Neutral Citation Number: [2009] IEHC 595

THE HIGH COURT

JUDICIAL REVIEW

2009 193 JR

BETWEEN

GANIYU ALLI (A MINOR, SUING BY HIS FATHER AND NEXT FRIEND KABIR ALLI) AND KABIR ALLI

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 2nd day of December, 2009.

1. By order of McMahon J. on the 22nd May, 2009 the applicants were granted leave to apply for an order of certiorari to quash the decision of the Minister for Justice, Equality and Law Reform ("the Minister"), dated the 27th January, 2009, making a deportation order against Mr Kabir Alli, the second named applicant. A similar leave order was made by Feeney J. on the 11th June, 2009 in the case of Mr Lovis Asibor [2009 No. 200 J.R.]. Mr Alli and Mr Asibor are not related but as the same issues arose in both cases, the judicial review hearings took place together at the King's Inns, Court No. 1, over four days in July, 2009. Mr Mark de Blacam S.C. with Mr Colm O'Dwyer B.L. appeared for the *Alli* family. Mr John Finlay S.C. with Mr Michael McNamara B.L. appeared for the *Asibor* family. Ms Sara Moorhead S.C. with Ms Cindy Carroll B.L. and Mr David Conlan Smyth B.L. appeared for the respondent in both cases.

2. In brief Mr Alli and Mr Asibor are the fathers of citizen children whose wives have leave to remain in this country with their children. Both families also contain children who are not Irish citizens. Mr Alli and Mr Asibor arrived in Ireland three years after the birth of their citizen children and are both subject to deportation orders. They challenge the Minister's decision to deport them on similar grounds. Their arguments are analysed at length in this decision but the Court's conclusions on the applicable principles apply equally to the deportation of Mr Asibor.

Background

3. The applicants in this case are members of a family living in Athlone. The second applicant Mr Alli is a national of Nigeria. He is the father of the first applicant who is a citizen of Ireland. Mr Alli married his wife, Mrs Alli, in 2003. Mrs Alli, who is not a party to these proceedings, claims to be a national of the Côte d'Ivoire. She arrived in the state in July, 2004 accompanied by her two sons, then aged three and five, from a previous relationship. She sought asylum in the State claiming to fear persecution in the Côte d'Ivoire arising from her pregnancy with twins around which there was superstition. She claimed that her twins would be killed when they were born. Her twins are citizens of Ireland by reason of their birth in the State. The boy who is the first applicant and a girl, who is not a party to these proceedings, were born in September, 2004, two months after Mrs Alli's arrival in Ireland. Shortly after their birth, Mrs Alli withdrew her claim for asylum and relied on the terms of the IBC 05 scheme which permitted her (and by proxy her two older children) to remain in the State for a period of two years. That period has since been extended up to October, 2010.

4. The second applicant Mr Kabir Alli, who is the father of the Irish citizen twins, arrived in the State from Nigeria in December, 2007 and joined his wife, children and step-children. He made an application for asylum upon entering the State, claiming to fear persecution by a secret cult which he had joined and then attempted to leave in Nigeria since 2004. Mr Alli's background as claimed in his asylum application is that he was born in Lagos State in Nigeria in 1969 and is a Muslim. He was educated for thirteen years and graduated with a diploma in engineering. He worked as a self-employed engineer, a trader and a teacher. In 2003 while on a business trip in the Côte d'Ivoire he met and married his wife, who is also a Muslim. He became the step-father of her two sons who were born in 1999 and 2001. She left the Côte d'Ivoire without informing him in 2004 and he returned to Nigeria where he remained until he joined her in Ireland in November, 2007. By then, his twins were more than three years old.

5. Mr Alli's asylum application failed and he was informed that the Minister intended to make a deportation against him. His legal representatives made extensive representations on his behalf seeking leave for him to remain with his family in Ireland on the basis that two of his children were citizens of the State and by reason of the family's rights under Article 8 of the European Convention on Human Rights. Those representations were considered by the Minister who, in January, 2009, refused the application for leave to remain and made a deportation order against Mr Alli.

6. While leave was granted to the applicants to seek judicial review of that decision on nine grounds the arguments before this Court were more confined. The general thrust of the challenge was that the Minister's examination of Mr Alli's file did not accord with the guidelines provided by Denham J. when she delivered the unanimous judgment of the Supreme Court in *Oguekwe v. The Minister for Justice, Equality and Law Reform* [2008] 2 I.L.R.M. 481. It was further argued that the Minister applied the wrong test in asking whether there were any "insurmountable obstacles" to the family moving with Mr Alli to Nigeria rather than applying a test of reasonableness and proportionality.

The Applicants' Arguments

7. Mr de Blacam S.C. represented the Alli family. All of his submissions were made against the background of the primary argument that citizen children have rights guaranteed under the Constitution to live in the State, to be educated and to enjoy the presence of their parents in a constitutionally protected family here. Those rights were recognised by the Supreme Court in *Fajujonu v. The Minister for Justice, Equality and Law Reform* [1990] 2 I.R. 151 and reiterated in the more recent cases of *Dimbo v. The Minister for Justice Equality and Law Reform* [2008] I.E.S.C. 26 and *Oguekwe* (cited above). Those decisions, it is argued, set citizen children's constitutional rights at a very high level and include the citizen child's right never to be deported. If those rights were to be given real meaning then the deportation of their parent(s) could only occur where there was a very compelling reason that was applicant-

specific such as, for example, where the parent had engaged in serious criminality or posed a threat to State security. As citizen children's rights are constitutionally guaranteed, those citizens could not be in a less favourable position than those of a refugee child who is entitled to be reunited with his parents pursuant to s. 18 of the Refugee Act 1996. The Alli citizen children are also EU citizens and if Mr Alli chose to exercise their right to reside in the U.K. under EC law, then he would be entitled to reside with them there pursuant to the judgment of the European Court of Justice in *Zhu and Chen v. Secretary of State for the Home Department* (Case No. C-200/02, judgment of 19th October, 2004). It is difficult to conceive that the citizen children could have more extensive rights under s. 18 of the Refugee Act 1996 or under EC law than under the Constitution.

8. Against that general background Mr de Blacam's first ground for challenge to the Minister's decision to make a deportation order was that following the decision of the Supreme Court in *Oguekwe* (cited above) and a series of decisions in the U.K. (e.g. *Huang v. Secretary of State for the Home Department* [2007] 2 A.C. 167; *Chikwamba* [2008] 1 W.L.R. 1240; *EB (Kosovo)* [2008] 3 W.L.R. 178; *VW (Uganda) and AB (Somalia)* [2009] EWCA Civ 5), the appropriate test when considering the deportation of a citizen child's family member was whether it was reasonable to expect the family members to move to Nigeria with the deportee. In considering that question, the Minister should also consider the consequences for them if they elected to remain in Ireland without the deportee. The Minister erred in law by confining his consideration under Article 8 of the European Convention on Human Rights (ECHR) to the question set out by Lord Phillips in *R (Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840 as to whether there are any "insurmountable obstacles" to the family returning to Nigeria with Mr Alli.

9. Secondly, the Minister failed to engage in an adequate balancing exercise in that he neglected to identify, assess and consider the best interests and constitutional rights of the citizen children and the severity of the consequences of the deportation on the family as a whole. In so doing, the Minister acted in breach of the obligations set out in *Oguekwe.*

10. Thirdly, the decision was not proportionate, as is required by *Oguekwe,* in that too much emphasis was attached to the rights of the State and too little to the constitutional rights of the children, which are set at a very high constitutional value. Inadequate consideration was afforded to whether the decision to deport Mr Alli would impact excessively on the citizen children, Mrs Alli and the step-children. No explanation was provided as to why the Minister was treating this case differently to other similar cases where both parents were given leave to remain.

11. The applicants' final argument was that the Minister failed to identify a sufficient "substantial reason" associated with the common good which required the deportation of Mr Alli. The reason provided, which was that the deportation accorded with orderly immigration control and there was no less restrictive process, was not a sufficient reason where family and children's rights are involved. While Mr de Blacam accepted that there were occasions where the Minister could deport a person in Mr Alli's position, it would have to be for a very compelling reason which would justify the rupture of a family which included citizen children. If general policy considerations are to be relied on then the basis for those considerations must be clearly demonstrated which did not occur in this case.

The Respondent's arguments
12. Ms Moorhead S.C. on behalf of the Minister submitted that the *Mahmood* principles are a distillation of the jurisprudence of the European Court of Human Rights (ECtHR). Those principles remain applicable and they have not been displaced by the decision of Denham J. in *Oguekwe.* The U.K. cases relied on by the applicants arose in a situation where the *Mahmood* principles were interpreted as incorporating an "exceptionality" test. The House of Lords clarified in *Huang*, *EB (Kosovo)* and *Chikwamba* that no such "exceptionality" test applies and the ultimate question is whether the family cannot reasonably be expected to enjoy their family life elsewhere. An exceptionality test was never applied in Ireland and the Minister has always directed his mind towards the reasonableness of the deportation. The U.K. case law has had no impact in Ireland and *Oguekwe* brought about no change.

13. The Minister's examination of Mr Alli's file is remarkably more detailed and fact-specific than the impugned examination of the applicants' files in *Oguekwe* which were sparse and contained little specific consideration of the facts relating to the children or the families and nothing at all in relation to Article 8 ECHR. While the Minister is not required to spell out each and every consideration on the face of his decision, it is clear that there was a very close consideration of all the matters put before him in Mr Alli's application. *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593; *Osheku v. Ireland* [1986] 1 I.R.733; *Fajujonu* (cited above); *A.O. and D.L. v. The Minister* [2003] 1 I.R. 1 and *Oguekwe* all determine that the constitutional rights of citizen children are not absolute and there are instances where those rights may be outweighed by the common good. The Minister is obliged to consider the best interests of the children but he is not obliged to act in their best interests. The ECtHR has drawn a clear distinction between the family rights of settled migrants and those of persons whose presence in the Contracting State is merely tolerated while their applications under the State's immigration and asylum system are determined. In the case of non-settled migrants the ECtHR has generally found that although there might be very significant obstacles to the family returning with the deportee, the deportation would not breach Article 8.

14. As to their arguments about the absence of a "substantial reason", the applicants are in effect trying to re-run the arguments that were firmly rejected by the majority of the Supreme Court in *A.O. and D.L.* where it was clearly found that general reasons of immigration control may be identified as a "substantial reason" requiring deportation and no applicant-specific reason is required. That was also found in *Pok Sun Shum* and *Osheku. Oguekwe* did not overturn or overrule any of those decisions which therefore still represent the law. The "substantial reason" identified in Mr Alli's case is much more compelling than in *Oguekwe* where the sole reason given for the deportation order was that refoulement was not an issue.

15. As to the applicants' arguments on the absence of proportionality in the Minister's decision, Denham J. in *Oguekwe* made no finding that a different proportionality test is applicable when considering constitutional rights than when Article 8 rights are in issue. If the ECtHR jurisprudence is applied to this case there is nothing to suggest that the Minister reached a disproportionate decision.

Context
16. It is perhaps instructive to approach these cases on the basis of an understanding of immigration policy in the State as this forms the basis of the decision made by the Minister on the 27th January, 2009 to deport Mr Alli. The governments of this State have for many years operated a restrictive immigration policy which means that, subject to international agreements, foreign nationals are eligible for admission to live and work in the State only on the basis of visa requirements and work permits. While in more recent times, membership of the EU has given rise to the free movement of EU citizens into the State, the obligatory acceptance of asylum seekers into the State pending the determination of their status remains the exception to the general limitation of free movement of foreign nationals.

17. Under s. 9(1) of the Refugee Act 1996, a person who makes an application for a declaration of refugee status "shall be given leave to enter the State" subject to specified exceptions. Provided that his application is not transferred to another EU Member State under the Dublin II Regulation and provided that the application is not withdrawn, s. 9(2) provides that he or she "shall be entitled to

remain in the State" until notice is sent to him that the Minister has refused to give him a declaration of refugee status. Once the Minister has rejected the asylum application, the person becomes illegally resident in the State and the Minister is entitled to make a deportation order against him pursuant to s. 3(2) (*f*) of the Immigration Act 1999. The Minister's entitlement is subject to the prohibition of refoulement set out in s. 5 of the Refugee Act 1996, the provisions of the Immigration Act 1999 (s. 3(6) in particular) and the State's obligations under various other statutes including the European Convention on Human Rights Act 2003 and the Criminal Justice (UN Convention Against Torture) Act 2000, as amended. Mr Alli is a person who falls within s. 3(2) (f) of the Immigration Act 1999. He disputes the validity of the Minister's decision to deport him. He claims that as the father of Irish citizen children he is in a different category of foreign national in that his children have rights under the Constitution to live as a constitutionally protected family which includes him, and that he enjoys the right to respect for his family life under Article 8 ECHR which would be disproportionately interfered with by the deportation order.

18. Thus, the background to the applicants' arguments in this case is the tension between the right of a child citizen to reside in the State and the right of the State to refuse leave to the parents to remain in the State, thereby effectively rendering nugatory the right of the child to live here. The harmonious interpretation of those conflicting rights requires a careful balancing exercise to arrive at a proportionate decision.

19. The issue of the conflict between these rights has been considered many times. In particular, this conflict was considered in *Pok Sun Shum, Osheku, Fajujonu* and *A.O. and D.L*. (cited above). The most recent occasion on which the issue was considered by the Supreme Court in *Oguekwe* and *Dimbo* (cited above) where the judgments were delivered on the 1st May, 2008. In no case before the Supreme Court where the conflict was considered has it ever been suggested that the Minister cannot deport the parents of a citizen child even if the deportation has the inevitable result that the child will be removed from the State and his / her citizen rights temporarily suspended, subject only to his having considered all facts known about and specific to the child and the family. In no Supreme Court decision has it been suggested that the parents of citizen children have an automatic or even a *prima facie* right to remain in the State by reason of their parentage of a citizen child.

20. The possible reason for the frequency with which these issues have been ventilated in the courts is that the constitutional rights of citizen children and the rights of the family as a whole have become somewhat blurred since the passing of the European Convention on Human Rights Act 2003. The issue of Article 8 rights was not in issue in any of the cases which predate the entry into force of that Act on the 31st December, 2003 and the main question in each of the earlier cases (*Pok Sun Shum, Osheku, Fajujonu*) was whether the deportation of the foreign national parents of Irish citizen children would infringe those children's constitutional rights. However, the consideration necessary for such a deportation to accord with Article 8 of the ECHR was examined by Hardiman J in *A.O. and D.L*. when he considered that the jurisprudence of the ECtHR relevant to the issue in that case and stated at p. 143:

> *"it will be noted that this approach of balancing family and state rights closely reflects the approach in the Irish cases cited above. It is also consistent with the more general principles of constitutional construction applied in this country."*

21. In the knowledge that this case and the case of Mr Lovis Asibor are test cases where the outcome will affect the challenge on similar grounds in something approaching a hundred other cases, the Court considers it necessary to extensively recite the representations made by the Refugee Legal Service (RLS) and the considerations given to those representations in this case and that of Mr Asibor. The consideration will be analysed to determine whether, in accordance with judicial review principles and the guidance provided by Denham J. in *Oguekwe,* the deportation order was made in accordance with law.

22. Before outlining the detailed submissions made on Mr Alli's behalf, a number of inconsistencies have been noted by the Court. Both Mr and Mrs Alli claimed in their separate asylum applications that they were Muslims but in the s. 3 representations made on their behalf it was submitted that Mr Alli is a member of the Christ Apostolic Church in Athlone. It is suggested that Mrs Alli has never been to Nigeria but during the asylum process Mr Alli said that her mother lives in Ondo State in Nigeria and that she, his mother-in-law, had provided him with his wife's address in Ireland. The impression given was that Mr Alli lived with his wife and step-sons in the Côte d'Ivoire after his marriage and that Mrs Alli and the children had never been to Nigeria. However, Mr Alli stated in his leave to remain application in a letter written by him to the Minister of the 4th November, 2008 that his step-sons "*have been with me since 2003 in Nigeria".* Finally, Mr Alli claimed never to have had a passport even though he claims that he travelled regularly on business between Nigeria and the Côte d'Ivoire. To do so he would have had to traverse Ghana, Benin and Togo. Mrs Alli's passport was renewed in Cote d'Ivoire in 2006 at a time that she was living in Ireland. The Court notes these matters purely to demonstrate that these are issues which, though clear from the papers before this Court, were not commented upon by the Minister and remain unresolved.

The RLS Representations

23. The representations made by the RLS to the Minister on behalf of Mr Alli on the 14th July, 2008 follow the order of the itemised sub-sections of s. 3(6) of the Immigration Act 1999. Mr Alli's age was 38 years and the duration of his residence in the State was eight months. His date of marriage (2003) and the dates of birth of his step-children (1999 and 2001) and citizen children (September, 2004) were recorded. Details of his wife's leave to remain temporarily in Ireland were furnished.

24. Although Mr Alli was only eight months in the State when the representations were made, it was asserted that he had "*been warmly received by those by whom he has had contact, has integrated extremely well into the community and is held in the highest regard*." It is noteworthy that this submission was repeated verbatim in Mr Lovis Asibor's case. Mrs Alli was supporting the family financially on a self-employed basis through her shop in Athlone. Mr Alli assisted his wife in this endeavour by looking after the four children while she works. It was submitted that Mrs Alli considers that her husband's continued presence in the State is vital to the upbringing of their four children. Mr Alli participated in coaching and weekly training sessions for children at the local football club in Athlone and he attended the local church.

25. It was submitted that Mr Alli was educated to third level, having completed a diploma in electrical engineering, and he had worked as an air conditioning engineer, a self-employed engineer, a custom clearing agent, a self-employed trader and as a teacher / driver. He was willing to accept any form of employment offered to him should he be allowed to remain in Ireland and he believed that he would be able to significantly contribute to Irish society as a whole.

26. The Minister was informed in several different ways, including from personal letters written by Mr and Mrs Alli, that the help and support provided by Mr Alli as a father was vital to the moral, physical and financial wellbeing of the family and, in effect, that it would be very difficult for Mrs Alli to manage four children on her own. It was detailed that the step-children were in primary school and were members of the local football team and that the citizen twins would be starting school in September, 2008. If Mr Alli were returned to Nigeria, the family would be separated and the wellbeing of his wife and children would be affected. It was also stated that his wife has indicated that she is not prepared to return to Nigeria with her children as her first consideration is for the wellbeing of her children who are settled with their local community in Athlone.

27. Submissions were made on Ireland's obligations under Article 8 of the ECHR and Article 3.1 and 3.2 of the UN Convention on the Rights of the Child. Extensive and detailed submissions were made as to the nature of the analysis that the Minister was required to conduct when considering the deportation of a parent of an Irish citizen child. Reference was made to the decisions of Finlay Geoghegan J. in *Oguekwe v. The Minister for Justice, Equality and Law Reform* [2006] I.E.H.C. 345; *Bode and Ors.* [2006] I.E.H.C. 341 and *Dimbo and Ors.* [2006] I.E.H.C. 344 (14th November, 2006). No reference was made to the decision of the Supreme Court in *Oguekwe* (cited above) which was delivered on the 1st May, 2008 and which revised the nature and extent of the analysis that the Minister is required to undertake.

28. References were furnished from the children's school, the secretary of the local football club and a family friend. Mr Alli's second personal letter dated the 4th November, 2008 stated that his family found Ireland to be safe, convenient and best for the upbringing and welfare of the children and the family in general and he repeated the points made previously, namely that he was a loving father who made a great difference in the children's lives and gave them courage and support, that he was an expert in auto air conditioning, and was willing to study more and to be employed so that he could take care of his wife without depending on social welfare. He pointed out that his deportation would result in the break up of a strong and loving family unit and would have a negative impact on the wellbeing of his children. He said that it was his and his wife's strong belief that it was not in the interests of the family to reside in Nigeria as they would not have access to free primary education or free primary health services.

29. The submission concluded by citing extracts from country of origin information reports from Amnesty International, U.S. Department State and Human Rights Watch. No facts specific to where the children would live or go to school in Nigeria if they followed their father were put before the Minister. No submissions were made as to the languages spoken by the children, the common language spoken by the family while in Ireland, or the schooling of the stepchildren in the Côte d'Ivoire and / or Nigeria prior to coming to Ireland.

The Minister's examination of file

30. Mr Alli's file was examined by an officer of the Repatriation Unit on the 13th January, 2009. The examination of file extended over 13 pages. The examining officer had before her the file relating to Mr Alli's asylum application, the s. 13 report prepared by the Refugee Applications Commissioner and the decision of the Refugee Appeals Tribunal. The analysis was carried out using the following headings:

> Section 3(6), Immigration Act 1999
>
> Section 5, Refugee Act 1996
>
> Section 4(2), Criminal Justice (UN Convention against Torture) Act 2000
>
> Article 8, European Convention on Human Rights; and
>
> Constitutional Rights of the Irish Children.

31. The examining officer recommended that the Minister should make a deportation order in respect of Mr Alli. The recommendation was affirmed by an Executive Officer, a second supervisor, the Assistant Principal of the Repatriation Unit and finally, it was signed by the Minister. The examination of s. 5 of the Act of 1996 and s. 4(2) of the Act of 2000 bears no relevance to this case and are therefore not summarised. The relevant portions of the examination of file are the consideration given to s. 3 of the Act of 1999, Article 8 of the ECHR and the constitutional rights of the citizen children, which are summarised below.

Section 3(6), Immigration Act 1999

32. The matters set out in s. 3(6) were examined on the basis of relevance on the date of examination at which time Mr Alli was 39 and had been in the State for approximately one year. His family and domestic circumstances were fully and accurately noted. It was stated that his connection with the State lay in his application for asylum and his parentage of citizen children. His employment prospects were subject to comment where it was stated that he was not entitled to work in Ireland and *"If he was permitted to work, his prospects of obtaining employment would be poor in the current economic climate."* It was noted that there are letters on file confirming that his two step-children are in school in Athlone and his twins are in junior infants. No adverse comments were made on his character and the references on file from friends and acquaintances who attested positively to his character were noted.

33. Under "Humanitarian Considerations" it was noted that*" there is nothing to suggest that Mr Alli should not be returned to Nigeria."* The representations and submissions made by the RLS were again fully and accurately summarised as were the contents of the personal letters written by Mr and Mrs Alli. It was noted that Mrs Alli has indicated that she is not prepared to return to Nigeria with her children. Under the heading "*The Common Good*" it was stated that "*It is in the interest of the common good to uphold the integrity of the asylum and immigration procedures of the State.***"**

Article 8 of the ECHR

34. The officer accepted that if the Minister made a deportation order, this would engage Mr Alli's right to respect for his private and family life under Article 8 ECHR. Her conclusion with respect to the private life aspect was that the deportation would not have consequences of such gravity as to potentially engage the operation of Article 8. That conclusion is not challenged in these proceedings. The applicants focussed instead on the assessment of the family life aspect of Article 8. In that regard the officer set out the family's circumstances in the State, noting the length of their cohabitation, the mother's permission to remain and the existence of citizen children and other foreign national children. The officer accepted that the deportation would constitute an interference with Mr Alli's right to respect for his family life within the meaning of Article 8(1) but she concluded that the deportation would:-

> (1) Be in accordance with law *(pursuant to s. 3 of the Act of 1999);*
>
> (2) Pursue a pressing need and a legitimate aim *(i.e. "the legitimate aim of the State to maintain control of its own borders and operate a regulated system for control, processing and monitoring of non-national persons in the State. It is consistent with the Minister's obligations to impose these controls and is in conformity with all domestic and international legal obligations.")*
>
> (3) Be necessary in a democratic society, in pursuit of a pressing social need and proportionate to the legitimate aim being pursued within the meaning of Article 8(2).

35. The officer went on to assess the proportionality of deportation. That assessment commenced as follows:-

> *"In R (Mahmood) v. Home Secretary [2001] 1 W.L.R. 840, the U.K. Court of Appeal found, inter alia, that the removal or exclusion of one family member from a State where other members of the family are lawfully resident, will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family."*

36. The officer then noted the following facts:-

> The Irish citizen children were born in the State in 2004 and were now four years of age and in junior infants. They were "therefore of an adaptable age";
>
> Mr Alli has parental responsibilities to his children which he wishes to perform to the best of his abilities, and which obligations necessitate his presence in the State in order to be fully discharged. However the Minister is not obliged to respect the father's choice of residence;
>
> The jurisprudence of the European Court of Human Rights (ECtHR) has established that a State has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.
>
> Although Mr Alli stated that he was anxious to undertake full time employment in Ireland, his prospects of obtaining employment would be poor in the current economic climate.
>
> The grant of permission to remain to Mr Alli would have an impact on the health and welfare systems of the State, and may lead to similar decisions in other cases;
>
> The citizen children did not have the care and company of their father for approximately three years until he arrived in 2007. Therefore if the mother was to decide to stay in Ireland with her children, "*the disruption to their family life would not have the same impact as it would have had they been living as a family unit for a much longer period*."

37. Having noted each of those matters the officer identified a "substantial reason associated within the common good" requiring the deportation of Mr Alli as follows:

> *"Kabir Alli has been given an individual assessment and due process in all respects. Having weighed and considered all of the above factors outlined above relating to the position of the family, and in particular the citizen children, as well as the factors relating to the rights of the State, it is submitted that if the Minister makes a deportation order in respect of Kabir Alli, there is no less restrictive process available which would achieve the legitimate aim of the State to maintain control of its own borders and operate a regulated system for control, processing and monitoring of non-national persons in the State. This therefore exists as a substantial reason associated with the common good which requires the deportation of Kabir Alli."*

Constitutional Rights of the Irish Born Children

38. The officer noted the following matters:

> The citizen children have personal rights under Article 40 of the Constitution and further rights under Articles 41 and 42 including their right to reside in the State, to be reared and educated with due regard to their welfare, to the society, care and company of their parents, as well as protection of the family pursuant to Article 41;
>
> The twins were enrolled in school as junior infants in Athlone;
>
> The constitutional rights of the citizen child are not absolute and must be weighed against the rights of the State;
>
> The rights of the State include the right to control the entry, presence and exit of foreign nationals subject to the Constitution and international agreements;
>
> To be considered are issues of national security, public policy, the integrity of the Immigration Scheme, its consistent and fairness to persons and to the State, as well as issues relating to the common good.

39. The officer then set about balancing the competing interests she had identified against one another. She acknowledged that the citizen children have constitutional rights but noted that according to the Supreme Court in *Lobe and Osayunde* [2003] IESC 3 (often referred to as *A.O. and D.L.* [2003] 1 I.R. 1), it does not flow from those rights that the family or parents and siblings of the children have the right to reside in the State. She set out the position as follows:-

> *"The Minister may determine to deport the immigrant family, notwithstanding the effective removal of the Irish citizen child, without violating that child's rights. While there is an obligation on the Minister to consider each case on its individual merits, he is entitled to take into account the consequences of allowing a particular applicant to reside in the State where that would inevitably lead to similar decisions on other cases. If the Minister is satisfied for good and sufficient reason that the common good requires that the non-national parent should be removed from the State, even if that means that in order to preserve the family unit the Irish citizen child must also leave the State, then that is an order he is entitled to make."*

40. The officer again identified a "substantial reason" as follows:-

> *"All factors relating to the position of the citizen twins have been considered above and these have been considered against the rights of the State. In weighing these rights, it is submitted that if the Minister makes a deportation order in respect of Kabir Alli, there is no less restrictive process available which would achieve the legitimate aim of the State to maintain control of its own borders and operate a regulated system for control, processing and monitoring of non-national persons in the State. This therefore exists as a substantial reason associated with the common good which requires the deportation of Kabir Alli."*

41. The officer concluded that having considered all of the facts relating to the position of the family and the citizen children, "*there is nothing to suggest that there are any insurmountable obstacles to the family being able to establish a family life in Nigeria".* She therefore recommended that the Minister make a deportation order in respect of Mr Alli. The Minister accepted the recommendations and determined that the deportation orders would be made.

The Court's Assessment
42. The main challenge to the Minister's decision in this case, aside from his reliance on the absence of "insurmountable obstacles" to the family moving to Nigeria, relates to the nature and quality of the Minister's assessment and consideration of the applicants' facts and circumstances and the manner in which those rights were weighed against the rights of the State.

43. The recent decisions of the Supreme Court in *A.O. and D.L.* extensively examined the issue of the right of foreign parents of Irish citizen children to remain in the State. The same issue was further argued in the series of cases known as *Dimbo* and *Oguekwe.* The Court therefore has some sympathy for the argument advanced by Ms Moorhead that this case and that of Mr Asibor is a re-run of the issues already determined by the Supreme Court in *A.O. and D.L.* The applicants yet again start their challenge squarely on the basis that deportation of the father of citizen children should only occur in exceptional circumstances and compared with this basic premise the other arguments advanced are of relatively minor significance. That is the crux of the matter. It seems to the Court that if that premise were legally sound then it is surprising that neither the majority of the Supreme Court in *A.O. and D.L.* supported this view nor did the unanimous decision of the Supreme Court in *Oguekwe* made this finding. The contrary is true. Denham J. in *Oguekwe* reaffirmed the law formulated in *Pok Sun Shum, Osheku, Fajujonu* and *A.O. and D.L.* which is that the parent of a citizen child may be deported even if the effect is that the child has to follow. Such a deportation will be lawful once the Minister has considered all relevant factors and has identified a substantial reason for the deportation. It is not the law that the Minister can only deport the father of a citizen child in exceptional circumstances. The law is that notwithstanding the very important status of citizenship, the Minster can deport such a father in pursuit of an orderly and fair restrictive immigration policy in the common good provided that a full and fair assessment of the particular child and particular family's situation has been balanced against the State's interests and the decision is not disproportionate to those interests.

44. The judicial review proceedings in this case and that of Mr Asibor and in numerous other cases where the Minister has made a deportation order against the fathers of citizen children make it clear that notwithstanding the recent decisions of the Supreme Court, a considerable amount of uncertainty still prevails. In particular, the meaning of the phrases "proportionate", "insurmountable obstacles" and "substantial reason" were major issues in the two cases which are before this Court.

I. Insurmountable Obstacles
45. As noted above, the applicants argue that the question of whether there are "*insurmountable obstacles*" to the family establishing family life elsewhere, which was one of the matters noted by the Court of Appeal in *R. (Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840 at 861, is the wrong test and has been disapproved of in the United Kingdom in later decisions of the House of Lords and in particular in *Huang v. Secretary of State for the Home Department* [2007] 2 A.C. 167. The applicants contend that the "insurmountable obstacles" test is therefore inappropriate in this jurisdiction.

46. It is important to recall the exact statement in *Mahmood* in which Lord Philips summarised the general principles under European Court of Human Rights (ECtHR) case law relevant to the deportation or exclusion of a family member as follows:

> '(1) A state has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.
>
> (2) Article 8 does not impose on a State any general obligation to respect the choice of residence of married couples.
>
> (3) Removal or exclusion of one family member from a State where other members of the family are lawfully resident will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family members excluded, even where this involves a degree of hardship for some or all members of the family.
>
> (4) Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a State if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled.
>
> (5) Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8.
>
> (6) Whether interference with family rights is justified in the interests of controlling immigration will depend on (i) the facts of the particular case and (ii) the circumstances prevailing in the state whose action is impugned."

47. As is clear from the above, the use of the term "insurmountable obstacles" is found in paragraph (3) of the *Mahmood* principles. That paragraph is part of the general summary applicable to ECHR law and was not the sole consideration identified by Lord Phillips. The *Mahmood* principles include two sides of the same coin, i.e. the deportation would be unlikely to infringe Article 8 if there were no insurmountable obstacles to the members of the family joining the deportee even if they suffer some inconvenience and the corollary principle, that the deportation would be likely to infringe Article 8 rights if the family member being deported had long term residence in the State and it would be unreasonable to expect his other family members to follow.

48. This Court is of the view that there is no real difference between the two sides of the coin. As an example: if the family are not long term residents in the host state and there are, for instance, no language or cultural barriers to their returning to their home state, it will usually be said that there are not any insurmountable obstacles to their pursuing family life together in the home state. On the other hand, if the family has spent so much time away from the home state that they have lost the ability to speak their original language or they no longer have an extended family there, it may well be unreasonable to expect them to return there. The applicants in these two cases have sought to equate "insurmountable obstacles" with a mountain that cannot be climbed whereas the reality is that the jurisprudence of the ECtHR views an "*insurmountable*" problem as being no more than a significant difficulty which cannot easily be overcome. Minor or significant inconvenience is not seen as an obstacle that would render deportation impermissible under Article 8 of the ECHR. The ECtHR jurisprudence shows that it would normally be considered unreasonable for a family to go to great lengths to be able to continue family life together. Determining which side of the coin applies necessitates an examination of the facts of the particular family and a realistic and reasonable assessment of why they cannot live together in their country of origin. This can only be done on a case by case basis.

49. It was correctly argued on behalf of the Minister that the phrase "*insurmountable obstacles*" derives from decisions of the ECtHR and was not invented by Lord Phillips in *Mahmood* when he sought to distil the ECtHR decisions on deportations / expulsions of family members in the context of Article 8 rights.

Insurmountable obstacles and the ECtHR
50. In considering exclusion and deportation cases where family rights are involved, both the European Commission of Human Rights (EComHR) and the European Court of Human Rights (ECtHR) have consistently considered the question of whether any insurmountable obstacles exist preventing the family from adapting to family life elsewhere (see for example *Gül v. Switzerland* (1996) 22 E.H.R.R. 93; *Ajayi v. U.K.* (App. No. 27663/95, decision of 26th June, 1999); *Boultif v. Switzerland* (2001) 33 E.H.R.R. 50; *Sen v. The Netherlands* (2003) 36 E.H.R.R. 7; *Mokrani v. France* (2005) 40 E.H.R.R. 5; *Üner v. Switzerland* (2007) 45 E.H.R.R. 14 [GC]; *Konstatinov v. Netherlands* (App. No. 16351/03, judgment of 26th April, 2007); *Omoregie v. Norway* (App. No. 265/07, judgment of 31st October, 2008)). In all those cases the EComHR and the ECtHR examined the facts of the individual family to establish whether in all the circumstances there were "*insurmountable obstacles*" preventing the family following the person being deported or excluded and continuing family life with him elsewhere. In some cases, insurmountable obstacles were identified while in others it was found that there were none and the conclusion in each case depended entirely on the facts and circumstances of the family in question. It is clear from the case law that the ECtHR commences its assessment from the perspective that Contracting States are not obliged to respect the choice of residence of a family and, wherever appropriate to the facts, that knowledge on the part of one spouse at the time of marriage that the right of residence of the other spouse were precarious is a consideration.

51. The ECtHR addresses the existence of insurmountable obstacles even to those cases where a family member faces expulsion for serious criminal activity. It distinguishes between cases where the party being expelled has lived for a relatively short time in the Contracting State, on the one hand, and the cases involving "settled migrants" or "second-generation" immigrants, on the other. The recent judgment in *Narenji Haghighi v. The Netherlands* (2009) 49 E.H.R.R. SE8 demonstrates the consistency of the application of the same principles. The ECtHR held in *Haghighi* that in cases involving persons whose presence in a host State relates solely to their asylum and immigration applications (as opposed to settled migrants who are legitimately residing in the host State), the following matters require consideration:-

> "Factors to be taken into account in this context are the extent to which family life is effectively ruptured, the extent of the ties in the contracting state, <u>whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them</u>, whether there are factors of immigration control (e.g. a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion. Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of *art.8* (see *Da Silva v Netherlands* (2007) 44 E.H.R.R. 34 at [39])." (emphasis added)

52. Thus it is clear that the ECtHR consistently recognises that the degree of anticipated difficulties or obstacles in establishing family life elsewhere is a relevant factor in the assessment of the proportionality of removing a third country national from a Contracting State within the meaning of Article 8, whether that deportation is for the purposes of immigration control or for the maintenance of public order.

Application of the ECtHR jurisprudence in the UK
53. The next question is whether the decision of the House of Lords in *Huang* has had the effect of overruling the principles in *Mahmood.* Did that decision in fact, as was argued by Mr de Blacam, determine that a decision-maker should not ask whether there are insurmountable obstacles to the family continuing family life elsewhere, and did it by extension or analogy affect the legality of reliance on the absence of such insurmountable obstacles by decision-makers in this jurisdiction? The Court is of the view that it does not, for the following reasons.

54. The *Huang* decision must be viewed in the light of the manner in which the Court of Appeal addressed the question of "insurmountable obstacles" over a period of some years. The Court of Appeal's approach appears to follow from a misinterpretation of a dictum of Lord Bingham in *R v. Secretary of State for the Home Department, ex p. Razgar* [2004] 2 A.C. 368 where he said at p. 389 that the question of whether a measure is "necessary in a democratic society" for the purposes of Article 8(2) will "almost always" fall to be answered affirmatively where the measure is proposed in pursuance of a lawful immigration policy. This became known as the "exceptionality rule".

55. For a period, the Court of Appeal seemed to apply the principles set out in *Mahmood* and *Razgar* in a strict way holding that an applicant would have to establish something close to extraordinary circumstances in order for his deportation to be considered disproportionate within the meaning of Article 8 ECHR. An example of this application is *(HB) Ethiopia v. Secretary of State for the Home Department* EWCA Civ 1713 where Buxton LJ set out the proposition that:-

> "The application to an article 8 case of immigration policy will usually suffice without more to meet the requirements of article 8(2) [*Razgar*]. Cases where the demands of immigration policy are not conclusive will be truly exceptional".

56. Lord Bingham in *Huang* and later in *EB (Kosovo) v. Secretary of State for the Home Department* [2008] 3 W.L.R. 178 clarified that it had not been his intention in *Razgar* to import any exceptionality rule. In *Huang* he held at p. 593:-

> *"In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in Razgar, Para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test."*

57. In *EB (Kosovo)* Lord Bingham further clarified at p. 184:

> *"[…] there is in general no alternative to making a careful and informed evaluation of the facts of the particular case.*

The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires."

58. The practice of applying an "exceptionality" rule has now ceased in the U.K. and the current approach is to examine proportionality in Article 8 cases by asking whether family members can reasonably be expected to join the deportee. This is clear from the decisions of the Court of Appeal in *LM (DRC) v. Secretary of State for the Home Department* [2008] EWCA Civ 325; *VW (Uganda) and AB (Somalia)* [2009] EWCA Civ 5; *A.F. (Jamaica)* [2009] EWCA Civ 240; *D.S. (India)* [2009] EWCA Civ 544 (12th June, 2009); *M.A. (Pakistan)* [2009] EWCA Civ 952 (29th July, 2009); *Z.B. (Pakistan)* [2009] EWCA Civ 834 (30th July, 2009) and also from the Asylum and Immigration Tribunal's decision in *VW and MO (Article 8 – Insurmountable Obstacles, Uganda* [2008] UKAIT 00021.

59. What is also clear from that line of authority is that the change of approach does *not* mean that it is no longer valid to consider whether "insurmountable obstacles" exist to the members of a family continuing their family life in the country of origin of the proposed deportee. The House of Lords in *Huang* and *EB (Kosovo)* did not reverse, modify or overturn the principles noted by Lord Phillips in *Mahmood* nor did they identify the question of "insurmountable obstacles" as being flawed. Instead they clarified that the question of "insurmountable obstacles" does not incorporate an exceptionality rule. The change wrought by the series of decisions following *Huang* seems to have effected a modification of the language used rather than a modification of the principles of ECtHR jurisprudence as elucidated in *Mahmood*. As the exceptionality rule was never considered or applied in this jurisdiction, the cases preceding and following *Huang* and *EB (Kosovo)* have little real relevance here.

The implications of Oguekwe

60. The applicants' next argument is that irrespective of this line of U.K. authority, the decision of Denham J. in *Oguekwe* indicates that the question the Minister must ask himself in determining whether a deportation would be in breach of Article 8 ECHR or impact disproportionately on the citizen children's constitutional rights is whether it would be reasonable to expect family members to follow the deported father to his country of origin and not whether there would be any insurmountable obstacle to their joining him in Nigeria. They argue that this "reasonableness" test involves a much lower threshold than the "insurmountable obstacles" test.

61. This argument is not convincing. As previously mentioned, the applicants attribute a meaning to the phrase "insurmountable obstacles" which is not supported by the Strasbourg decisions. The jurisprudence of the EComHR and the ECtHR makes it clear that whether a family would encounter difficulties or obstacles to the establishment of family life in the country to which the family member is being removed is a relevant consideration when assessing the proportionality of a decision which has the effect of interfering with family life. Further, the degree of difficulty in overcoming any obstacles or difficulties faced by family members in relocating is not the only issue involved in a reasoned assessment of proportionality as can be seen by examining the six *Mahmood* principles.

62. Having reviewed the cases on Article 8 rights, the Court is satisfied that to argue that an "insurmountable obstacles" test has been replaced by a "reasonableness" test is to engage in semantics. The cases demonstrate that the former term is shorthand for the latter and that both terms require an assessment of the length of time the family members have been in the deporting state, the roots they have put down and whether in all the circumstances it would be reasonable for them to follow the deportee and establish family life elsewhere. If there are no insurmountable obstacles to the family following, then in almost all cases the deportation or exclusion will be deemed not to be in breach of Article 8. States enjoy a very wide margin of appreciation in this area, save perhaps where the person who is to be expelled or deported is a "settled" or "second generation" migrant who had been led to believe he/she would have an entitlement to settle in the Contracting State.

63. The Court finds no material difference between the ECtHR jurisprudence on whether "insurmountable obstacles" stand in the way of the family establishing family life elsewhere and the finding by Denham J. in *Oguekwe* that the Minister should consider "*whether it would be reasonable to expect family members to follow the [deportee] to Nigeria*". It is noted that Denham J. expressly echoed the finding of Fennelly J. in *Cirpaci v. The Minister for Justice, Equality and Law Reform* [2005] 2 I.L.R.M. 547 that the principles set out in *Mahmood* are very useful. Logically, it would follow that if the Supreme Court intended to distance itself from the "insurmountable obstacles" consideration or that it considered the *Mahmood* principles to represent an outdated test, Denham J. would have said so and would not have endorsed the view that the principles set out by Lord Philips were very useful.

64. That, however, does not fully resolve the issues in these cases as the argument that the decision to deport the father of the Irish citizen children was made in error of law lies not solely in the application of the Mahmood principles. In addition the applicants argue that the assessment of the facts pertaining to each family was inadequate and the Minister should have considered the likely degree of hardship which would be suffered by the family if they were to follow to Nigeria.

65. Obviously, in each case the Minister's assessment of the difficulties, if any, which would be faced by the family will inform his decision as to whether it is reasonable to expect them to move with the father. This will, in turn, contribute to a reasoned assessment of whether the proposed deportation is proportionate to the legitimate aim pursued and whether it is necessary in a democratic society within the meaning of Article 8 of the ECHR.

Application to this case

66. A reading of the examination of file does not suggest that the Minister understood the question identified in *Mahmood* as to whether there are any "insurmountable obstacles" to the family following the deportee to mean that unless there are exceptional circumstances, every decision to deport will be proportionate within the meaning of Article 8. If he had approached his assessment from that angle and without engaging in a fact-specific analysis and balancing exercise, he may have been in error. It seems to this Court, however, that in this case the Minister approached his analysis of proportionality in a manner that is consistent with both the jurisprudence of the ECtHR and the judgments of the Supreme Court in *Oguekwe* and the House of Lords in *Huang*.

67. Regard was had to the young age of the citizen children and the short duration of their residence in the State; the fact that they had just started into junior infants' class, their parallel entitlement to Nigerian citizenship; and the degree to which they might be considered to have integrated in their local communities. Having noted those essential features of the children's personal circumstances, the Minister quite correctly found that the Alli twins, who were four years old, were "of an adaptable age". Having so decided, he stated that there were therefore no insurmountable obstacles to the family being able to establish family life in Nigeria. It is difficult to argue with such conclusions. The family has only been in the State for four and a half years. The citizen children are very young and their siblings at nine and eleven are also at an adaptable age, particularly as it is suggested that they adapted readily to life in Ireland after moving here from the Côte d'Ivoire and according to Mr Alli from Nigeria. Certainly there was nothing of any substance before the Minister to suggest otherwise.

68. The Minister made no distinction between an assessment of whether it was reasonable to expect the family to establish family life in Nigeria and an assessment of whether there were "insurmountable obstacles" to the family returning there. The applicants may, in

focussing specifically on the formula of words and phraseology which the Minister used, have neglected to view and assess the content of the Minister's consideration and the decision as a whole. As previously mentioned, civil servants and Ministers frequently and even generally resort to the use of identical phraseology as answers to particular considerations. Administrators are perfectly entitled, in the interests of maintaining consistency in decision-making and the reasons given, to express themselves in similar language in respect of the same issue. They do this to ensure uniformity in the reasons given but the Minister's decision should not stand or fall on his reliance on a particular phrase and it is the legality and reasonableness of his decision which must be assessed.

69. The Court is satisfied that the Minister took full account of the circumstances of the Alli family insofar as those circumstances were known to him, that he acted in accordance with law when he asked whether there were any insurmountable obstacles to the family following Mr Alli to Nigeria, and that it was reasonable for him to find that there were no insurmountable obstacles to the family being able to continue family life in Nigeria.

II. Compliance with Oguekwe

70. The applicants' second argument is that the manner in which the Minister considered and balanced the various competing rights and interests which he identified failed to comply with the judgment of the Supreme Court in *Oguekwe*.

71. In assessing this argument it is necessary to note that reliance on the judgment of the Supreme Court in *Oguekwe* in isolation from the decisions commencing with *Pok Sun Shum* and following through to *Osheku, Fajujonu* and most of all *A.O. and D.L.,* which expressly approved of those earlier decisions, would be to read into the judgment of Denham J. in *Oguekwe* more than was intended. Those earlier decisions clearly accept that the constitutional rights of citizen children are *never* absolute nor should they be seen in isolation from other constitutional rights and in particular from the inherent rights of the State to control immigration and to deport foreign nationals who are unlawfully resident in the State. With very few exceptions, the exercise of all constitutional rights is subject to the requirements of public order and the common good. This frequently requires that a balance be made between individual constitutional rights and the common good. Denham J. specifically accepted and referred to those principles in *Oguekwe* and there is no suggestion in *Oguekwe* that any of these principles or decisions were overruled.

72. The requirements of s. 3(6) of the Immigration Act 1999 apply irrespective of whether reliance is placed on constitutional rights or Convention rights. In each case the individual circumstances of the proposed deportee must be considered whenever a deportation order is proposed, whether as a failed asylum seeker with no other connection to the State or where citizen children's rights are concerned. While additional considerations beyond those contained in s. 3(6) apply where there potential for the deportation to be a breach of a citizen child's constitutional rights, there is a danger of overstating those rights.

73. The danger of such overstatement was discussed by Barrington J. in the High Court decision in *Fajujonu* and in the Supreme Court in *A.O. and D.L*. As Barrington J. pointed out, the right to live and to be educated in the State does not give rise to a right in the child to prevent its parents from emigrating and removing it from an opportunity to live and be educated in the State. The Court would add that it is not necessary to be a citizen to benefit from free primary or secondary education in the State. The right of a child to be educated does not derive solely or uniquely from constitutional rights as all parents living in the State are obliged by law to ensure that their children receive an education. Whether they provide this education themselves or avail of the national free school system is a matter of parental choice. The fact that parents are not citizens of the State does not absolve them from such legal obligation and the children of the many foreign nationals working in the State are entitled to avail of all state-provided primary and secondary education. The citizen child's right to education is in practical terms no different from Mr Alli's foreign national step-children's access to education in their local primary school.

74. The real differences between the rights of citizens and those of foreign nationals lie perhaps in lifelong rights to hold an Irish passport, to enter and leave the State at will; to apply for employment and to vote in constitutional referendums. A citizen applicant to university and third level courses will not normally face discrimination in entry eligibility or the payment of fees nor will that citizen be affected by entry into those courses operating restricted entry to foreign nationals. A citizen child who lives abroad can return to avail of his / her citizen privileges in further education, in unimpeded entry into the other EU States, and in access to that large labour market. The removal of the citizen child's parents and the consequent following of that child do not strip the child of citizenship rights and privileges as those rights can be enjoyed fully when the child is of age if he / she seeks to return to the birth country. However, the birthright of an Irish citizen child does not extend to an unrestricted right to reside here with his / her foreign national family.

75. The Court was urged to compare the situation of a citizen child with the situation of a minor who is recognised as a refugee and who is thereafter entitled to seek permission for his or her parents to enter and reside in Ireland. In addition, the Court was asked to compare the rights of the citizen child under the Constitution with that child's right to freedom of movement and residence under EU law. The Court finds that the comparisons are not particularly appropriate as the rationale behind the right to family reunification in refugee law lies in the fact that the State has recognised that the refugee child has a fear of persecution and is likely to have faced adversity in the past and is alone in a foreign country. Such a child is assumed to have particular parental needs because of youth and because he is away from his family in an asylum state. The right to family reunification is designed to address those specific needs which are not normally found in the cases of a citizen child and are not present in this case. The comparison with the citizen child whose parent exercises his right to reside in another EU Member State is equally not persuasive. The derivative right of the child's "primary carer" who is self supporting to reside in that Member State with the child, as recognised by the ECJ in *Zhu and Chen,* does not appear to extend to both of the child's parents or to their foreign national siblings. If Mr Alli wished to move to Northern Ireland with his citizen children as suggested, the family unit would be ruptured just as much as it would in the event of his deportation, as it is doubtful that Mrs Alli and her older children would have a derivative right to reside in the host Member State and if the citizen twins moved to Northern Ireland with their father, her permission to reside in Ireland would surely lapse. In addition, it has not been demonstrated to the Court that the prerequisites of health insurance and "sufficient means" would be satisfactorily fulfilled. Thus the comparison to those two situations is not particularly useful or instructive as to the value to be attached to the citizen children's constitutional rights.

76. This brings the Court back to the information that was before the Minister when considering Mr Alli's application for leave to remain. The situation of the *Oguekwe* family was directly comparable to the situation of this family. In that case, the Supreme Court had the opportunity to find that it would be unlawful under the Constitution and disproportionate within the meaning of Article 8 of the ECHR for the Minister not to allow all fathers of citizen children to remain with their spouses who had benefited from the grant of temporary leave to remain under the IBC 05 Scheme. The Supreme Court very definitely did not do this. The Supreme Court did not say that all parents of citizen children had the right to live with their children in the State. It recognised the continuing right of the State to deport the parents of citizen children even in cases where that deportation effectively meant that the children would have to follow their father to his country of origin in order to maintain family life with him. The unanimous decision of the Supreme Court confirmed that the rights of citizen children to enjoy the company of their parents under the Constitution are not absolute. If the specific facts relating to those children are considered and those rights are weighed and balanced with the right of the State to

maintain immigration control and it is found that the State's rights outweigh the children's rights, then parents of a citizen child can be deported.

77. The application by Mr Alli for leave to remain under s. 3(6) of the Immigration Act 1999 post dated the delivery by the Supreme Court of the *Dimbo* and *Oguekwe* decisions in May, 2008. Although the applicant's s. 3 representations quoted from the High Court decisions in both cases, it must be assumed that the Minister was fully aware of the state of the law when he came to analyse Mr Alli's file in January, 2009 as that analysis includes the factors outlined by Denham J. in *Oguekwe*.

(a) Substantial Reason
78. The more specific aspects of the applicants' arguments in relation to *Oguekwe* were that the Minister (a) failed to identify a sufficient "substantial reason" which required the deportation and (b) failed to reach a reasonable and proportionate decision. Those aspects will now be assessed.

79. Having noted all of the relevant facts and circumstances relevant to the family and the citizen children, the Minister expressed the following as a "substantial reason associated with the common good" which requires the deportation of Mr. Alli:-

> *"there is no less restrictive process available which would achieve the legitimate aim of the State to maintain control of its own borders and operate a regulated system for control, processing and monitoring of non-national persons in the State."*

80. As previously noted, the applicants argued that this was an insufficient "reason associated with the common good" which requires the deportation of the father of a young family including a citizen child. Mr de Blacam has argued that the rights of a citizen child and its family are of such strength that a very cogent reason must exist to justify a deportation order. He argues that immigration policy is simply not a good enough reason. In other words, in the absence of a compelling reason that is personal to the applicant or the family such as serious criminal behaviour or State security, or a cogent reason associated with particular, proven requirements of the common good, family and citizen rights will always trump the State's rights and the reason will never be a "substantial" one within the meaning of *Oguekwe*.

81. What then would be a sufficient reason that would require Mr Alli's deportation? He has not been convicted of any criminal offence and he does not pose a threat to State security. The Minister has not disclosed any facts or statistics relating to the numbers of foreign nationals who are living in the State. What is stated in the examination of file is that in the current economic situation Mr Alli would be unlikely to find employment, he would be a draw on the health and welfare systems of the State, and the granting of permission to remain in his case would lead to the expectation of a similar decision in other cases. It was argued that these reasons do not equate with a "substantial reason" for the deportation.

82. The use of the word "substantial" when associated with a reason is almost a term of art in asylum judicial review. It has long been accepted that the definition adopted by Carroll J. in *McNamara v An Bord Pleanála (No. 1)* [1995] 2 I.L.R.M. 125 sets the threshold for the grant of leave pursuant to s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000. The applicant must show substantial grounds for the contention that the decision ought to be quashed. In order for a ground to be "substantial" it must be reasonable, arguable and weighty and it must not be trivial or tenuous. A ground that does not stand any chance of being sustained (for example, where the point has already been decided in another case) could not be said to be substantial.

83. The meaning of a "substantial reason associated with the common good" seems to cause a little more difficulty. It seems the phrase was first used when the requirement to identify a "grave and substantial reason" for the deportation of an Irish citizen's family member was discussed by Finlay C.J. in the Supreme Court in *Fajujonu*. The requirement and the phrase have been analysed extensively by the Supreme Court in *A.O. and D.L.* and in the series of eight cases including *Oguekwe.*

84. In *Fajujonu* Finlay C.J. was considering the situation of persons who, he said, had been living in the State for a considerable period of time and were the parents of citizen children. He rhetorically asked whether the Minister could force such a family to leave the State in any circumstances. He answered that question at p. 162:-

> *"I am satisfied that he can, but only if, after due and proper consideration, he is satisfied that the interests of the common good and the protection of the State and its society justifies an interference with what is clearly a constitutional right.*
>
> *The discretion, it seems to me, which in the particular circumstances of a case such as this is vested in the Minister for Justice to consider as to whether to permit the entire of this family to continue to reside in the State, on the one hand, or to prevent them from continuing to reside in the State, on the other hand, is a discretion which can only be carried out after and in the light of a full recognition of the fundamental nature of the constitutional rights of the family. The reason, therefore, which would justify the removal of this family as it now stands, consisting of five persons three of whom are citizens of Ireland, against the apparent will of the entire family, outside the State has to be a grave and substantial reason associated with the common good."*

85. The judgments of the majority of the Supreme Court in *A.O. and D.L.* dealt at length with what is meant by the requirement to identify a "grave and substantial reason associated with the common good". The applicants' argument in *A.O. and D.L.,* which is quite similar to the applicants' argument in this case, was that the Minister could not cite the desire to maintain the integrity of the immigration system as his "grave and substantial reason" which required the deportation of the foreign national parents of Irish citizen children, and should instead identify reasons that are personal to the parents i.e. a threat to national security or serious criminal wrongdoing. That argument was firmly rejected by the majority of the Supreme Court. Denham J. concluded at p. 62 that the Minister's reasons "*will depend on the circumstances of each case but may include: (a) the length of time the family has been in the State; (b) the application of the Dublin Convention; and (c) the overriding need to preserve respect for and the integrity of the asylum and immigration system.*" Those were the three common reasons cited by the Minister in support of his decision to deport the non-national parents in *A.O. and D.L.*

86. The judgment of Hardiman J. is particularly instructive as to the nature of the reasons that must be given by the Minister. He rejected the argument that the Minister's consideration was confined to the private character of the deportee. He held at p. 155:-

> *"It seems wholly artificial to contend that "a grave and substantive reason associated with the common good", in the words of Finlay C.J., is to be read as excluding general considerations of that common good, including the statistical pattern of immigration and asylum-seeking, the demands thereby created on the State's resources, the State's international obligations and the need to ensure that one applicant for permission to reside in the State does not gain an*

unfair advantage over others."

87. He said that the phrase "grave and substantial reason" must be construed realistically in light of contemporary and changing conditions and found that immigration control was the most important reason for deportation recited by the Minister in *A.O. and D.L.* He stated that the need to preserve respect for the asylum and immigration system is a "*generally applicable open-ended administrative reason*" capable of satisfying the test in *Fajujonu* provided that it is considered in the light of the facts of the individual case. He clarified:-

> *"The detailed exercise required in each individual case is a function of the executive, to be discharged with reference to the finding of the relevant statutory bodies and with the advice of the civil service."*

88. In Oguekwe the Minister identified no reasons for the deportation other than to say that "Refoulement was not found to be an issue in this case. In addition, no issue arises under section 4 of the Criminal Justice (UN Convention Against Torture) Act, 2000". In the High Court Finlay Geoghegan J. found that these were not the type of reasons contemplated in A.O. and D.L. as permitting the deportation of the foreign national parent of a citizen child who would, as a consequence, have to leave the State. This finding was affirmed by Denham J. in the Supreme Court. Denham J. went on to list the requirement to identify a "substantial reason associated with the common good which requires the deportation of the foreign national parent" as one of the 16 matters that are relevant for the Minister to consider when deciding whether to deport the parent of a citizen child. In particular, she stated that when considering whether in the all the circumstances there exists such a substantial reason, the Minister should take into consideration "the personal circumstances of the Irish born child and the foreign national parents, including, in this case, whether it would be reasonable to expect family members to follow the [father] to Nigeria". The judgment of Denham J. provides no further guidance as to what may or may not constitute a substantial reason. This Court is satisfied that a "substantial reason" is one that is reasonable and weighty and not trivial or tenuous and that it is in furtherance of an orderly immigration policy which serves the common good.

89. In this case the Minister has fully complied with the requirements set out in Oguekwe and, having conducted a fact-specific analysis, has identified a substantial reason associated with the common good which requires the deportation of Mr Alli.

(b) Proportionality

90. The applicants argued that the Minister failed to adequately balance the competing rights of the children and those of their family with the State's rights and obligations. They argued that this inadequate balancing exercise failed to comply with the Supreme Court's judgment in *Oguekwe* where Denham J. directed that the decision to deport ought, in all the circumstances, to be a proportionate one. It seems to this Court that when Denham J. in *Oguekwe* spoke of proportionality she did so principally in the context of the jurisprudence of the ECtHR. Hardiman J. in *A.O. and D.L.* referred to the jurisprudence of the ECtHR on proportionality and stated:-

> "it will be noted that this approach of balancing family and state rights closely reflects the approach in the Irish cases cited above. It is also consistent with the more general principles of constitutional construction applied in this country. These are best expressed in the passage from the dissenting judgment of Henchy J. in *The People v. O'Shea* [1982] I.R. 384, which concerned whether Article 34.4.3 of the Constitution conferred on the prosecution in a criminal case in the Central Criminal *Court* a right of appeal against a directed verdict of not guilty. Henchy J. said at p. 426:-
>
> > "I agree that if the relevant sub-section of the Constitution is looked at in isolation and is given a literal reading, it would lend itself to that interpretation. But I do not agree that such an approach is a correct method of constitutional interpretation. Any single constitutional right or power is but a component in an ensemble of interconnected and interacting provisions which must be brought into play as part of a larger composition, and which must be given such an integrated interpretation as will fit it harmoniously into the general constitutional order and modulation. It may be said of a constitution, more than of any other legal instrument, that 'the letter killeth, but the spirit giveth life'. No single constitutional provision (particularly one designed to safeguard personal liberty or the social order) may be isolated and construed with undeviating literalness."

91. This observation made by Henchy J. and quoted by Hardiman J. elegantly and accurately expresses the basis of a harmonious approach to constitutional interpretation. It follows that when Denham J. in *Oguekwe* used the word "proportionate", she intended it in the context of both constitutional and Convention rights. Proportionality in that context requires a consideration of all the facts and circumstances of the case so as to ensure that the interference by the State with a fundamental right is necessary in a democratic society, in pursuance of a pressing social need and goes no further than is necessary to achieve those aims. That approach to proportionality is consistent with the approach taken by the Irish courts with respect to the balancing of competing constitutional rights and interests.

92. What remains to be considered is whether the balancing exercise conducted by the Minister complied with the requirement to reach a decision that was proportionate within the meaning of *Oguekwe*. It is clear that the Minister was made fully aware of the applicants' representations in relation to Mr Alli's contributions to family life. If he were to be deported, then the family would be ruptured, the children would have no father to guide them and Mrs Alli would have difficulties with childcare and in bringing up the children as a single parent. As Mrs Alli made it clear that she had considered that her children's best interests lie in their remaining in Ireland, no submissions were made as to the children's life in Nigeria or in the Côte d'Ivoire. It is inconceivable that the Minister was unaware of the consequences of his proposed decision as it was in fact specifically noted that if the mother was to stay in Ireland there would be some disruption to their family life. The Minister also looked at the personal facts pertaining to the citizen children and their family and the consequences of permitting Mr Alli to remain with his family. These consequences were that it Mr Alli was unlikely to obtain employment, the grant of permission for Mr Alli to remain would have an impact on the health and welfare systems of the State and could lead to an expectation of similar decisions in other cases.

93. While the method and language utilised by the Minister in the balancing exercise is formulaic and differs little from that conducted in Mr Asibor's case or indeed in other similar cases recently viewed by this Court, the Court finds that the Minister complied with all of the guidelines set out in *Oguekwe.* Judicial review is not a review of style nor does the Court substitute its own style or opinion. The Court reviews the impugned decision to determine whether it is in accordance with law. The Court has previously noted that that language used by civil servants in administrative actions must frequently, if not almost invariably, contain or involve identical language and stock phrases. There is wisdom in this practice as it ensures equality and clarity in the reasons for the civil servants' recommendations to the Minister.

94. In spite of the use of standard phrases, the Minister in this case had due regard to the various competing interests and he weighed and balanced those interests against one another. In effect, he concluded that the decision to deport Mr Alli would not impact in an excessive way on the personal and family rights of his wife and children as there were no insurmountable obstacles to their going with him to Nigeria and continuing family life there. The Court is satisfied that this was a reasonable conclusion. Quite

appropriately, the Minister accorded weight to the relatively short time the family has been in the State; the young age of the twin citizen children; and to Mr Alli's absence from the family for a significant time after his children were born. The Minister had already determined that there is no risk of torture in Nigeria in the event of their return there, and the applicants do not contest that conclusion. The Minister was aware that since his arrival Mr Alli has taken up his parental responsibilities and is loved and needed by his spouse and children, but that on the other hand his wife says that the welfare of their children means she will remain with her children in Ireland even if her husband is deported. He cannot be faulted for assuming that a mother and especially this mother, who had come as a stranger to this country and lived for more than three years without the presence or assistance from her husband during the late stages of her twin pregnancy and their delivery, might be in a good position to consider the best interests of her children and might not be excessively inconvenienced if her husband is returned to Nigeria in accordance with the State's immigration policy.

95. The rights of the citizen children in this particular family and the rights of the family under the Constitution and the ECHR cannot be seen in isolation from the duties and powers of government and the interests of the common good. In all the circumstances it is clear that the Minister weighed in the balance all of the relevant considerations, and it is very difficult to see what further he could have included in the examination of file so as to ensure that he complied with the requirement to reach a proportionate decision. The Minister is required to act in accordance with law and fair procedures and the Court must be assiduous in ensuring that this occurs but the Court cannot impose unrealistic obligations on the Minister and his agents. The Court is satisfied that there was no requirement to carry out either a more sophisticated or more detailed analysis than that which was conducted in this case.

96. In the light of the foregoing, the Court is unable to identify any ground of challenge which has been established. The application for certiorari of the decision to deport Mr Alli is thus refused.

Summary
97. The following is a brief synopsis of the Court's findings in this case.

98. Having considered the arguments on both sides the Court has concluded that the Minister did not err in law in asking the question whether there were any "insurmountable obstacles" to the family moving with Mr Alli to Nigeria and continuing family life there with him. The posing of that question is well established in the ECtHR jurisprudence on Article 8 and is unaffected by recent U.K. judgments. Its relevance is reaffirmed by the Supreme Court's judgment in Oguekwe. An evaluation of whether there are any insurmountable obstacles to the family moving with the deportee incorporates an evaluation of the reasonableness of expecting that family to move.

99. Having identified that there were no insurmountable obstacles to the family following Mr Alli to Nigeria and following a fact-specific consideration of the applicants' circumstances, the Minister identified the following "substantial reason" for the deportation of Mr Alli:-

> *"there is no less restrictive process available which would achieve the legitimate aim of the State to maintain control of its own borders and operate a regulated system for control, processing and monitoring of non-national persons in the State."*

100. The Court is satisfied that in all the circumstances and on the basis in particular of the judgment of the Supreme Court in A.O. and D.L., this constitutes a "substantial reason associated with the common good" which requires the deportation.

101. The judgment in Oguekwe requires that the Minister weighs the applicants' constitutional and Convention rights against the rights of the State and reaches a reasonable and proportionate decision. Bearing in mind that the rights of the applicants and their family members which, though of considerable importance, are not absolute and can be outweighed, the Court is satisfied that in the circumstances of this case, these requirements were met and that the Minister reached a reasonable and proportionate decision.