The High Court

Bankole Lawrence Fajujonu, Zohra Fajujonu and Miriam Fajujonu (an infant suing by her next friend Celine Maher) v The Minister for Justice, Ireland and The Attorney General

1984 No 9203p

11 November 1987

BARRINGTON J:

The first-named plaintiff is aged 36 years and is a citizen of Nigeria. The second-named plaintiff is a Moroccan citizen. They met in London in the late 1970s where he, at that time, was a temporary resident studying accountancy. They were married in the city of Westminster in London on 20 March 1981.

At the end of March 1981 Mr Fajujonu and his wife came to live in Ireland. Whether knowingly or not, they came as illegal immigrants and have at all material times been illegal residents in Ireland and subject to the risk that a deportation order might be made against them pursuant to the provisions of Section 5 of the Aliens Act 1935. No such deportation order has in fact been made, though the plaintiff Mr Fajujonu has been asked by the Minister for Justice to make arrangements for his departure from the State and it was this request, coupled with the fear that a deportation order would follow, which gave rise to the present proceedings.

A deportation order was apparently made against Mr Fajujonu in the United Kingdom in July 1981 but this order, I am informed, was invalid and is no longer in force.

I am satisfied that at all material times since he came to Ireland Mr Fajujonu has been anxious and willing to work. He has not however succeeded in obtaining a work permit nor has he succeeded in completing his accountancy studies. For a time he drew unemployment assistance. To obtain this he had to sign a certificate saying that he was available for work. He was available for work in the sense that he was physically able and anxious to work but he was not legally available for work in the sense that, not having a work permit, he was not legally entitled to work for reward.

In December 1983 Dublin Corporation offered Mr and Mrs Fajujonu a house at 27 Croftwood Crescent, Ballyfermot, Dublin, where they still reside. They are apparently popular with the local community. The secretary of the local tenants' association, Mr Larkin, gave evidence on their behalf before me. Indeed it would appear that it was a request by the committee of the Ballyfermot sports and leisure complex to employ Mr

Fajujonu which brought his presence in the country formally to the attention of the Department of Justice.

From enquiries made by the Department of Justice it would appear that, at one stage, when Mr Fajujonu was stopped by police in England, he had in his possession a birth certificate purporting to show that he had been born in Ireland. It does not appear however that Mr Fajujonu in fact used the certificate for any improper purpose.

However, the issue of principle which the plaintiffs seek to raise in this case arises not from any of the matters referred to in the immediately preceding three paragraphs but from the fact that the third-named plaintiff Miriam Fajujonu is a citizen of Ireland, having been born there on the 24 September 1983. Since then Mr and Mrs Fajujonu have had two further children. These also are Irish citizens and, though they have not been joined as parties to these proceedings, the same issues arise in relation to them as arise in Miriam's case.

In a letter to the Department of Justice dated the 17 November 1984 the plaintiffs' solicitor put his clients' case as follows:

'From the instructions I have taken I am of the opinion that my clients are in a position to assert a right to remain in the State. Their daughter, Miriam, is an Irish citizen having been born in Dublin on 24 September 1983. Mr and Mrs Fajujonu have been resident in the State since the 31 March 1981. In December 1983 they were allocated by Dublin Corporation a three bedroomed house at 27 Croftwood Crescent Ballyfermot Dublin where they are now residing. Mr Fajujonu is a medical-card-holder and a part-time student attending a five year course in the College of Commerce, Rathmines, where he is studying to be a certified accountant. He first enrolled as a student in the college in September 1981.

Miriam Fajujonu, an Irish citizen with a permanent residence in the State, is, in my opinion, in a position to assert a constitutional right to the company, guardianship, custody, care and control of her parents. Any order made in pursuance of the Aliens Act 1935 prohibiting either or both of her parents from continuing to remain in the State is, in my opinion, in breach of her constitutional rights. Furthermore, any such order under the Aliens Act 1935 amounts in this particular case to a threat to the family as a unit and a violation of the constitutional rights of both Mr and Mrs Fajujonu as well as of their daughter Miriam.

In their statement of claim the plaintiffs put the matter as follows:

4. The first and second-named plaintiffs have established the family home within the State and propose to reside within the State with the third-named plaintiff.

5. The first-named defendant has refused permission to the first-named plaintiff to remain in the State and requested him to make arrangements for his departure as soon as possible. The first and second-named plaintiffs fear and believe that the first-named

defendant has decided to prohibit the first-named plaintiff herein from continuing to reside or remain within the State and intends unless restrained by this Honourable Court to deport the first-named plaintiff herein or otherwise make provision for his exclusion from the State.

6. The third-named plaintiff is, by virtue of her citizenship, entitled to remain in and be protected by the State. The third-named plaintiff is entitled as a citizen and as a member of the family of tender years to reside with and be raised, educated and supported by her parents and to enjoy their company and their society.

7. The aforementioned decision of the first-named defendant to deport the first-named plaintiff or otherwise make provision for his exclusion from the State is, and if made in future would be, unlawful unjust and contrary to the provisions of Articles 40, 41 and 42 of the Constitution.

8. In the alternative, the plaintiffs will claim that insofar as the deportation or exclusion from the State of the first and second-named plaintiffs herein or either of them is made lawful by the provisions of the Aliens Act 1935, the said provisions of the said Act are repugnant to the Constitution and were not continued in force by Article 50 of the Constitution.

The plaintiffs accordingly claim an order restraining the defendants from deporting the plaintiffs or any of them from the State; a declaration that the plaintiffs are entitled to reside within the State; a declaration that such provisions of the Aliens Act 1935 as purport to empower the defendants to deport the plaintiffs or any of them or otherwise exclude them or any of them from the jurisdiction of this Honourable Court are inconsistent with the Constitution and were not carried over as laws by Article 50 of the Constitution; and, if necessary, an order directing the first-named defendant to grant to the first and second-named plaintiffs a visa entitling them to remain within the State as long as they are memebers of the family referred to.

As previously stated I am satisfied that no deportation order has in fact been made against any of the plaintiffs. However, in view of the request by the Minister to the first-named plaintiff to make arrangements to leave the State I am satisfied that all the plaintiffs had reason to fear that the making of such a deportation order against him was imminent and that they were justified in bringing these proceedings.

Mr McDowell, on behalf of the plaintiffs, rests his clients' case largely on the right of the infant plaintiff, as a citizen of Ireland, to remain in this country. He says that Mr Justice Kenny accepted in Ryan v Attorney General [1965] IR 294, that the citizen has a right to free movement within the State. The present Chief Justice, when President of the High Court, accepted that an Irish citizen has a right to leave the State and that, in the case of a child of tender years, the appropriate person to make this decision on its behalf is its parent. (The State (M) v Attorney General [1979] IR 73).

Mr McDowell submits that the logical corollary of a right in the citizen to move within

the State and to leave the State is a right to reside within the State.

I would be prepared to accept that the normal place for a citizen to be is within the State and that this must imply some form of right of residence as well as some form of right to free movement. But the President was careful to point out in State (M) v Attorney General [1979] IR 73, that the right to leave the State was subject to certain very significant limitations.

At page 80 of the report he puts the matter as follows:

Without entering into and enforcing binding agreements with other sovereign States, the State can neither by its laws nor by the acts of its Executive guarantee its citizen freedom of movement outside the State as a personal right. It does not seem to me that the Constitution can or should be construed as imposing upon the State in any event or upon any terms an obligation to enter into or enforce such agreements.

However, where such agreements already exist in terms, and subject to conditions, acceptable to the State, it appears to me that the citizens of the State may have a right (arising from the Christian and democratic nature of the State -- though not enumerated in the Constitution) to avail of such facilities without arbitrary or unjustified interference by the State. To put the matter more simply and more bluntly, it appears to me that, subject to the obvious conditions which may be required by public order and the common good of the State, a citizen has the right to a passport permitting him or her to avail of such facilities as international agreements existing at any given time afford to the holder of such a passport. To that right there are obvious and justified restrictions, the most common of which being the existence of some undischarged obligation to the State by the person seeking a passport or seeking to use his passport -- such as the fact that he has entered into a recognizance to appear before a criminal court for the trial of an offence. Such a right to travel, which is inextricably intertwined with the right to obtain a passport, has been recognized by the constitutional law of the United States of America in such cases as Kent v Dulles (1958) 357 US 116. Furthermore, one of the hallmarks which is commonly accepted as dividing States which are categorised as authoritarian from those which are categorised as free and democratic is the inability of the citizens of, or residents in, the former to travel outside their country except at what is usually considered to be the whim of the executive power. Therefore, I have no doubt that a right to travel outside the State in the limited form in which I have already defined it (that is to say, a right to avail of such facilities as apply to the holder of an Irish passport at any given time) is a personal right of each citizen which, on the authority of the decisions to which I have referred, must be considered as being subject to the guarantees provided by Article 40 although not enumerated."

The former President then continues in a passage which Mr McDowell (on behalf of the Plaintiffs) relies on very heavily. The passage reads 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 a 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 by 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 provisions for its welfare consist, 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 was dealing in the case referred to with a comparatively straightforward clash between the rights of the child, on the one hand, and the rights of the State on the other. He is adding that, in the case of a child of tender years, the parent may make the child's choice for him subject to the Court being satisfied that the dominant interest of the welfare of the child is being achieved.

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 wished 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?

But that, Mr McDowell says, is not this case. The three plaintiffs in the present case, he submits, constitute a family and, in Article 41 of the Constitution, the State recognizes 'the family as the natural primary and fundamental unit group of society and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.' The State accordingly guarantees to protect the family 'in its Constitution and authority as the necessary basis of social order and as indispensable to the welfare of the nation and the State'. The parents are the authority, within the family, for making decisions for the welfare of the family and particularly for making decisions touching the welfare of infant children of the family. Unless therefore the State can show that the parents have in some way failed in their duties towards their children it must respect those decisions.

The rights of the family are declared to be 'inalienable' which means that they cannot be surrendered or given away. They are also declared to be 'imprescriptible' which means that they cannot be lost or forfeited through the wrongful act of a third party over a period of time. One is therefore driven to the conclusion that the Constitution reserves to the family a certain sphere of authority and that within this sphere it has inalienable and imprescriptible rights. But this does not mean that the sphere of authority is unlimited or the rights absolute. There are certain matters which are outside and beyond the competence of the family; for example, issues such as peace or war or the foreign policy of the State.

An example of how the balance is struck between the rights of the State on the one hand and the rights of the parents of a family on the other is to be seen in Article 42.3 of the Constitution.

Subsection 1 degree provides that:

"The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State".

But subsection 2 degree provides that:

"The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social".

It is clear from this that the Constitution does not contemplate the family as existing in isolation but regards it as living in a larger community or society in which the State has a role to play as the guardian of the common good. Morever, Article 40 of the Constitution clearly contemplates that a citizen may under certain circumstances be deprived of his personal liberty, or even of his life, notwithstanding the fact that this may have tragic repercussions for innocent members of his family who may be deprived of his society and his support. In interpreting the Constitution it appears to me to be important to preserve the balance which the Constitution itself contemplates.

Whatever the 'inalienable and imprescriptible' rights of the family may be, they hardly comprise the right to dictate the foreign policy of the State. It appears to me that the control of the circumstances under which aliens may live or work in Ireland and the making of arrangements for rights of free travel between this and other countries are peculiarly matters within the competence of the Oireachtas and the Government and that they are matters into which these Courts should be slow to enter.

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 a 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 Attorney General [1979] IR 73. In State (M) v Attorney General, 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 immigratioin of aliens into the country.

Apart from the foregoing Mr McDowell is confronted by certain decisions of the Irish

High Court in which the submissions he is making in this case have been rejected Osheku and others v Ireland and others [1987] ILRM 330. The facts were very similar to the facts in the present case. The plaintiffs were a husband and wife and their child. The husband was an alien while both the wife and the child were citizens of Ireland. The husband feared deportation and the plaintiffs challenged the constitutionality of the Aliens Act 1935. This challenge was rejected by Mr Justice Gannon who made a positive determination that the Aliens Act 1935 and the Statutory Orders SR&O N 395 of1946 and SI N 128 of 1975 were not inconsistent with the Constitution.

In the course of his judgment Mr Justice Gannon said at p 342 that:

'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 the protection of the boundaries of the State. That it is in the interests of the common good of a State that it should have control of the entry of aliens, their departure, and their activities and duration of stay within the State is and has been recognized universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter'.

Similary in Pok Sun Shum and others v Ireland and others [1986] ILRM 593, Mr Justice Costello held that the rights given to the family under the Constitution were not absolute and that the provisions of the Aliens Act 1935 and the orders made under it were permissible restrictions.

Mr McDowell has submitted that the Osheku case and the Pok Sun Shum case were wrongly decided and has invited me not to follow them. Even if I accepted Mr McDowell's submissions (which I do not) I would not feel free not to follow two considered judgments of the High Court on such an important issue.

Finally, Mr McDowell referred to a dictum of my own in The State (Bouzagou) v The Station Sergeant Fitzgibbon Street Garda Station, [1986] ILRM 98.

That was a case in which the prosecutor, Mr Bouzagou was an alien who had been refused permission to land at Dublin Airport. He sought to justify his presence in Ireland on the basis that he was married to an Irish citizen and was the father by her of children who were also Irish citizens. On investigation, however, it transpired that unhappy differences existed between himself and his wife and that his wife and children had had the protection of a barring order against him when last he was in Ireland.

Under these circumstances I stated:-

The prosecutor's problem, however, is that he cannot automatically claim the rights guaranteed to the family under Article 41, because, in this case, unfortunately the family is divided. It is not a question of asserting the rights of a family, or even of the parents, as against the outside world but of reconciling the rights of individual members of the

family when the family itself is divided. The wife and the children now live as a separate unit and, when the prosecutor was last in the country, had the protection of a barring order against him. In these circumstances it appears to me that, in the absence of agreement between husband and wife, the task of reconciling the rights of the prosecutor with those of other members of his family is one for the courts.

I then went on to say:

I am not called upon to state in this case what the position would be if Mr Bouzagou's wife were not estranged from him. Indeed, even in the case of an estranged husband, there might be circumstances in which he would be entitled to a visa or to enter Ireland for the purpose of sorting out his family difficulties by litigation or other lawful means. But Mr Bouzagou did not put his case on that basis.

The first situation contemplated in the above dictum appears now to be governed by Mr Justice Gannon's decision in the Osheku case. The second matter does not arise for consideration in this case.

In the circumstances it appears to me that the plaintiffs are not entitled to any of the reliefs claimed.