THE SUPREME COURT

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

109/02 & 108/02

BETWEEN/
DAVID LOBE, JANA LOVEOVA, ALADAR LOBE (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, DAVID LOBE), LUKAS LOBE (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, DAVID LOBE) JANA LOBE (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, DAVID LOBE) AND KEVIN LOBE (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, JANA LOVEOVA)
Applicants/Appellants

and

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM
Respondent/Respondent

BETWEEN/
ANDREW OSAYANDE AND OSAZE JOSHUA OSAYANDE (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, FLORA OSAYANDE)
Applicants/Appellants

and

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM
Respondent/Respondent

JUDGMENT of Mr. Justice Geoghegan delivered the 23rd day of January 2003

I have had the benefit of reading in draft the judgments of the Chief Justice and Mr. Justice Hardiman in these appeals and subject to some comments of my own in relation to *Fajujonu v. Minister for Justice* [1990] 2 IR 151, I am in agreement with them and in particular, I agree that both appeals should be dismissed.

The appellants have heavily relied in these appeals on *Fajujonu*. As has been pointed out in the other judgments there are two arguments relating to *Fajujonu* which are particularly crucial to the appellants' case. The first is that little or no significance should be attached to the particular facts of *Fajujonu* in discerning the principles which this court enunciated. The second is that in a situation where the alien parents have a young child who is an Irish citizen the *"good and sufficient reason"* which the Minister must have before making a deportation order must relate to the particular individual proposed deportees as for instance that they were guilty of criminal misconduct or were a threat to the security of the State. More general considerations cannot be taken into account. I reject both of those arguments. In relation to the second, I am happy to rely on the points made by way of refutation of that argument by Mr. Justice Hardiman in his judgment though I reserve till a suitable case any consideration of whether in a judicial review of a Ministerial decision the courts are confined to an *O'Keeffe v. An Bord Pleanála* function. I would, however, like to make some observations of my own in relation to the first argument. In considering the significance of any particular dicta by Finlay C.J. or Walsh J. in their respective judgments, it is important to bear in mind the context in which the appeal was argued in the Supreme Court which was significantly different from the case made in the High Court. It is, therefore, important first to examine the judgment of Barrington J. in the High Court. It is clear from that judgment that the issue of principle which the plaintiff sought to raise in the High Court solely related to the fact that a child of the marriage of two aliens was a citizen of Ireland. The learned trial judge adverted in passing to the fact that two other siblings were Irish citizens also but that they had not been joined as parties to the proceedings. He acknowledged that the same issues would arise in relation to them. The learned judge then went on to set out a letter written by the plaintiff's solicitors to the Department of Justice dated 17th of November, 1984 which read 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 the 24th of September, 1983. Mr. and Mrs. Fajujonu have been resident in the State since the 31st of March, 1981. In December, 1983 they were allocated by Dublin Corporation a three bed roomed 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 their daughter Miriam."*

In the light of certain particular dicta in the judgment of Finlay C.J. which have caused some difficulty in interpretation and to which I will be returning, it is important to note that the expression *"to assert a right"* has its origins in that letter. The letter refers to a double assertion of rights. First, there is an assertion on the part of all three plaintiffs of *"a right to remain in the State"* and then there is an assertion allegedly by Miriam Fajujonu herself of *"a constitutional right to the company, guardianship, custody, care and control of her parents".* There is nothing in the judgment of Barrington J. to suggest that it was ever in dispute that Miriam Fajujonu was entitled to assert a right to remain in the State and there is nothing to suggest that the issue of whether technically that assertion had to be made by the parents on her behalf rather than by her was ever considered.

Barrington J. at p. 155 of the report makes clear that Mr. McDowell, on behalf of the plaintiffs, had rested his clients' case largely on *"the right of the infant plaintiff, as a citizen of Ireland, to remain in this country".* The learned trial judge a few sentences later says the following:

> *"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."*

At p. 156 of the report Barrington J. says the following:

> *"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 a 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."*

It is clear from the report that Mr. McDowell avoided that argument on the basis that it did not arise in his case. But I think that in that passage Barrington J. was not disputing the constitutional right of residence of the child but rather was referring to the conflict of constitutional rights which could arise and which could prevent enforcement of that right. I also believe that to be the correct position.

The key passage in the judgment of Barrington J. commences at the bottom of p. 157 of the report and reads as follows:

> *"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."*

As I see it, Barrington J. was not denying or disputing the constitutional right of the child to reside in Ireland (for this purpose the mechanics of asserting the right are immaterial) but what he was disputing was the right to remain in Ireland in the society of the parents and as I have already pointed out he had indicated in the earlier part of his judgment that having regard to a clash of two rights a child might not be entitled to enforce a right to remain in Ireland against the wishes of parents who wanted to take the child to another country.

I now move to the judgment of Finlay C.J. on the appeal. First of all the former Chief Justice was at pains to point out that the case made in the High Court was quite different from the case made in the Supreme Court. He pointed out that the plaintiffs' case in the High Court *"was simply confined to a single net and complete issue, and that was an assertion that the third plaintiff as a citizen of Ireland was entitled to the protection of the constitutional rights to which she was entitled pursuant to Articles 40, 41 and 42 of the Constitution, and that amongst those rights was a right to remain resident within the State and have preserved for her the family of which she was a member as a unit of society within the State and to be parented by her parents within the State".* The former Chief Justice further pointed out that that had been asserted as an absolute right which could not be defeated or infringed by any order made by the Minister under the Aliens Act, 1935. He then summarised the decision of Barrington J. as being to the effect that whilst the learned trial judge clearly recognised the constitutional rights in the third plaintiff as asserted that nevertheless these rights were not absolute and could be restricted *"by the proper exercise"* by the Minister for Justice of his powers under the 1935 Act. It would appear, therefore, that Barrington J.'s decision related only to the allegation of absolute rights and he was not called upon to consider the relevance of those rights to the proper exercise by the Minister of his powers.

The new case which was made in the Supreme Court was that the alleged *"constitutional right"* was not absolute but *"could only be restricted or infringed for very compelling reasons".* The use by the former Chief Justice of the expression *"constitutional right"* in the singular would seem to refer to the composite right alleged that is to say not just a right to reside in the State but to reside in the State in the company of the parents. It is the following passage in the judgment of the former Chief Justice which has caused a certain amount of difficulty.

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

In my opinion the only statement of law contained in that passage is contained in the first part of it. The second part of it is merely a statement of the obvious. In the first part, the former Chief Justice is effectively agreeing with Barrington J. that the parents cannot claim any constitutional right to remain in Ireland merely because the children are Irish citizens. In the second part he is referring to the obvious parental right to assert a choice of residence on behalf of their infant children and in the interests of those infant children. But this does not mean and I do not think that the former Chief Justice was claiming that that choice once made was necessarily procurable. It is quite clear from the rest of his judgment that Finlay C.J. took the view that the Minister was still entitled to consider deportation of the parents. He was of the view, however, that the Minister in exercising his discretion and in weighing up the different factors must have regard and must fully recognise the fundamental nature of the constitutional rights of the family. Although a slightly different wording was used, the opinion of Walsh J. in his judgment was the same and that is why the three other judges agreed with both judgments.

But what is quite clear from both the judgments of Finlay C.J. and the judgment of Walsh J. is that the Minister in considering the fundamental constitutional rights of the family was not expected to do so in a vacuum but rather with particular reference to the actual facts of the particular case before him. At the bottom of p. 162 of the report, Finlay C.J. with reference to the Minister's powers refers to *"the particular circumstances of a case such as this."* In the very same paragraph, the former Chief Justice refers to *"this family as it now stands, consisting of five persons three of whom are citizens of Ireland".* Earlier in the judgment Finlay C.J. had this to say:

> *"I have come to the conclusion that where, as occurs in this case, an alien has in fact resided for an appreciable time in the*

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

The importance of citing this passage is the reference to "*an appreciable time"* and the reference to family unit … "*containing children who are citizens".*

Once the constitutional right asserted was not an absolute one the Minister in considering its relevance for the purposes of making or refusing to make a deportation order was expected to look at the facts of the case and in that case the long period of residence and the fact that three out of the five members of the family were Irish citizens were clearly intended by the former Chief Justice to be relevant factors.

Early on in the judgment of Walsh J., he points out that the third plaintiff (which it must be remembered was the only one of the children to be a party to the proceedings) was one of three children all of whom were Irish citizens. It is quite clear, therefore, that Walsh J. was regarding as a relevant factor that there were two siblings who were Irish citizens. The learned judge goes on to describe the nature of the family and ends by commenting that the family *"has made its home and residence in Ireland"*. Walsh J. goes on to point out that the father was unable to get a work permit because of being an alien and that as a consequence of that he was unable to support his family, even though members of it were Irish citizens who thereby suffered discrimination by reason of the fact that their parents were aliens. He then asked the rhetorical question:

"Whether a family, the majority whose members are Irish citizens, can effectively be put out of the country on the grounds of poverty."

It is perfectly clear from the rest of his judgment that he was not suggesting that the Minister could not make a deportation order but what he was clearly suggesting was that the Minister would have to have special regard to these factors. It is obvious from the judgment of Walsh J. that in his view the constitutional rights had to be considered by the Minister in the light of the actual facts of the case. Otherwise his comments relating to the refusal of the work permit and consequent poverty would be irrelevant. The view of Walsh J. can really be summed up in a later sentence in his judgment where he says the following:

"But it would be ultra vires the Act to exercise the powers which had been sought to be exercised by the Minister to disrupt this family for no reason other than poverty, particularly when that poverty had been effectively induced by the State itself."

It is abundantly clear, in my view, that both Finlay C.J. and Walsh J. regarded the facts of the particular case as highly relevant to the considerations of the Minister. I find it very difficult to understand how the opposite argument can be put forward.

As I have already indicated I believe that both appeals should be dismissed.