four years, will be entitled to Irish citizenship".

A public notice appeared in the newspapers and on the Department of Justice, Equality and Law Reform's website on 15th January, 2005. Under a heading stating:- "Revised arrangements for the consideration of applications for permission to remain made by the non-national parents of Irish born children born before 1st January, 2005" it was stated:-

"1. This notice sets out details of the new arrangements which are being introduced with effect from today. Applications from non-national parents of Irish born children born before 1 January 2005 for permission to remain in the State can be made on form IBC/05. This form is now available on our website at www.justice.ie Hard copies of the form will be available with effect from 21st January, 2005 at the Department of Justice, Equality and Law Reform, 13-14 Burgh Quay, Dublin 2, Garda District Headquarters stations outside Dublin and at all Reception and Integration Agency accommodation centres countrywide. Forms will also be distributed to various non-governmental organisations working with immigrants and asylum seekers. Blank forms can be photocopied and applications submitted on photocopied forms.

2. Please note that if you have previously applied for permission to remain based on parentage of an Irish born child and your application

was not processed to a conclusion, you must re-apply by completing an application form under this new scheme. If both parents are applying, they must do so on separate forms. Completed applications must be submitted before the end of March, 2005. Applications will be processed as quickly as possible.

3. Your completed application form should be accompanied by the following documents:-

• Original passport/National Identity card (not GNIB card) of the adult applicant
• Original birth certificate for Irish born child
• 2 passport size photographs of the adult applicant (each one signed on back)
• Evidence of continuous residence in the State since the birth of the child (utility bills, lease/rental agreements etc.)
• Letter from your Community Welfare Officer stating the period that you have been in receipt of welfare payments in the State
• If you have been employed in the State, details of that employment, such as tax certificate, letter from employer etc.

Important: All documents must be original documents and copies of documents will not be accepted.
If you are unable to provide any of the above documents, please include a note explaining why this is the case. If you have already sent any of the above documents to the Department please give details.

[The emphasis is added]

4. Each applicant will be required to make a statutory declaration as to their future conduct which must be made in front of and signed by a Notary Public, a Commissioner for Oaths or a Peace Commissioner.

5. Each case will be examined on its merits and successful applicants will be granted permission to remain for an initial period of two years. Applicants will be required to acknowledge that the granting of permission to remain does not give any entitlement to any other person, related or not, to enter the State. This scheme does not make any provision for persons granted permission to be joined by family members from outside the State.

6. Applications will be processed in the order in which they are received. In order to facilitate processing, queries will not be answered over the telephone. All queries should be put in writing and sent to the following address:

Irish Born Child Unit
Department of Justice, Equality and Law Reform
P.O. Box 10003

Dublin 2
15th January 2005"

A reminder notice was published on 18th March, 2005.

The second named applicant obtained an application form. The learned trial judge found that the application form, at section 4, under a heading of "Supporting Documentation", stated:

> "The completed application form must be accompanied by the following original documents (please tick confirming documents included): the relevant heading is 'Evidence of continuous Residence in the State since the birth of the Irish born child. (utility bills, lease/rental agreements, etc.)'
>
> Under this list there is then a note:
>
> If you are unable to provide any of the above documentation, please include a note explaining why this is the case. If you have already supplied any of the above documents to the Department please give details on the additional sheets provided.
>
> From the copy of Mr Bode's application form it would appear that he did not tick any of the boxes listed but opposite the relevant one he seems to have added a note, part of which was obliterated in the copy handed in but appears to read 'see additional … in form …
>
> With the copy of the form exhibited there are only two relevant documents, the document from the Health Services Executive, the first part of which appears to have been completed by Mr. Bode and shows different addresses in Ireland from August, 2002, until March, 2005 and the second part completed by the H.S.E. which confirms weekly welfare claims from the 25th July, 2002, to the 14th August, 2002 and from the 22nd February, 2005, to date. The second document is from the Dún Gibbons Inn and is dated the 8th March, 2005 and confirms that Mr. Bode is then a resident at the Dún Gibbons Inn, Co. Galway and states that he arrived to join his family on the 21st February, 2005 and that his family had been living in the Inn since the 17th June, 2004. The final document of relevance attached to the application form is the birth certificate of the citizen child. She was born on the 13th September, 2004. Mr. Bode is named as her father and his address is given in Nigeria.
>
> However, in the application form in response to the specific question “have you left the State for any reason since the birth of your first Irish born child?” He has ticked the box “No”.
>
> The documents supplied by Mr. Bode on their face are not evidence of continuous residency in the State since the birth of his daughter on the 13th September, 2004. It can also be said that there are inconsistencies

between his assertion that he has been so resident and the address given on the birth certificate. He has explained the address in the affidavit grounding this application as being by reason of the fact that his partner had been in Ireland for a short period of time and he was unsure of his status and did not wish to cause him any difficulties with the authorities in Ireland.

Mr. Bode has maintained in the affidavits sworn in these proceedings that he resided in the State since he arrived here in July, 2002. He was not cross-examined on his affidavit."

9. Parameters of IBC 05 Scheme

The parameters of the IBC 05 Scheme were set out clearly in the documents. The scheme was a revised set of administrative arrangements. It related to applications for permission to remain in the State from foreign national parents of Irish born children born before 1st January, 2005, in certain circumstances. The applicant had to complete an application form. There was a requirement that the following documents accompany the application form: (i) Original passport or national identity card of the adult applicant; (ii) original birth certificate of the Irish born child; (iii) two passport photos of the adult applicant; (iv) evidence of continuous residence in the State since the birth of the child (utility bills, lease/rent agreements etc.); (v) letter from a Welfare Officer stating the period the applicant had been in receipt of welfare payments in the State; (vi) details of any employment. Also, each applicant had to make a statutory declaration as to their future conduct. The matters taken into account in the scheme were stated in paragraph 6 above. The scheme was introduced on the 15th January, 2005 and the closing date for the receipt of applications was the 31st March, 2005.

10. Parties

In this case Deborah Olarantimi Bode (a minor suing by her father and next friend Folajimi Bode), Folajimi Bode and Caroline Ola-Bode are the applicants/respondents, hereinafter referred to as the first, second and/or third named applicant individually, or collectively as 'the applicants'. The Minister is the respondent/appellant. 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 hereinafter as 'the Commission'. The Attorney General was joined as a Notice Party.

11. Particular Facts

Particular facts relevant to this case include the following. Deborah Bode, who was born in the State on 13th September, 2004, is an Irish citizen and has resided in the State continuously since her birth.

Her mother, Caroline Ola-Bode, the third named applicant, has been resident in the State since June, 2004. She is a national of Nigeria. On 10th October, 2005 she was granted permission to remain in the State on her IBC 05 Scheme application.

Folajimi Bode, the second named applicant, is the father of Deborah Bode, is also a national of Nigeria, and made an application under the IBC 05 Scheme.

12. Application

The second named applicant filled in an application form, dated 5th March, 2005, and

sent it in. This was described by the learned High Court judge, and is set out in paragraph 8 above.

13. Decision of the Minister
The decision of the Minister was conveyed to the second named applicant by letter dated 21st November, 2005, in the following terms:-

> "Dear Folajimi Bode,
>
> I am directed by the Minister for Justice, Equality and Law Reform to refer to your application for permission to remain in the State under the revised arrangements announced by the Minister on 15 January 2005 for the processing of applications from the non-national parents of Irish born children born before 1 January 2005.
> It is a requirement under the revised arrangements that the applicant has been resident in the State with their Irish born child on a continuous basis since the child's birth. Evidence of such residence is required. In this case I note that you have not provided sufficient evidence of residency in the State since the birth of your child.
> On the basis of the foregoing, I am not satisfied you met the criteria for the granting of permission to remain under the revised arrangements and, accordingly, your application is hereby refused.
>
> Yours sincerely"

It is this decision which the applicants sought to quash, which the High Court has quashed, and which is at the core of this appeal.

14. Leave to apply for Judicial Review for Reliefs
On the 30th January, 2006 the High Court (Finlay Geoghegan J.) gave the applicants leave to apply by way of an application for judicial review for the following reliefs:-

> I. An order of *certiorari* quashing the decision of the Minister, dated the 21st November, 2006, to refuse to grant permission to reside in the State to the second named applicant.
>
> II. A declaration that the Minister's decision to refuse to grant permission to reside in the State to the second named applicant is unlawful.
>
> III. A declaration that the Minister's refusal to grant permission to the second named applicant to reside in the State with his daughter and her mother (the first and third named applicants herein) is in breach of the Constitution and the European Convention on Human Rights.
>
> IV. An order of *mandamus* requiring the Minister to determine the second named applicant's application for permission to reside in the State by letter (undated) sent in December, 2000.

V. An order of *mandamus* requiring the Minister to provide the departmental file on the applicant's case to the applicant.

VI. A declaration, pursuant to section 5(1) of the European Convention on Human Rights Act, 2003, that the rule of law as set out in **O'Keefe v An Bord Pleanala** [1993] 1 IR 39, insofar as it governs the scope of judicial review in respect of decisions concerning fundamental rights protected by the Constitution and the European Convention on Human Rights, is incompatible with the European Convention on Human Rights.

15. Grounds for Judicial Review

The applicants' grounds for review were amended and the amended grounds of the application were:-

(1) The refusal to grant residency to the second named applicant is a breach of the constitutional and legal rights of the applicants. In particular, it is in breach of the applicants' family rights as protected by Articles 40 and 41 of the Constitution, and article 8 of the European Convention on Human Rights Act, 2003.

(2) The refusal to grant residency to the second named applicant is disproportionate in circumstances where thousands of foreign national parents have been granted residency in the State in the past 12 months.

(3) No grave or substantial reason exists for the refusal to grant residency to the second named applicant such that the refusal is in violation of the Constitutional rights of the first named applicant and/or the third named applicant. Further, the Minister has given no reasons as to why a grave and substantial reason could exist requiring his refusal to permit the second named applicant to continue reside in the State with the first and third named applicants.

(4) The reason given by the Minister for the refusal to grant residency to the second named applicant is irrational, arbitrary and/or unreasonable.

(5) Further to (4), the reason given by the Minister for the refusal to grant residency to the second named applicant is not "in accordance with law" by reason of which it is in breach of article 8(2) of the European Convention on Human Rights, and is in breach of the Minister's duties under the European Convention on Human Rights Act, 2003.

(6) Further, the reason given by the Minister for the decision to refuse to grant the second named applicant residency does not fall within article 8(2) of the European Convention on Human Rights.

(7) The refusal to grant residency to the second named applicant constitutes unlawful discrimination against the first named applicant, in breach of her constitutional rights and in violation of article 14 of the

European Convention on Human Rights. The applicants are being unlawfully discriminated against on the ground that the second named applicant has not provided sufficient evidence that he resided continuously in the State. They are thereby being deprived of the opportunity to reside in the State together. There is no reasonable or objective reason for the said discrimination, such that it is unlawful, and in violation of article 14 of the European Convention on Human Rights.

(8) The sole reason for the Minister's decision to refuse to grant residency to the second applicant is not a proper, or sufficient, reason for denying the first named applicant, an Irish citizen child, the company of her father in the State. It fails to properly weigh the constitutional rights of the Irish citizen child. The reason is arbitrary and has no legislative basis, such that it is *ultra vires*.

(9) The Minister has unlawfully fettered his discretion.

(10) The Minister has relied on the terms of an administrative scheme devised by him for which there was no statutory basis. Such scheme is unlawful by reason of it containing requirements that are contrary to article 8 of the European Convention on Human Rights and of *inter alia* being discriminatory, arbitrary, disproportionate, irrational and/or *ultra vires*.

(11) The Minister took into account considerations and/or failed to take into account relevant considerations in his decision to refuse to grant residency to the third named applicant.

(12) The Minister acted in breach of the applicants' right to constitutional and natural justice and to fair procedures.

(13) The applicants' fundamental human rights are affected by the Minister's refusal to grant residency to the second named applicant, such that the applicants are entitled to adversarial proceedings before an independent body competent to review the reasons for the decision and the relevant evidence. The only forum for review that is open to the applicants is judicial review before this Honourable Court to confining itself to the so-called "**O'Keefe** test" in reviewing the applicants' case and the Minister's decision, such a review is inadequate and contrary to the rights guaranteed by the European Convention on Human Rights. Further, insofar as this Honourable Court feels bound by the so-called "**O'Keefe** test", such is incompatible with the European Convention on Human Rights and, if appropriate, the applicants seek a declaration of incompatibility pursuant to section 5(1) of the European Convention on Human Rights Act, 2003.

16. Grounds of Opposition

The Minister filed twenty two grounds of opposition. In essence it was stated that:-

1. The Ministerial scheme entitled IBC 05 was formed and introduced to deal with the significant problems the Government was encountering in the course of formation and administration of Immigration policy in that post the Supreme Court decision in "**L & O v. Minister for Justice**" individual consideration was required to be given to applications for leave to remain in the State, received from foreign national parents of Irish born children. The numbers of such applicants were substantial, details were set out specifically in the principal affidavit. The Government determined to introduce an administrative scheme to permit foreign national parents fulfilling certain criteria to avail of the IBC 05 Scheme.

2. At all material times the Ministerial scheme was one in which the Minister would have absolute discretion. The conditions of the scheme were clearly delineated and such terms and conditions were more particularly set out in the principal affidavit. It was at all times publicised and made clear that failure to comply with any of the criteria rendered a foreign national parent of an Irish born child ineligible under the scheme.

3. At no time did refusal under IBC 05 mean, nor does it mean, that Irish born children are not entitled to consideration of their constitutional rights and/or their rights under article 8 of the European Convention on Human Rights, before any attempt is made to deport their foreign national parents, nor does a refusal under the IBC 05 Scheme mean that parents of Irish born children are not entitled to consideration of such Constitutional Rights as they may have and such rights under article 8 of the European Convention on Human Rights before an attempt is made to make a deportation order in respect of them.

There was a traverse of the grounds for the judicial review. In addition:-

- The Minister submitted that the application was premature in that the rights which the applicants assert are rights which will duly and properly be afforded in the context of any consideration pursuant to section 3 of the Immigration Act, 1999, as amended, in respect of the second named applicant.

- The Minister submitted that the standard and scope of review as applied by this Honourable Court is compatible with the European Convention on Human Rights and is sufficient to ensure that such rights are guaranteed to the applicants pursuant to the European Convention on Human Rights.

- The Minister submitted that the applicants are not, in the context of the within application, entitled to adversarial proceedings before an independent body competent to review the reasons for the decision and the relevant evidence.

17. The High Court Order
The High Court granted an order of certiorari, on consent, quashing the deportation order dated the 7th February, 2005, relating to the second named applicant.

The High Court granted an order of certiorari quashing the decision of the Minister dated 21st November, 2005, refusing the application of the second named applicant under the IBC 05 Scheme, and ordered that the application be remitted for consideration and determination by the Minister in accordance with law.

The High Court also granted an order of certiorari quashing the decision of the 21st November, 2005 on a separate ground of a breach of fair procedures

18. The High Court Judgment
18.1 IBC 05 Scheme
The learned High Court judge held, in relation to the generality of the scheme:-

> "Considering each of the above documents I have concluded in accordance with their plain meaning the revised arrangements (which became known as the IBC/05 Scheme) established by the [Minister] on 15th January, 2005 were, as the title of the notice of that date states, "Revised arrangements for the consideration of application(s) for permission to remain (in the State)". Further, the persons to whom they were addressed were non-national parents of Irish born children born before 1st January, 2005. Such parents were invited or permitted to apply for permission to remain in the State based upon the parentage of their Irish born child. The [Minister] by the announcement committed himself to consider and determine applications for permission to remain in the State from parents of Irish born children born before the 1st January, 2005 made on form IBC/05.
>
> There is nothing in any of the documents which expressly, or by implication states that the revised arrangements do not apply to a person who was not continuously resident in the State with his or her Irish born child since the date of birth in the sense of precluding such persons from making an application on IBC/05.
>
> The revised arrangements announced were essentially a revised procedure for the making and processing or considering applications to remain in the State from parents of Irish born children born before 1st January, 2005.
>
> Insofar as reliance is placed on the IBC/05 Form and the questions asked in relation to continuous residency at para. 3(e) the details sought do not imply automatic exclusion from consideration if a person had left the State since the date of the birth of their child, rather that the length of absence and reason for absence may be relevant."

The learned trial judge referred to the multiple grounds and submissions of the parties. It was noted that the primary submission was that the decisions of the Minister were invalid or unlawful in that they were taken in breach of personal or fundamental rights

of the citizen children guaranteed and protected by the Constitution and the European Convention on Human Rights, and that there were submissions alleging breach of rights of foreign national parents. The learned trial judge proposed to consider the following grounds:-

> "1. The taking of a decision to refuse a parent residency for failure to meet a requirement of continuous residency without considering the rights, including welfare, of the citizen child is in breach of the citizen child's rights under Article 40.3 and 41 of the Constitution.
>
> 2. The taking of a decision to refuse a parent residency for failure to meet a requirement of continuous residency without considering the rights of the child to respect for his/her private and family life is in breach of the State's obligations under article 8 of the European Convention on Human Rights and consequently in breach of the [Minister's] obligations under s.3 of the European Convention on Human Rights Act 2003.
>
> 3. The requirement of continuous residency as a criteria for the granting of permission to remain in the State is in breach of the citizen child's rights under article 14, when considered in conjunction with article 8 of the European Convention on Human Rights and consequently in breach of the [Minister's] obligation under s.3 of the Act of 2003."

In a lengthy and learned judgment the High Court then considered Constitutional and Convention rights of the applicants.

As to the criteria of review the learned High Court judge held:-

> "Insofar as the applicants allege that the [Minister] in either the establishment or implementation of the IBC/05 Scheme acted in breach of the constitutional rights of the citizen children or contrary to his obligations under s. 3 of the Act of 2003, then such dispute is to be determined by the Courts and in such proceedings the challenged decision or implementation is subject to review by the courts."

The learned High Court judge, having addressed the rights of the applicants, including those of a citizen child, concluded:-

> "For the reasons set out above I have reached the following conclusions.
>
> 1. The decision taken by the [Minister] on the application on IBC/05 of the second named applicant as communicated in the letter of 21st November, 2005 is unlawful as it was taken in breach of the first named applicant's rights under Article 40.3 of the Constitution.
>
> 2. The decision of the [Minister] on the application under IBC/05 of the second named applicant communicated in the letter of 21st November, 2005 is unlawful as it is in breach of the [Minister's] obligations under s. 3(1) of the European Convention on Human Rights Act, 2003."

The High Court, therefore, found it unnecessary to consider the challenge to the law as stated in **O'Keefe v. An Bord Pleanala** [1993] 1 I.R. 39. The High Court made an order of certiorari quashing the decision of the Minister made on 21st November, 2005, refusing the second named applicant's application under the IBC 05 Scheme.

18.2 Fair Procedures

The High Court also addressed the claim of the second named applicant that there had been a breach of fair procedures. The complaint was that the second named applicant was not given any notice that the Minister considered the evidence supplied with the application form not to be sufficient evidence of residency in the State since the birth of his child, nor was he given any opportunity of providing further evidence. The High Court stated that the issue was whether the Minister was obliged to give the second named applicant an opportunity of providing further or additional evidence prior to making the decision.

18.3 High Court Judgment on particular facts

In relation to the second named applicant and the issue of continuous residence, and other cases where the issue of continuous residence arose, the learned High Court judge held:-

> "Finally, it is clear from the form of letters sent to Mr. Bode and the other parents who were refused by reason of a failure to meet the requirement of continuous residence that their application was processed and considered under the revised arrangement and a determination made that their application should be refused.
>
> In the formal notice of 15th January, 2005 the only indication given of the criteria which would apply in determining applications made is at para. 5:
>
> > "Each case will be examined on its merits …"
>
> In the announcement of 14th December, 2004 the [Minister] had stated:
>
> > "… each case will be examined thoroughly and I intend to grant residence only to those people who can show that they have been resident in Ireland taking care of their Irish citizen children, have not been involved in criminal activity and that they are willing to commit themselves to becoming economically viable."
>
> In this judgment, I propose continuing to refer to the revised arrangements introduced by the [Minister] in January, 2005 as the IBC/05 Scheme for the sake of simplicity. However, in doing so, I do not intend to confer any special status on the revised arrangements."

The High Court found that the documents supplied by the second named applicant did not provide evidence of continuous residency in the State since the birth of his daughter on 13th September, 2004.

The High Court referred to the fact that Maura Hynes in describing the procedure on the IBC 05 Scheme had deposed that where applicants omitted to supply certain documents or information they were informed by letter and given time to reply. A standard form letter for such a situation was exhibited. The High Court endorsed such a procedure as fair, and it held:-

> "However, on the facts pertaining to Mr. Bode there is no evidence offered on behalf of the [Minister] that he received the type of letter exhibited by Ms. Hynes. He has averred that he did not receive any such letter. On his application form he had stated that he had not left the State since the birth of his daughter. The documents put in evidence to the court as the supplied supporting documentation evidencing residence in the State from September, 2004 do not do so.
>
> I have concluded that fair procedures did require that he received the type of letter seeking specifically documentation evidencing residency in the State from September, 2004 and giving him an opportunity of producing it within a specified period of time. This is the procedure which the Department recognised as being appropriate. There is no explanation as to why the omission occurred in this case. It is perhaps understandable in the context of so many applications but the omission in my view entitles the applicant to an order of *certiorari* on this ground as sought."

18.4 Mandamus and immigration history of second named applicant

As to the application for an order of mandamus, in the circumstances where the High Court had made an order of certiorari of the decision of the Minister, it was determined unnecessary to make an order of mandamus against the Minister in respect of the free standing application for residency. However, the High Court proceeded and considered the matter, and reference was made to the second named applicant's personal immigration history. It appears that he arrived in the State on the 23rd July, 2002. He applied for asylum on 20th February, 2003. He was notified that the Refugee Applications Commissioner was recommending that he be refused refugee status. He did not appeal this recommendation. On the 14th March, 2003 he was notified that the Minister proposed making a deportation order under s.3 of the Act of 1999. By letter dated 29th May, 2003, his solicitors made representations under s.3 seeking leave to remain. On 23rd November, 2004 the Department of Justice, Equality and Law Reform informed the second named applicant's solicitors that they would be examining his case under s.5 of the Refugee Act, 1996 and s.3 of the Immigration Act, 1999 and that any information for consideration should be forwarded within fourteen days. By letter dated 21st December, 2004, solicitors acting for the second named applicant informed the Department that the second named applicant had become the father of an Irish born citizen child on 13th September, 2004, reference was made to the recent announcements as to applications for residency for such parents, and a request was made that no decision be made until he had time to make an application. In the intervening time, on 13th December, 2004, a clerical officer and an executive officer had recommended that the Minister sign a deportation order. The Minister considered the matter on the 7th February, 2005, when a deportation order was made. The deportation order appears to have been signed without considering the fact that the second named applicant is the father of an Irish born child. The

deportation order was sent to the second named applicant with a letter dated 2nd March, 2005, and required him to be at the Garda National Immigration Bureau on Burgh Quay on 10th March, 2005. By letter dated 23rd March, 2005, solicitors for the second named applicant informed the Department that he had made an application under the IBC 05 Scheme and requested confirmation that no steps be taken to execute the deportation order pending a decision in that scheme. On 11th April, 2005, such confirmation was given. When the second named applicant's application under the IBC 05 Scheme was refused by letter dated 21st November, 2005, the deportation order was still in existence.

The second named applicant then made an application to the Minister in an undated letter, acknowledged by letter dated 8th December, 2005. In that letter the second named applicant applied for permission to reside in Ireland. He confirmed that he was the father of an Irish born citizen child, that the child's mother had been granted permission to remain in the State as parent of an Irish citizen child. He made his application on humanitarian grounds and as a parent of an Irish citizen child pursuant to IBC 05 Scheme.

An affidavit was filed on behalf of the Minister in which it was acknowledged that because of the information furnished on the 21st September, 2004 that the second named applicant was a parent of an Irish citizen child born on 13th September, 2004, that:

> "It will therefore be necessary to revoke the deportation order and reconsider such representations as the second named applicant may make in respect of an application for leave to remain in the State pursuant to s.3 of the Immigration Act, 1999."

Because of the granting of the order of *certiorari*, the High Court held that it was unnecessary to make an order of *mandamus* against the Minister in respect of the subsequent free standing application for residency.

19. Grounds of Appeal

The Minister appealed against the orders and judgment of the High Court, filing twenty four grounds of appeal. These were as follows:-

> "The Scope and Terms of the IBC 05 scheme
>
> 1. The learned High Court judge erred in law and in fact in her construction of the "IBC 05 scheme" in so far as she purported to determine as a matter of fact that the IBC 05 Scheme was addressed to all non-national parents of Irish citizen children born before the 1st of January 2005.
>
> 2. The learned High Court judge misdirected herself in law and in fact in her construction of the terms of the IBC 05 Scheme and in particular as to whether or not continuous residence in the State since the birth of the Irish citizen child was a requirement of the IBC 05 Scheme.
>
> 3. The learned High Court judge was misdirected both in law and in fact in purporting to find that evidence of continuous residence in the

State since the birth of the Irish citizen child was not required prior to consideration of an application under IBC 05 in light of the fact that there was no dispute between the Minister and the applicants to the appeal that such a requirement was a term of the IBC 05 Scheme.

4. The learned High Court judge erred in law and in fact in the interpretation which she placed upon the IBC 05 Scheme in holding that it was addressed to all non-national parents of Irish citizen children born before the 1st of January, 2005, whereas on its proper construction it was addressed to all those non-national parents of Irish citizen children, born before the 1st of January 2005 who could satisfy the terms of the scheme.

5. The learned High Court judge erred in law and in fact in holding that the [Minister] was under a duty to treat the application under the IBC 05 Scheme as an application for permission to remain in the State outside the terms of the scheme in circumstances where the second named applicant would not have qualified under the terms of the scheme.

6. The learned High Court judge erred in law and in fact in holding that the Constitutional and/or European Convention rights of the Irish born child were central to the IBC 05 Scheme in circumstances where evidence of the rationale of the scheme as explained in the affidavit of Maura Hynes indicated that the IBC 05 Scheme was adopted by reference to the anomalous position of non-national parents of Irish born children.

Constitutional Rights of the Irish Born Child in the context of the IBC 05 Scheme

7. The learned High Court judge erred in law and in fact in finding that in the establishment and adoption of the scheme in January 2005 the [Minister] was required to have regard to the constitutional rights of the Irish born child including the right to live in the State and to be reared and educated with due regard for its welfare.

8. The learned High Court judge erred in law and in fact in her determination that the [Minister] had acted in breach of the Irish citizen child under Article 40.3 of the Constitution.

9. The learned High Court Judge erred in law in holding that a positive decision in respect of an application pursuant to the IBC 05 Scheme was *prima facie* a decision which defended and vindicated the personal rights of the citizen child to live in the State and to be reared and educated with due regard for its welfare.

10. The learned High Court judge erred in law or in fact or in the determination of a mixed question of law and fact by failing to give any or any proper or adequate notice to the fact that the refusal of the

application by the second named applicant under the IBC 05 Scheme did not alter or affect his status within the State.

The Separation of Powers and the Executive's Role in the Formation of Policy in respect of the IBC 05 Scheme.

11. The learned High Court judge erred in law in holding that the establishment and implementation of the IBC 05 Scheme by the [Minister] was subject to review by the courts other than to ensure that it was applied properly in accordance with the terms.

12. The learned High Court judge erred in law in failing to accord sufficient recognition to the exclusive responsibility of the executive in the formulation and adoption of the IBC 05 scheme.

13. The learned High Court judge erred in law in the weight which she attached to the Irish born child's rights to be reared and educated with due regard to its welfare and to have its welfare considered in any decision that might have effect upon it in the context of the [Minister's] role in forming and implementing the immigration policies in the State.

14. The learned High Court judge erred in law in her construction of section 3 of the European Convention on Human Rights Act, 2003 so as to apply it to executive functions without any limitation in the sphere of the formation and implementation of policy, in accordance with the constitutional separation of powers.

Grounds relating to the European Convention on Human Rights Act 2003

15. The learned High Court judge erred in law in determining that in the establishment and adoption of the IBC 05 Scheme the [Minister] was bound by the provisions of the European Convention on Human Rights Act, 2003.

16. The learned High Court judge erred in law and in fact in holding that the first named applicant had established a private life in the State such as to be entitled to the protection afforded by the European Convention on Human Rights Act, 2003.

17. The learned High Court judge erred in law and/or in fact in particular in holding that the first named applicant's right to private life in the State derived from her Constitutional right to live in the State.

18. Without prejudice to the foregoing the learned High Court judge erred in law and in fact in holding that the decision to refuse the second named applicant's application pursuant to the IBC 05 Scheme interfered with, infringed or breached the asserted right to private life in the State of the first named applicant;

19. The learned High Court judge erred in law and in fact in holding that the [Minister] was obliged in considering an application under the IBC 05 Scheme to ensure that a decision to refuse the application in accordance with the terms of the scheme was not disproportionate to the ends sought to be achieved in the interests of the common good.

Grounds relating to the learned High Court Judge's finding that there was a failure of the Minister to afford the Respondents fairness of procedure

20. The learned High Court judge misdirected herself in law or in fact in holding that the [Minister] had not afforded fair procedures to the second named applicant in the manner in which the [Minister] determined that the second named applicant had not provided adequate evidence of continuous residency in the State.

21. The learned High Court judge misdirected herself in law or in fact in the determination of a mixed question of law and fact by failing to give any or any adequate reasons of law as to why fair procedures required the second named applicant to be informed of the deficiencies in the documentation he had submitted other than by referring to the statements in the affidavit of Maura Hynes at paragraph 33 thereof;

22. The learned High Court judge erred in law in holding that the [Minister] was obliged to inform the second named applicant that the documentary evidence of continuous residence that he had submitted was insufficient to provide evidence of continuous residence in the State in circumstances where the learned High Court judge had held that the documents submitted did not on their face prove continuous residence.

Grounds relating to the learned High Court Judge's findings in relation to separate and distinct applications for residency in the State

23. The learned High Court judge erred in law and in fact in determining that the [Minister], on receipt of an application for residency or leave to remain in the State from a non-national parent of an Irish born citizen must by a fair and proper inquiry into the circumstances of the citizen child and his/her family consider (*sic*) determine whether or not respect for and defence of the vindication of the citizen child's personal rights as guaranteed by Article 40.3 of the Constitution required that the [Minister] should then consider the application for residency.

24. The [Minister] contended that the said finding was otiose in that in light of the learned High Court judge's order of certiorari of the decision refusing the second named applicant's application under the IBC 05 scheme, as in the circumstances, there was no necessity to consider the said issue.

20. Submissions
Written and oral submissions were received by the Court in this matter, and the appeal was at hearing over three days.

21. Decision
I would allow the appeal of the Minister. My reasons are as follows.

22. Executive Power
In this case one of the fundamental powers of a State arises for consideration. In every State, of whatever model, the State has the power to control the entry, the residency, and the exit, of foreign nationals. This power is an aspect of the executive power to protect the integrity of the State. It has long been recognised that in Ireland this executive power is exercised by the Minister on behalf of the State. This was described by Costello J. in **Pok Sun Shun v. Ireland** [1986] I.L.R.M. 593 at 599 as:

> "In relation to the permission to remain in the State, it seems to me that the State, through its Ministry for Justice, 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."

The special role of the State in the control of foreign nationals was described by Gannon J. in **Osheku v. Ireland** [1986] I.R. 733 at 746. He stated at p.746:-

> "That it is in the interests of the common good of a State that it should have control of the entry of aliens, their departure and their activities and duration of stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual 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."

I would affirm and adopt this description. While steps taken by a State are often restrictive of the movement of foreign nationals, the State may also exercise its powers so as to take actions in a particular situation where it has been determined that the common good is served by giving benefits of residency to a category of foreign nationals - as a gift, in effect. The inherent power of the State includes the power to establish an *ex gratia* scheme of this nature. Such an arrangement is distinct from circumstances where legal rights of individuals may fall to be considered and determined.

Exercising such power, in light of unique circumstances in Ireland in 2005, in addition to the specific statutory procedures, a special administrative scheme, the IBC 05 Scheme, was introduced by the Minister. The Minister obtained Government approval. It was a generous scheme, for those who came within its criteria. It was an example of the State exercising its discretion to allow specific foreign nationals to reside in Ireland. Yet, the foreign nationals still retained all rights under the formal procedures.

The IBC 05 Scheme was administered by the IBC 05 unit in the Department of Justice, Equality and Law Reform. It was a *sui generis* scheme. Under this scheme leave to reside was granted on general principles.

The scheme was introduced by the Minister, exercising the executive power of the State, to address in an administrative and generous manner a unique situation which had occurred in relation to a significant number of foreign nationals within the State. However, those who did not succeed on their application under this scheme remained in the same situation as they had been prior to their application. They were still entitled to have the Minister consider the Constitutional and Convention rights of all relevant persons.

The scheme enabled a fast, executive decision, giving a benefit to very many people. However, a negative decision in the IBC 05 Scheme did not affect any substantive claim for permission to remain in the State. In other words, an adverse decision to an applicant under the IBC 05 Scheme left the applicant in no worse position than he or she was prior to the application as no decision had been made on any substantive rights.

23. Decision on IBC 05 Scheme

The terms of the IBC 05 Scheme were set out clearly in the public documents of the scheme and on the application form. One of the requirements was continuous residence within the State since the birth of the Irish born child.

I am satisfied that the High Court erred in holding that there was nothing in the documents which stated that the revised arrangements did not apply to a person not continuously resident in the State with his or her Irish born child since the birth of the child. The public documents clearly stated that continuous residence in the State with the child was a requirement of the scheme.

The High Court then went on to consider whether in fact the second named applicant had provided evidence of continuous residency and found that he had not. The High Court held that he had failed to meet this term of the scheme and I would endorse that finding. The consequence is that the second named applicant's application did not come within the terms of the IBC 05 Scheme. Thus his application must fail.

The IBC 05 Scheme was a limited scheme, directed to foreign national parents of Irish born citizen children born before 1st January, 2005, who satisfied the terms of the scheme. It was the duty of the Minister to consider each application, to see if it met the criteria of the scheme.

On the face of the documents furnished by the second named applicant, he did not come within the scheme. The public notice stated that the application form should be accompanied by, *inter alia*:

> "Evidence of continuous residence in the State since the birth of the child (utility bills, lease/rental agreements etc.)

Such evidence was not provided. The decision of the Minister was that the second named applicant did not come within the scheme and his application was refused.

There is no reason, to interfere with that decision. It was a decision made by the Minister within the terms of the scheme.

The consequence is that the second named applicant is in the same position as he was prior to applying under the IBC 05 Scheme. The merits of his case have not yet been addressed in a judicial or statutory procedure. Substantive rights have not been considered and continue as before. The decision within the IBC 05 Scheme does not lead to his deportation.

The IBC 05 Scheme no longer exists. It was a generous scheme introduced and administered by the Minister and it is concluded and is no longer applicable.

There is no evidence that the scheme was not applied to the second named applicant within its terms, or that any other than the criteria of the scheme were applied. Indeed the evidence is to the contrary. Thus the situation to be considered now is one post the IBC 05 Scheme.

24. Misconceived

The basic premise of the applicants, and of the High Court, that the Constitutional and Convention rights of the applicants were in issue in the IBC 05 Scheme, was misconceived. Thus much of the pleadings, judgment and submissions related to matters not in issue.

The High Court found that the second named applicant had not complied with the requirements of the scheme. However, it then fell into error in its analysis of the IBC 05 Scheme.

I am satisfied that the scheme was an exercise of executive power by the Minister. It did not purport to address, nor did it address, Constitutional or Convention rights. It was a scheme with clear criteria. On the face of the documents the criteria were applied to the second named applicant, and he failed to meet the criteria.

As the IBC 05 Scheme did not address Constitutional or Convention rights applicants who were not successful were left in exactly the same position as they had been prior to their application. There was no interference with any Constitutional or Convention rights. Consequently, it was an error on behalf of the High Court to consider the application of the scheme as an arena for decision making on Constitutional or Convention rights, whether they be; as considered by the High Court: (1) the rights of the child under Articles 40.3 and 41 of the Constitution; (2) Rights under article 8 of the European Convention on Human Rights; or, (3) Rights under article 14 of the Convention; or other rights. It follows, also, that in establishing the criteria for judicial review, the High Court took too expansive an approach. Neither Constitutional nor Convention rights were in issue, at issue was whether or not the Minister acted within the stated parameters of the executive scheme.

Insofar as the issue of rights under the Constitution and the Convention were considered and decisions made on these issues, it was a premature analysis by the High Court. Issues as to the Constitutional and Convention rights of the applicants have yet to be considered by the Minister. Insofar as the review extended into this arena it was in error.

This conclusion as to the Minister's decision is sufficient to determine the appeal. However, I consider it would be of assistance to refer to the arena where Constitutional or Convention rights may be considered.

25. Section 3 Immigration Act, 1999 - Deportation Order

The fact that the applicant failed on his IBC 05 Scheme application does not mean that Constitutional or Convention rights will not be considered. The IBC 05 Scheme is entirely separate from the Minister's function under the Immigration Act, 1999, as amended, where a decision may be made as to whether or not a deportation order should be made in respect of a foreign national.

In making a deportation order the Minister must comply with s.3 of the Immigration Act, 1999, as amended. The Minister is required to have regard to a wide range of matters in s.3(6) of the Immigration Act, 1999. This section states:-

> "(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."

Thus, bearing in mind the case law of this Court, the Minister is required to consider in this context Constitutional and Convention rights of the applicants. This statutory process provides a forum for consideration of the relevant rights. The s.3 process is sufficiently wide ranging for the Minister to exercise his duty to consider Constitutional or Convention rights of the applicants. This has yet to be done in this case as the pre-existing deportation order has been quashed on consent.

26. Unfair Procedures
The learned High Court judge held that there had been unfair procedures. Maura Hynes deposed as to the procedure in the IBC 05 Scheme where applicants omitted to supply certain documents; she stated that they were informed by letter and given time to reply. A draft template letter was exhibited in Maura Hynes' affidavit. The High Court endorsed such a procedure but held that there was no evidence that the second named applicant received such a letter, and that he averred that he did not receive such a letter. The High Court held that fair procedures did require that he receive such a letter, but that there was an omission in this case. On the basis of that omission the High Court granted an order of *certiorari*.

The second named applicant had stated on his IBC 05 application form that he had not left the State for any reason since the birth of the child. However, the supporting documentation which he furnished was limited to (a) the statement from the Health Service Executive that he had received welfare payments from 25th July, 2002 to 14th August, 2002, and from 22nd February, 2005 to 8th March, 2005; and, (b) a letter from the hostel stating that he had arrived at that hostel on the 21st February, 2005. The birth certificate of the child, the first named applicant, gave his address at the time of her birth as No. 35, Okesegun Street, Nigeria.

During the proceedings in the High Court it was argued that the second named applicant had provided sufficient evidence of continuous residence. The High Court held that this was not so, and I would uphold that finding.

On the face of the documents the second named applicant did not prove that he came within the scheme. This was a requirement of the scheme. Thus the Minister was entitled to reach the conclusion he did on the documents.

While Maura Hynes averred that a letter was normally sent to an applicant if documents were absent, there was no obligation to do so. The Minister was merely required to consider the application within the ambit of the scheme. There is no general duty on an administrative body to give the opportunity to provide additional material after the closing date for application. The fact that the Minister may have chosen to give a second chance does not make it an obligation. The Minister's obligation was to consider the application within the requirements of the scheme. Given the nature of the administrative scheme, the factual history presented by the second named applicant, the documents provided, and the fact that the administrative decision does not relate to any Constitutional or Convention rights, but leaves the second named applicant in the same position as he was prior to making the application, there was no breach of fair procedures, and consequently the issue of an order of certiorari does not arise. I reach this decision also because the second named applicant has made submissions relating to the Constitutional and Convention rights of the applicants - which he wishes to be considered by the Minister, and which matters have yet to be addressed, and which would not be addressed in the IBC 05 Scheme. Consequently, there is merit in enabling the second named applicant proceed to address these issues in the appropriate process, i.e. the process under s.3 of the Immigration Act, 1999, as amended.

27. Right to Apply
The High Court found it unnecessary to make an order of *mandamus* to require the

Minister to consider the second named applicant's stand alone application to remain in the State, per letter dated 6th December, 2005. However, the High Court then went on to consider the Minister's legal obligation to consider stand alone applications.

This is not now relevant in view of my decision on the nature of the IBC 05 Scheme, and the consequences, and the applicability of the s.3 procedure under the Act of 1999. However, I consider it important to state my opinion, to clarify the consequences of the decision.

The appropriate process within which to consider Constitutional or Convention rights of applicants is on the process under s.3 of the Act of 1999. This is the relevant statutory scheme.

In addition, within the statutory scheme there is provision to revoke a deportation order, see s.3(11) of the Act of 1999, which states:-

> "The Minister may by order amend or revoke an order made under this section including an order under this subsection."

Thus, a person, such as the second named applicant, could notify the Minister of any altered circumstances since the making of a deportation order, such as the birth of an Irish born child. On such notification the Minister would have a duty to consider the new information to determine whether to revoke a deportation order. As the statutory scheme makes this provision for such an application, there is no need to seek a further process for a right to apply. The integrity of the system should be maintained, as long as it protects the rights of the applicants, which it does in this case.

Consequently, it is my view that there is no free standing right of the second named applicant to apply to the Minister. The appropriate procedure is under s.3 of the Act of 1999, as amended, with the potential right to apply under s.3(11) in the future if the need to make such an application should arise.

28. Conclusion

For the reasons given I would allow the appeal.

The application was misconceived. The IBC 05 Scheme was a scheme established by the Minister, exercising executive power, to deal administratively with a unique group of foreign nationals in a generous manner, on general principles. The parameters of the scheme were set out clearly, and included a requirement of continuous residence in the State since the birth of the child. There was no evidence of continuous residence - indeed the evidence was to the contrary. The scheme was administered by the Minister within the terms of the scheme.

At no stage was it intended that within the ambit of the scheme the Minister would consider, or did the Minister consider, Constitutional or Convention rights of the applicants. Thus the terms of the pleadings and of the appeal relating to the Constitutional and Convention rights of the applicants were misconceived and premature. Applicants who were not successful in their application under the IBC 05 Scheme remain in the same position as they had been before their application.

The Oireachtas has established a statutory scheme providing that the Minister, in considering the situation of foreign nationals, shall have regard to a wide range of issues when making a decision under s.3 of the Immigration Act, 1999, as amended. Constitutional and Convention rights are appropriately considered at that stage. If there is a change of circumstances then an application may be made to the Minister to consider further matters under s.3(11) Immigration Act, 1999, as amended.

Consequently, I would allow the appeal and reverse the decision of the High Court. Constitutional and Convention rights of the applicants have yet to be considered by the Minister. Such consideration may arise in the future in the statutory process under s.3 of the Immigration Act, 1999, as amended. If necessary, further matters may be considered at a later date under s.3(11) Immigration Act, 1999, as amended.