Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

**MK (Albania) v. Minister for Justice**

**On appeal from: [2021] IEHC 275**

**Judgment delivered on 24th November 2022** **[2022] IESC 48**

**Headline**

1. The Supreme Court, by a majority of 3-2 (O'Donnell C.J., O'Malley, and Hogan JJ.; MacMenamin and Baker JJ. dissenting), dismissed the appellant's appeal against the High Court judgment refusing to quash the Minister's refusal to grant permission to remain and subsequent deportation order.
2. The Court was unanimous in ruling that the Minister's assessment of Article 8 rights, by following the Court of Appeal in *CI,* was incorrect. The High Court erred by applying this same approach.
3. However, the Court held by a majority (O'Donnell C.J., O'Malley, and Hogan JJ.) that this did not mean that the decision was a breach of the appellant's rights and invalid. The minority (MacMenamin and Baker JJ.) held that the decision was invalid and accordingly would have granted *certiorari.*
4. The Court also considered the appellant's constitutional rights but agreed that a full examination should be reserved to an appropriate case. In any event, a proportionality assessment under Constitution would not lead to a different outcome than by reference to the Convention in this appeal.

**Composition of Court**

O'Donnell C.J., MacMenamin, O'Malley, Baker, Hogan JJ.

**Judgments**

O'Donnell C.J.; MacMenamin J.; O'Malley J.; Baker J.; Hogan J.

**Background to the Appeal**

The issues in this appeal relate to the rights of "unsettled" migrants under the Convention and Constitution when the Minister is considering deportation under the International Protection Act 2015. The appellant is an unsettled migrant who applied unsuccessfuly for international protection. Subsequently, he was refused permission to remain. In her decision, the Minister applied the '*Razgar'* test from the UK House of Lords decision which sets out five questions to address when considering deportation:

i. *"Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?*
ii. *If so, will such interference have consequences of such gravity as potentially to engage the operation of Art. 8?*
iii. *If so, is such interference in accordance with the law?*
iv. *If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?*
v. *If so, is such interference proportionate to the legitimate public end sought to be achieved?"*

The decision concluded that *"it is not accepted that such potential interference will have consequences of such gravity as potentially to engage the operation of Article 8(1)"* . The appellant was refused leave to remain, and a deportation order was issued.

The appellant issued judicial review proceedings, arguing that unsettled migrants had a right to a proportionality assessment when considering the effect deportation may have on their Article 8 ECHR and constitutional rights. The High Court, following the Court of Appeal in *CI*, held that exceptional circumstances were required before the appellant's Article 8 rights were engaged, and that he had not acquired a procedural right under the Constitution to have a proportionality test conducted.

**Reasons for the Judgment**

**Article 8 Issue:** The Court agreed that the Minister had erred in her approach to the appellant's application when considering his Article 8 rights. The Court of Appeal's 2015 judgment in *CI* had interpreted question (ii) of the *Razgar* test to require wholly exceptional circumstances before Article 8 was engaged in the case of deportation orders for unsettled migrants. In this decision, the Minister addressed only *Razgar* questions (i) and (ii) (in the reverse sequence), found that Article 8 was not engaged and did not proceed to carry out a proportionality assessment under *Razgar* question (v).

The Court found that this approach did not represent consistent Strasbourg jurisprudence in the field of the right to respect for private and family life for unsettled migrants. The ECtHR applied a relatively low threshold as to Article 8 engagement; "exceptional circumstances" did not arise when considering engagement, but were considered when weighing factors for and against deportation.

As a result, the High Court judgment, in following *CI*, was incorrect; the Minister ought to have conducted a proportionality assessment at stage (v) of the *Razgar* test.

**Constitutional Issue:** The Court agreed, in principle, that the appellant's constitutional rights to a private life should have been weighed by the Minister when considering deportation.

However, Chief Justice O'Donnell found that it was not necessary to address the question of the relationship between the rights protected by Article 8 ECHR and the Constitution. If there was a violation of the appellant's Article 8 ECHR rights, Article 8 would provide a complete remedy.

Mr Justice MacMenamin also would reserve full consideration of the constitutional issue to an appropriate case. While not excluding a consideration of an Article 40.6 analysis, he held that the rights at issue should be largely derived from Article 40.3 which would involve a proportionality assessment, balancing the rights of the individual against considerations of the common good, public order and morality**.** In principle, a constitutional consideration would lead to the same outcome as a consideration under the Convention.

Ms Justice O'Malley and Ms Justice Baker agreed that a full consideration of the constitutional issue ought to be reserved to an appropriate case and did not comment on the inter-relationship between the Constitution and Convention in this case.

Mr Justice Hogan held that the right to private life at issue found principal expression in Article 40.3.1 and 40.3.2 of the Constitution and in case law relating to freedom of association contained in Article 40.6.1(iii), though it was diffused throughout the Constitution and could not be expressed in a single

clause. However, he held that it was unnecessary to determine the limits of such rights, as this would depend on the precise facts of each case.

Mr Justice Hogan held that the Minister ought to have conducted a proportionality assessment in respect of the appellant's constitutional privacy rights, though it was unlikely that there would ever be a difference in result when conducting such an assessment under the Convention or the Constitution, save in an unusual or special case.

**Remedial Issue:** Chief Justice O'Donnell found that the Minister's error in conducting a proportionality assessment at question (ii) of the *Razgar* test rather than at question (v) was an error of sequence rather than an error of substance. Hence, this did not amount to an unlawful breach of the appellant's Article 8 rights and the Minister's decision should not be quashed.

Ms Justice O'Malley agreed that an order of *certiorari* was not necessary or appropriate**.**

Mr Justice Hogan agreed with Chief Justice O'Donnell that the Minister did, in substance, conduct a proportionality assessment required by Article 8(2)**.** He also found that the decision conducted a proportionality test as required under the Constitution**.** Hence, the Minister's overall decision could not be faulted, and no order of *certiorari* should be granted.

Mr Justice MacMenamin disagreed with the majority and held that *certiorari* ought to be granted, finding that the primary purpose of judicial review was to prevent the abuse of power rather than the final determination of rights. He considered that the Minister and courts have legal duties under the ECHR Act 2003, and that in this case the Minister's decision was incompatible with the Convention and Strasbourg case law. An effective remedy as required under Article 13 ECHR should follow if the Court was to be consistent with the rule of law and legal certainty.

Ms Justice Baker agreed with Mr Justice MacMenamin that an order of *certiorari* was the appropriate resolution in this case. The decision-making process was flawed and therefore ought to be quashed. She held that it was not the function of a court in an application for judicial review to deduce what the correct answer would have been, but to ensure that the rules and methodology by which decision makers are to act are properly applied.

**Note**

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

**Case history**

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|---|---|
| 22-23 February 2022 | Oral submissions made before the Court |
| [2021] IESCDET 116 | Supreme Court Determination granting leave |
| [2021] IEHC 275 | Judgment of the High Court |

# AN CHÚIRT UACHTARACH
# THE SUPREME COURT

**S:AP:IE:2021:000064**

**[2022] IESC 48**

**O'Donnell C.J.**
**MacMenamin J.**
**O'Malley J.**
**Baker J.**
**Hogan J.**

**BETWEEN/**

**MK (ALBANIA)**

**Applicant/Appellant**

**AND**

**MINISTER FOR JUSTICE & EQUALITY**

**Respondent**

**JUDGMENT of Ms. Justice Baker delivered on the 24th day of November, 2022**

**1.** I am in agreement with the other members of the Court that the Minister ought to have conducted a proportionality analysis in respect of the potential impact of the proposed deportation order on MK's rights under the Constitution and the European Convention of Human Rights ("the Convention") prior to making a decision on his leave to remain application and the making of a deportation order. I adopt the reasoning of my colleague MacMenamin J. regarding the correct sequencing to be applied by a decision maker, and I agree too that the test as formulated by the Court of Appeal in *C.I. & Ors. V. the Minister for Justice, Equality & Law Reform* [2015] IECA 192, [2015] 3 I.R. 385 ("*C.I.*") was incorrect.

**2.** I agree with the judgment of MacMenamin J. that this Court should make an order of *certiorari* on account of the fact that the decision of the Minister was not in

accordance with law. To that extent, I disagree with the views of the majority. I wish to take this opportunity to make some comments in support of the conclusion of MacMenamin J. with regard to the appropriate remedy.

**3.** The fact that only a small number of applications for leave to remain by unsettled migrants are likely to succeed, and that there are but a few "exceptional cases" is an observation regarding the result of the decision making process, and not the method engaged. It is not that exceptionality has to be shown before the decision maker should embark upon a consideration of whether Article 8 Convention rights exist and whether they are likely to be breached, but rather that the test, involving as it does a requirement to reconcile the right of the individual with that of the State to control its borders, imposes a high bar which is met in its application in relatively few cases.

**4.** Further, the statutory provisions do not appear to envisage an exceptionality test, and s. 49(3) of the International Protection Act 2015 ("the 2015 Act") mandates the Minister to have regard to the right to respect for private and family life of an applicant and then set out the applicable considerations. I do not think it is possible to read these statutory provisions as suggestive of an approach that those private and family life rights arise for consideration only in exceptional cases.

**5.** The jurisprudence of the ECtHR supports the proposition that in assessing the possible impact of Article 8, the first question to be asked is whether Article 8(1) is actually "engaged". This means simply that the decision maker is to categorise the application and, as MacMenamin J. says in para. 148 of his judgment, the gravity of any impact or effect on those rights is not relevant at that stage of the process, which could properly be described as a screening process to ascertain whether the rights under Article 8(1) exist and/or fall for consideration. At the later stage, the respective rights of the State in protecting its borders and the integrity of the immigration system

generally, are weighed against the interests of an applicant in his or her personal or family or private life. That analysis involves an assessment of the facts and factors in the life of the applicant. It is true, as my colleague MacMenamin J. notes, that there are few cases where the interests of a precarious unsettled migrant with a personal family or private life could outweigh the significant interests of the State. What is necessary, however, is that the individual circumstances of the private and family life of an applicant be ascertained and weighted in the balancing exercise.

**6.** I agree with the observations of MacMenamin J. at para. 151 of his judgment that the fact that a process is sometimes telescoped does not detract from the generality of application and the mode by which the decision maker must proceed to fully answer an application.

**7.** That the process be correct, and be seen to have been correctly applied, is not a mere formality. To ask first whether the potential impact could be of such a grave nature as to outweigh the interests of the State, could, and will often, mean that the decision maker will conclude that the Article 8 rights are not "engaged" at all, when an application does have those rights.

**8.** The decision maker must ask first, whether the rights exist, and then then what the elements of the rights are, and how weighty they are, and this analysis involves an examination of the granular detail of the elements of private life rights said to be enjoyed by the applicant.

**9.** It may be that the answer that emerges from the application of the correct sequence is the same as that from a more telescoped process where the exceptionality test is applied for the purpose of ascertaining whether right exists in the first place. But the essence of administrative law is to ensure that the process followed by an administrative decision maker were correct, not because due process is an end in itself,

but because a person who invokes a process is entitled to understand that process, to know that it was properly applied, and as a result to be in a position to know that the decision maker acted lawfully.

**10.** The remedy of *certiorari* is probably the most important tool to protect these procedural rights, not because procedure matters above all else but because procedural correctness is the framework within which administrative decision making must occur and must be seen to occur, and by which rights are protected. The general proposition remains that a person whose rights have been infringed by a wrongful exercise of administrative decision making is entitled as of right to a remedy: the dicta of O'Higgins C.J in the seminal *State (Abenglen Properties Ltd) v. Dublin Corporation* [1984] IR 381, at 393 retains its force:

> "In the vast majority of cases, however, a person whose legal rights have been infringed may be awarded *certiorari ex debito justitiae* if he can establish any of the recognised grounds for quashing; but the Court retains a discretion to refuse his application if his conduct has been such as to disentitle him to relief or, I may add, if the relief is not necessary for the protection of those rights. For the Court to act otherwise, almost as of course, once an irregularity or defect is an established in the impugned proceedings, would be to debase this great remedy."

**11.** The remedy allows for the restoration of an applicant to a position where an administrative decision maker will come to a concluded view in accordance with law. I adopt the dicta of Clarke J. (as he then was) in *Tristor Ltd v. Minister for the Environment and ors* [2010] IEHC 454, at para. 4.1:

> "The overriding principle behind any remedy in civil proceedings should be to attempt, in as clinical a way as is possible, to undo the consequences of any

wrongful or invalid act. The court should not seek to do more than that, but equally the court should not seek to do less than that."

**12.** While I agree that logically, the result of the application of the correct legal test in a sequence that fully respects the right of an applicant to have his or her private and family rights considered and weighed against the opposing interests of the State may in many, or most, cases arrive at the same result on the facts, I do not agree with the consequence for which the majority advocates. It is not the function of the court in an application for judicial review to ascertain whether a decision is correct, but rather to ascertain whether an impugned decision was legal.

**13.** That long-established proposition does not require authority and almost goes without saying. A person who challenges an administrative decision does so on the basis of the legality and not the correctness, or substance, of the decision. It is not the function of the court by a process of logical reasoning to deduce what the correct answer would have been, and to refuse relief because the answer would, and must, have been the same as that challenged. The logic for which my colleagues contend is not a mere syllogism, that one proposition necessarily follows from another, but rather a conclusion that the decision arrived at by the decision maker would have been the same whether he or she had assessed the nature and strength of the private rights asserted by MK in coming to a conclusion as to whether those rights were "engaged" or whether they were sufficiently weighty to outweigh those of the State. The solution proposed by the majority is to presume that the decision maker had examined all of the personal characteristics and details of the private life of MK in Ireland, and that the conclusion of that analysis can be presumed from the decision and extrapolated from there to a decision on the merits. My reading of the decision is that there is no analysis at all of how the private and family rights of MK were assessed or weighed against those of the

State. In other words, the proportionality analysis was not conduced, and it is not appropriate for this Court to now extrapolate from the decision that the error in process can, as the Chief Justice says, "have no consequence for the substance and therefore the validity of the decision" (para. 9).

**14.** My primary concern is that the approach for which the majority of this Court contends fails to recognise that the decision maker had screened out the application of MK by coming to a decision that his private and family rights were not "engaged". That word strictly speaking must be taken to mean that the rights did not fall for further consideration. I accept that the word "engaged" is used as shorthand, and shorthand is liable to confuse or obscure, but the fact is that MK did have rights which were engaged, albeit those rights may not have had sufficient weight when compared against those of the State. Whilst the decision maker did say that all information submitted on behalf of MK had been considered, that decision was that any interference with the asserted rights would not have "consequences of such gravity as potentially to engage the operation of Article 8(1) ECHR." The decision was one that there were no potentially grave consequences, and the decision maker did not thereafter go on to conduct a proportionality assessment to ascertain the nature of the rights asserted and the likely degree of interference with those right and how and whether they were sufficient to outweigh the interests of the State. A person reading the decision would not, save by extrapolation, understand the elements that went to form the concluded view of the proportionality assessment.

**15.** The decision maker conducted a screening analysis, and like all screening, the purpose was to categorise. Once an application was screened out, the decision maker was excused from further consideration, such that the balancing of the private rights of MK against those the State was not done. It is not that screening is formulaic as such,

but the screening exercise can be one that results from the application of certain pre-conditions, such as an assumption that a precarious or unsettled migrant does not or could not have private family rights, or, as in this case, an assumption that because MK's presence in the State was precarious, and because he was, for all purposes an unsettled migrant, his rights had to be "exceptional" before they fell for comparison with the rights of the State.

**16.** The difference is one of the fullness or degree of detail or analysis engaged with the individual facts and factors in the life of an applicant. I am not convinced that it is possible to say, notwithstanding the logical analysis for which the majority of this Court contends, that because the decision maker considered that MK had not asserted or been shown to have any exceptional factors in his private life in the State, that his application had been lawfully assessed. In fact, the application had not been lawfully assessed. The result of the logical analysis for which the majority contends is that the decision is to be found to have been actually correct notwithstanding that the methodology was unlawful.

**17.** It is important to repeat that administrative law has as its purpose the protection of the rights of the individual, not by the correction of an error as occurs in an appellate process, but rather by supporting those rights by ensuring that the rules by which decision makers are to act, and the methodology they must engage, is properly so engaged and applied. In that sense, administrative law is designed to close the gap, and to vest in the courts the power to review the process by which a decision is arrived, but not to displace an administrative appellate process which has been established to correct error. Many, or most, administrative bodies operate within a legislative or regulatory structure which provides for the correction of errors by an appellate body. The proper functioning of those bodies, and the preservation of the principle that there be finality

in decision making, requires in general that courts considering an applicant for judicial review will not interfere with the substance of a decision by an administrative appellate body. The historic basis of the development of judicial review was a perceived need to enable procedural, rather than substantive, challenges, because by that means the citizen was supported, and the actions of state bodies regulated, by the imposition of fair procedures, protection against bias, and a general oversight regarding the process and methodology of administrative decision makers.

**18.** This is not a matter of form over substance, and it would be wrong to see compliance with the requirements of formal correctness as an end in itself. Formal correctness rather is to be seen as a means by which fairness of process is achieved in order to properly support the rights of an applicant. It is closely allied to the requirement to give reasons and provided the reasons are clear, and the error of process did not result in an injustice, a decision will not or does not need to be quashed in order that fairness be achieved. As stated by Fennelly J. in *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 59, [2012] 3 I.R. 297 at para. 68:

> "In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded."

**19.** It is a matter of where one draws the line, but in my view, it is not appropriate for this Court to draw the line by the application of logic, if as in the present appeal, the Court is convinced that a wrong turn was taken early in the process, and if, again as here, that one turn was to screen out an applicant from a full assessment of how and to what extent the private and family rights of MK were weighed against those of the State in supporting its immigration system.

**20.** It is possible to ascertain from a reading of the decision under challenge that the decision maker did examine the elements of private and personal life for which MK contended, but it is not possible to say how in his case his rights as a very young person, who came to this State as a minor and whose formative teenage years were spent in schooling and later in work in the State, were properly balanced against the interests of the State. It is possible to say that the decision maker was aware of the elements or details of MK's life in Ireland, but not possible to say whether the decision maker properly weighed those against the interests of the State.

**21.** I am conscious that in *Mallak,* Fennelly J. observed that having determined that the appropriate order would be one of *certiorari*, it was a matter for the Minister to decide what procedures he would adopt in order to comply with the requirements of fairness. I am also conscious of the fact that in *Krumpscki v. The Minister for Justice and Equality (No 2)* [2018] IEHC 538, Humphreys J. adopted what the authors of Hogan, Morgan, and Daly called in the 5th edition of their *Administrative Law in Ireland* a "more sophisticated and serviceable analysis" of remedy, that a court should be sensitive to fashion a proportionate and just remedy, rather than to automatically reaching for the "crude, nuclear option of immediately quashing the decision" in full, merely because of the identification of any error. Humphreys J. was dealing with a case where the reasons were found not to be sufficient, and considered, correctly in my view,

that a court does have discretion to fashion a remedy, and to seek a solution that is just and appropriate in any given set of circumstances. He did however say that that approach more properly belongs when a case concerns "a decision that might otherwise be valid if the problem can be dealt with simply by directing reasons" (para 35.)

**22.** I do not believe that this present appeal concerns a decision which is "otherwise valid". The decision maker went wrong in a fundamental way early in the process, and while on the merits it might be possible to say it logically the decision would have been the same had the decision maker properly applied the process, I am not convinced that that possibility of correctness, no matter how logical it appears, is sufficient to refuse the remedy of *certiorari*.

**23.** As stated in para. 27 of the judgment of Hogan J., the applicant was entitled to a decision made which considered his rights under the Constitution and the Convention, and the Minister ought to have conducted a proportionality analysis in respect of the potential impact in respect of these rights prior to making the s. 49 decision and the subsequent making of a deportation order, in line the decision of this Court in *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 I.R. 701. As such, *certiorari* is the most appropriate remedy in this case as it allows the case to return to the Minister for consideration and a legally sound process to be followed, respecting the rights and entitlements of MK.

**24.** I would for these reasons allow the appeal.

**25.** With regard to the issue discussed in the judgments of my colleagues I agree with the approach of O'Malley J. and I too do not consider that the resolution of the present appeal does not require a decision as to the potential role of Articles 40.1, 40.3 and 40.6 of the Constitution.

# AN CHÚIRT UACHTARACH

# THE SUPREME COURT

**S:AP:IE:2019:000064**

**[2022] IESC 000**

**O'Donnell CJ**
**MacMenamin J**
**O'Malley J**
**Baker J**
**Hogan J**

**BETWEEN/**

**MK (ALBANIA)**

**Appellant**

**- and -**

**MINISTER FOR JUSTICE AND EQUALITY**

**Respondent**

**JUDGMENT of Mr. Justice Gerard Hogan delivered on the 24th day of November, 2022**

**1.** The applicant is an Albanian national who arrived in the State in September 2016 as an unaccompanied minor. At that time he was then aged 16 years of age. He has now remained in the State for just over six years. During this period, he has attained his majority, gone to school, stayed with a foster family, has been given permission to enter the labour market and has generally lived an unblemished life. His applications for

asylum and international protection having, however, been refused, the Minister for Justice subsequently made orders under s. 49 of the International Protection Act 2015 ("the 2015 Act") refusing him leave to remain in the State (on 4th December 2019) and providing for his deportation (on 17th February 2020). It is these orders which are the subject of the present judicial review proceedings.

**2.** The essential question presented in the appeal in the present case is whether the making of these orders had the effect of infringing his constitutional rights or were incompatible with his right to a private life under Article 8 ECHR. These arguments were rejected by Tara Burns J. in the High Court in a very careful judgment which she delivered on 6th April 2021: see *MK v. Minister for Justice and Equality* [2021] IEHC 275. By a determination dated 15th October 2021, we granted the applicant leave to bring a direct appeal to this Court pursuant to Article 34.5.4 of the Constitution: see [2021] IESCDET 116.

**The Article 8 ECHR argument**

**3.** I may say immediately that, together with all other members of the Court, I entirely agree with the judgment of MacMenamin J. so far as his treatment of the Article 8(1) ECHR issue is concerned and, specifically, the extent to which it can be said that these rights are engaged by the Minister's decision to refuse him leave to remain and to deport him. In his judgment, MacMenamin J. has helpfully set out the facts of the present case and has dealt comprehensively with the right to private life issue under Article 8 ECHR as it arises in the present case. Thus, for example, in the course of the s. 49(7) assessment, the Minister concluded that "it is not accepted that such potential interference will have consequences of such gravity as potentially to engage the operation of Article 8(1) ECHR."

**4.** While I agree that the Minister misapplied Article 8 ECHR insofar as she reached this conclusion on the engagement question, I find myself in respectful disagreement with MacMenamin J. on the ultimate issue of whether her decision must be quashed. For my part, I consider that, these legal errors notwithstanding, the Minister did in substance conduct the requisite proportionality test for the purposes of Article 8(2) ECHR. I shall be returning to this point later in this judgment.

**5.** So far as the Article 8(1) ECHR engagement issue is concerned, I also agree with MacMenamin J. that the Minister's reliance in this appeal on the test articulated by Lord Bingham in *R. (Razgar) v. Home Secretary* [2004] UKHL 27, [2004] 2 AC 368 was misplaced. It is, of course, clear from the jurisprudence of the European Court of Human Rights is that the Convention is engaged only where the interference with these rights attains a sufficient seriousness (see, *e.g., Costello-Roberts v. United Kingdom* (1993) 19 EHRR 112). My difficulty with *Razgar* (or, possibly more accurately, at least as this decision has been interpreted by the Court of Appeal in *CI v. Minister for Justice and Equality* [2015] IECA 192, [2015] 3 IR 185) is that it seems to pitch the minimum gravity test at too elevated a level. In this regard, I, like O'Donnell C.J., consider that MacEochaidh J. was entirely correct in his judgment in the High Court in *CI* when he said that that if "one has any sort of private life…then it is impossible to imagine how removal from the State will not interfere with that private life": *CI v. Minister for Justice and Equality* [2014] IEHC 447 at [26].

**6.** As MacMenamin J. observes in his judgment, it is *not* the case that the right to private life as guaranteed by Article 8(1) ECHR is engaged *only* in exceptional cases when (as here) the applicant is not a settled migrant and is rather one who has unsuccessfully sought asylum. Yet while this right is generally engaged by a proposed deportation decision, the case law of the European Court of Human Rights in decisions such as *Butt*

*v. Norway* [2012] ECHR 1905 onwards (if not earlier) also makes it clear that once the necessary proportionality analysis is conducted under Article 8(2) ECHR, the right to private life of such an applicant of such an unsettled migrant will but rarely prevail as against the interests of the Contracting State which, in cases of this kind, are normally regarded by the European Court of Human Rights as compelling.

**7.** It is in this sense – and in this sense only – that it can be said that it is only in exceptional circumstances that an unsettled migrant with a precarious right to remain in the State will prevail in an Article 8 ECHR private life case. Insofar, however, as the Court of Appeal in *CI* held that an unsettled migrant must demonstrate the existence of exceptional circumstances *before* Article 8(1) ECHR could even be engaged, I respectfully disagree for all the reasons set out in the judgment of MacMenamin J.

**8.** In effect, therefore, an unsettled migrant in the position of the applicant in the present case with a precarious entitlement to be in the State is generally entitled to an Article 8(2) ECHR proportionality analysis in respect of the private life implications of his removal from the State prior to the making of any deportation by virtue of Minister's obligations to respect the ECHR under s. 3(1) of the European Convention of Human Rights Act 2003. Yet for all the reasons I have all too briefly sketched out, it is only in exceptional or rare cases that a proportionality analysis of the circumstances of the private and family life of an unsettled migrant seeking leave to remain will have the result that the applicant will prevail given the State's interest in controlling immigration and maintaining the integrity of the asylum system. (I will be returning presently to this issue when dealing with the constitutional question).

**9.** In these circumstances I can now proceed directly to consider the first issue actually raised by the appellant in this appeal, namely, the contention that he has a constitutional right to private life and that such has been infringed by the Minister's orders.

**Is there a constitutional right to a private life corresponding to Article 8(1) ECHR?**

**10.** Perhaps the first question to be considered is whether there is, in fact, a constitutional right to a private life in the sense broadly corresponding to that envisaged by Article 8(1) ECHR. It is important to be clear about this. While Article 8 ECHR also clearly protects the right to privacy in a variety of different settings, the issue of the existence of a constitutional right to private life which is raised in the present case is a different one from that which has heretofore normally been raised to date in constitutional cases. Disputes regarding the scope of such a constitutional right have previously arisen in particular contexts, such as marital privacy (*McGee v. Attorney General* [1974] IR 287) or privacy generally (*Norris v. Attorney General* [1984] IR 36) or privacy of communications (*Kennedy v. Ireland* [1987] IR 587).

**11.** The right to private life which is at issue here can also be regarded in some instances, at least, as, in essence, an aspect of the right to form associations in Article 40.6.1.iii of the Constitution: the right to make friends, to pursue a course of education, to advance one's career and to engage in a variety of recreational and sporting occupations. Viewed in that sense, it embraces virtually all normal life outside of the special context of marriage, children and family.

**12.** It is striking that, outside of the special context of immigration, there have been very few cases in this jurisdiction on this topic. This is perhaps because up to now these rights have been taken for granted by Irish citizens. Both the Constitution and the common

law rather assume – and, indeed, in some respects are even predicated upon – their existence. One may certainly observe that the exercise of such rights has been essentially unproblematic in the eighty-five years of the operation of the Constitution to date. The right, however, to have a private life in this particular sense seems to be enjoyed by virtually every citizen, almost without any let or hindrance.

**13.** To some extent, therefore, this aspect of the right to a private life is diffused throughout the Constitution and does not find expression in a single, convenient, omnibus clause such as Article 8 ECHR. It was, I think, in that particular sense that Henchy J. said in *Norris v. Attorney General* [1984] IR 36 at 69 that Article 8 ECHR "has no counterpart in our Constitution." As I have already hinted, one can, however, find aspects of this wider right in different parts of the Constitution. The right, for example, to invite guests and to entertain them in one's home may be regarded as part of the "inviolability" of the dwelling for the purposes of Article 40.5, for the essence of that guarantee is to provide a degree of privacy and autonomy for the occupier. The freedom to follow a particular vocation, belief or way of life can be said to be embraced by the guarantee of freedom of conscience in Article 44.2.1. One need only go back as far as *McGee* to see how the right to privacy in Article 40.3.1 and Article 40.3.2 has long been recognised as what we would now term as a derivative right stemming from the "personal" rights of the citizen in Article 40.3.1 and the protection of the "person" in Article 40.3.2. The specific feature of marital privacy recognised in *McGee* also branches out to embrace other forms of privacy and private friendships divorced from the intimate settings of marriage and similar co-habiting relationships.

**14.** The right to a private life in this sense is also associational in nature, a point which even the majority in *Norris* appeared to recognise: see [1984] IR 36, at 60 per O'Higgins C.J. The language of Article 8 ECHR thus reflects the fact that humans are essentially

sociable creatures who desire and need the company of others. This is particularly true in respect of marriage, courtship, family and similar forms of close and intimate relationships. Yet over and above this the friendship of others is part of the general *joie de vivre* without which life would lose much of its gaiety, fun and interest.

**15.** All of this finds also expression in the case-law to date regarding the scope the freedom of association guarantee contained in Article 40.6.1.iii. As Murnaghan J. observed in *National Union of Railwaymen v. Sullivan* [1947] IR 77 at 101, the effect of this provision is such that: "Each citizen is free to associate with others of his choice for any object agreed upon by him and them." In *Equality Authority v. Portmarnock Golf Club* [2009] IESC 93, [2010] 1 IR 671 Hardiman J. spoke to similar effect when he observed (at 724) that:

> "The right to freedom of association is a pre-existing natural right, inhering in human kind by virtue of its rational and social being and is essential to the exercise of various other rights such as the right to engage effectively in political speech, to organise for industrial purposes or otherwise, to take part in elections, to participate in sporting or cultural events, and many more."

**16.** In passing, it may be noted that in *Portmarnock Golf Club* this Court held that the right to form and to join a sporting club or other recreational outlet was an aspect of the more general right of association expressed in Article 40.6.1. This is also reflected in another decision of this Court concerning the affairs of another unincorporated association (and, as it happens, another private golf club): see *Dunne v. Mahon* [2014] IESC 24.

**17.** It is, perhaps, unnecessary in this context to determine the precise limits of the right of association in Article 40.6.1.iii. Admittedly, the context of this provision ("…to form associations and unions") ("…comhlachais agus cumainn do bhunú…") may tend on

one view to suggest more formal associations (such as unions, clubs, political parties and so forth) rather than purely informal friendships as such. Yet I do not think that the Article 40.6.1.iii right can be quite so circumscribed and, for my part, I agree with all that O'Donnell C.J. has said on this issue

**18.** It suffices, however, for present purposes to say that in the present context the privacy rights protected by Article 40.3 take over where the right of freedom of association in Article 40.6.iii ceases and it is at that point that one right shades into the other. It is, accordingly, unnecessary to define the exact parameter of these rights or to state precisely how these rights inter-act with each other, as much may depend on the precise facts of any particular case. If, for example, A joins a sport club that right is clearly within the ambit of Article 40.6.1.iii as part of the right of association. Let us suppose that A invites B (who happens to be a friend of A but who is not a member of the club) to train with her or to play with her at the club, that zone of friendship possibly more naturally comes within the scope of the privacy guarantee as a derivative right from Article 40.3, although the right is also closely linked on these facts to a core associational right. If, thereafter, A invites B for dinner in her house, that probably come within the scope of Article 40.5 as part of the zone of protection expressed or implied by that provision's guarantee in respect of the inviolability of the dwelling. To repeat, therefore, Article 40.6.1.iii (and, in some instances, Article 40.5) will take over where the privacy guarantee of Article 40.3 in strictness ends.

**19.** Summing up, therefore, on this issue one may say that the essence of the Article 8 ECHR right to private life is the privacy and associational dimensions of that right. In a constitutional context this right principally finds expression in the right to privacy derived from Article 40.3.1 and Article 40.3.2 and, to date at least, also in the case-law dealing with the freedom of association contained in Article 40.6.1.iii. There are clearly

other types of circumstances where other provisions of the Constitution — such as, as I have just mentioned, the inviolability of the dwelling in Article 40.5 or freedom of conscience in Article 44.2.1 – can, depending on the precise circumstances of the claim, also potentially come into play.

**20.** It follows, therefore, that the aspects of private life relied on by Mr. K. in the present case – such as, for example, the fact that he has participated in a variety of social activities or that he has made many friends in the State – are indeed generally protected as aspects of the right to privacy in Article 40.3 and (depending possibly on the circumstances) of the freedom of association protected by Article 40.6.1.iii.

**Whether a non-citizen can invoke these Article 40.3 privacy and Article 40.6 associational rights?**

**21.** It is next necessary to consider whether the applicant can invoke this right in the present circumstances. It is true that in her judgment in *Dos Santos v. Minister for Justice and Equality* [2015] IECA 210, [2015] 3 IR 411, at 416, Finlay Geoghegan J. held that a non-citizen had no such constitutional right "within the meaning of Article 40.3 to remain in the State and/or participate in community life in the State." For my part, however, I think that this is, with respect, too absolutist a position. I consider that counsel for the applicant, Mr. Conlon SC, was correct to point out that this particular decision ante-dated the subsequent decision of this Court in *NHV v. Minister for Justice and Equality* [2017] IESC 35, [2018] 1 IR 246.

**22.** In *NHV* the applicant was a non-national whose application for refugee status had been beset by numerous and lengthy delays. During that period he was excluded by statute from participating in the labour market. In his judgment for this Court, O'Donnell J. held that this blanket form of statutory exclusion was unconstitutional. The importance

of this case for our purposes is that in his judgment O'Donnell J. addressed the difficult and troubling question of whether non-citizens can properly invoke constitutional rights of this nature by observing ([2018] 1 IR 246 at 312-313):

> "……I merely repeat the suggestion made in *Nottinghamshire County Council v. KB* [2013] 4 I.R. 662 that Article 40.1 may provide a useful insight and approach to this question. For present purposes, I would be prepared to hold that the obligation to hold persons equal before the law "as human persons" means that non-citizens may rely on the constitutional rights, where those rights and questions are ones which relate to their status as human persons, but that differentiation may legitimately be made under Article 40.1 having regard to the differences between citizens and non-citizens, if such differentiation is justified by that difference in status. In principle, therefore, I consider that a non-citizen, including an asylum seeker, may be entitled to invoke the unenumerated personal right including possibly the right to work which has been held guaranteed by Article 40.3 if it can be established that to do otherwise would fail to hold such a person equal as a human person. However, it is necessary to consider first what exactly is guaranteed by that right to citizens; second whether the essence of the guarantee relates to the essence of human personality and thus must be accorded to some or all non-citizens who in that regard are entitled to be held equal before the law; third, whether even so a justifiable distinction may be made under Article 40.1 between citizens and lawful residents, and non-citizens and in particular asylum seekers: and finally, whether if any such distinction can be made, such differentiation may extend to encompass the complete ban on employment of asylum seekers contained in s.9(4) [of the Refugee Act 1996]."

**23.** If one applies this reasoning to the present case, we can see that so far as the first issue is concerned, the right in question as enjoyed by Irish citizens is substantially a feature of the right to privacy in Article 40.3 and the right to associate in Article 40.6.1.iii (again, the precise nature of the particular right at issue depends on the particular circumstances of each case).

**24.** Turning to the second question, it may be said that this right is indeed an aspect of human personality. As I have already stated, humans are by nature social creatures: indeed, we know from our own individual experience and, for that matter, from a variety of prison cases (see, e.g., *Kinsella v. Governor of Mountjoy Prison* [2011] IEHC 235, [2012] 1 IR 467) that the extended deprivation of human contact may present acute psychological anguish.

**25.** Third, there is *in principle* no difference based on citizenship so far as the exercise of the right is concerned. Quite obviously as befits any free and democratic state non-citizens — as much as citizens — should be (and are) free to exercise these privacy and associational rights in any variety of ways: all residents of the State are free, for example, to make friends, engage in leisure and sporting activities and to pursue the wide variety of cultural, educational and recreational opportunities which are open to all.

**26.** It follows, therefore, that, based on the *NHV* analysis, non-nationals enjoy the protections afforded by Article 40.3 and Article 40.6.1.iii (and the other relevant constitutional provisions) in respect of these privacy and associational rights. To that extent, therefore, non-nationals enjoy (in principle, at any rate) a combination of privacy, associational and autonomy-style constitutional rights which correspond to the omnibus description of the right to a private life contained in Article 8 ECHR.

**Whether the Minister was obliged to conduct a proportionality analysis prior to making decisions regarding the leave to remain and deportation issues?**

**27.** This conclusion means, of course, that the Minister ought to have conducted a proportionality analysis in respect of the potential impact in respect of these constitutional rights prior to making the s. 49 decisions regarding the issue of leave to remain and the subsequent making of a deportation order: see generally the decision of this Court in *Meadows v. Minister for Justice* [2010] IESC 3, [2010] 2 IR 510. These rights would be engaged by the deportation of the present applicant in the present case, not least by reason of his lengthy stay in this State. I would nonetheless qualify this observation by the following remarks.

**28.** First, I do not think that there is any real difference of substance between the ambit of the various constitutional rights which are engaged here and the scope of Article 8 ECHR. It is true that in *Gorry v. Minister for Justice* [2020] IESC 55 this Court quashed ministerial orders of this kind because he had failed to conduct a proportionality assessment in respect of the constitutional rights of a married couple, one of whom was an Irish national. The reason, however, for that conclusion was that the ambit of the protection of marriage in Article 41 was more extensive that the corresponding guarantee in Article 8 ECHR. As both O'Donnell and McKechnie JJ. observed in their respective judgments, it does not at all follow that just because the variety of immigration orders were deemed by the Minister in that case to be proportionate by reference to Article 8 ECHR that the same could necessarily be said by reference to Article 41 of the Constitution had the appropriate proportionality exercise been equally carried out. It is, however, different so far as the privacy rights derived from Article 40.3 and associational rights contained in Article 40.6.1.iii are concerned: save possibly in some unusual or special case, it does not appear to me that a proportionality analysis

by reference to these Article 40.3 privacy and Article 40.6 associational type rights is likely to yield any different result as compared with that conducted by reference to Article 8 ECHR.

**29.** Second, the nature of these privacy and associational rights must themselves be taken into account. Here it may be useful to reflect on the very nature of the immigration process itself. In the ordinary way a third-county citizen who is not otherwise a citizen of the European Union or the European Economic Area or the United Kingdom or the Swiss Confederation has no free-standing legal entitlement to enter the State and their right to do so is wholly dependent on securing the appropriate visa or other permission from the Minister for Justice and Equality. Conforming to our obligations under the Geneva Conventions, the Refugee Act 1996 provides that permission will be granted to those claiming asylum to enter and to remain in the State lawfully while their application for asylum is being processed. The implicit understanding, of course, is that such permission to remain will be withdrawn in the event that such an application for asylum were to fail.

**30.** During this period, it can be anticipated that applicants for asylum will acquire and exercise what may be regarded as Article 40.3 privacy and Article 40.6-style associational rights corresponding to the right to a private life contained in Article 8(1) ECHR. They will invariably make friends, pursue a variety of educational, vocational, sporting or work-related activities and generally avail of a range of sporting, cultural or other recreational activities. If, at the end of the asylum process, they are ultimately denied international protection and are required to leave the State, there can be little doubt but that these rights will be affected in that, for example, they may lose touch with these friends or they will no longer be able to pursue these other sporting or leisure activities in quite the same way or in quite the same circumstances as they did while

they lived in Ireland. This, of course, was the very point made by MacEochaidh J. in the High Court in *CI,* albeit in the context of whether Article 8(1) ECHR was engaged.

**31.** This, however, explains why these particular Article 40.3 privacy rights (in the sense of ordinary friendships etc.) and Article 40.6.1.iii-associational type rights will but rarely prevail in any such proportionality analysis. The State's interest in controlling its frontiers and regulating entry is always a constant one. This is an important State interest which will, absent special circumstances, generally prevail when balanced against the claim of the unsuccessful asylum seeker advancing privacy and associational rights of this kind, not least because these private rights could only have been acquired or exercised in the first place in circumstances where the claimant was allowed conditional entry into the State for the purpose of seeking this international protection. If it were otherwise, the capacity of the State to operate its immigration and asylum system in any fair, orderly or coherent fashion would be severely compromised.

**32.** This point was well made by Finlay Geoghegan J. in her judgment in *CI* when, speaking about an interference with Article 8 ECHR rights to private life and having examined the contemporary ECHR case-law on this theme, she observed ([2015] 3 IR 385 at 403):

> "…whilst the inevitable consequence of expulsion may be the severing of the social ties which may be considered to form part of the private life, it appears that what requires to be examined by the decision maker is not just the obvious impact on the private life in the sense of the social ties but rather the gravity of the impact of severing social ties on the proposed deportee or on his or her physical and moral integrity."

**33.** The same may be said of the applicant in this case. His Article 40.3-privacy and Article 40.6-associational rights – such as the many friends he has made or the associational

activities he has engaged in – would clearly be affected by his proposed expulsion from the State and a forced return to Albania. But there is nothing to show that there was anything exceptional or remarkable in this respect about the rights which he had acquired and exercised during his stay here: he attended school, he had been looked after during his minority by a foster family, he had moved out of that family into his own accommodation and found a job at a restaurant. All of these matters are doubtless very much to his credit, but much the same could be said of any number of other people in the State (whether Irish citizens or otherwise) so far as the exercise of these and similar rights at a time corresponding to the period during which the applicant was waiting for a determination of his asylum application.

**34.** The Minister was, of course, in error insofar as she said (or implied) that the deportation of the applicant did not affect these private and associational rights (whether under the Constitution or the right to private life protected by Article 8(1) ECHR) because they clearly would be so affected. The Minister was, however, generally correct to say, having set out fairly the case made by the applicant in this regard, that in view of the State's constant and important interest in maintaining the integrity of its borders and the fair operation of our asylum system, the expulsion of the applicant would not in these circumstances ordinarily constitute a *breach* of these rights. Again, absent special circumstances, these rights will but rarely prevail as against the State's fixed interest in ensuring that the integrity of the asylum system is maintained. This is true whether the proportionality analysis is conducted in respect of these particular constitutional rights or, alternatively, by virtue of Article 8(2) ECHR.

**35.** It was in this vein that the original s. 49(3) decision (the reasons for which Tara Burns J. found were expressly incorporated into the subsequent s. 49(7) review decision) stated that it was "in the interest of the common good to uphold the integrity of the

international protection and immigration procedures of the State and to protect the economic well-being decision of the State." At all events, the Minister's assessment of these issues – which, in any event, corresponded in substance to a proportionality analysis both for the purposes of the constitutional question and the Article 8(2) ECHR analysis – cannot be said to be either unreasonable or disproportionate in the *Meadows* sense of that term.

**36.** To that extent, therefore, the Minister's decision was fully justifiable by reference to Article 8(2) ECHR, since maintaining the integrity and coherence of the asylum system is such an important consideration that, absent exceptional circumstances, a decision of this kind can nearly always be justified by reference to Article 8(2) ECHR and will be regarded as proportionate in the circumstances. Such a conclusion is also reflected in the consistent jurisprudence of the European Court of Human Rights: see, *e.g., Pormes v. Netherlands* [2020] ECHR 572 where the Court stated (at [58]) that:

> "if an alien establishes a private life within a State at a time when he or she is aware that his or her immigration status is such that the continuation of that private life in that country would be precarious from the start, a refusal to admit him or her would amount to a breach of Article 8 in exceptional circumstances only."

**Conclusions**

**37.** In summary, therefore, I am of the view that the applicant had constitutional rights to privacy in Article 40.3 and to associate protected by Article 40.6.1.iii in the manner I have just described. I further conclude that even as a non-national he was entitled to avail of these rights having regard to the decision of this Court in *NHV*. To that extent, therefore, I find myself in respectful disagreement with the conclusion of Finlay

Geoghegan J. to the contrary in *Dos Santos*. While this means that, in strictness, the Minister ought to have conducted a proportionality analysis in respect of the impact which the proposed deportation would have on the applicant's constitutional rights of this nature, nothing turns on this - at least so far as the present case is concerned - given that these rights correspond in substance to the right to a private life protected by Article 8 ECHR.

**38.** Given the ubiquitous nature of these privacy and associational rights – in that they are acquired and exercised simply by reason of ordinary life in the State – they can but rarely prevail against the important interests of the State in controlling its frontiers and preserving the integrity of the asylum system. While the applicant's constitutional rights in this respect would naturally be affected by his expulsion from the State, it cannot be said that the Minister did not properly consider or weigh these rights or that the proportionality exercise which she in substance conducted when reviewing the file for the purposes of the s. 49 decisions can be said to be unreasonable or disproportionate in the *Meadows* sense of that term.

**39.** To that extent, therefore, the Minister's decision was also fully justifiable by reference to Article 8(2) ECHR, since maintaining the integrity and coherence of the immigration system is such an important consideration that, absent special or unusual facts, a decision of this kind can nearly always be justified by reference to Article 8(2) ECHR and will be regarded as proportionate in the circumstances. While I agree that the Minister erred in law in her analysis of the constitutional issue and in holding that the interference with the applicant's right to a private life did not attain the level of gravity such as would engage Article 8(1) ECHR, I nevertheless consider that her conclusions that the applicant had not advanced any special reasons or circumstances such as would outweigh the State's consistent interest in maintaining the integrity of the asylum

system amounted in substance to the requisite *Meadows*-style proportionality analysis both for the purposes of Article 40.3 privacy rights and Article 40.6.1 associational rights and in respect of Article 8 ECHR rights, these legal errors notwithstanding.

**40.** There is no doubt but that the conclusions of the Court regarding the decisions in *Razgar* and *CI* will have significant implications for the functioning of the asylum system. These decisions have been frequently cited by officials in the Minister's departments in thousands of decisions. One may expect that for the immediate future that the High Court and Court of Appeal will still be obliged to consider decisions of the Minister which will contain the very same errors regarding the scope of constitutional rights and/or Article 8(1) ECHR regarding the scope of these rights to private life. In these circumstances I suggest that both courts should examine whether the facts of each case did indeed present constitutional/Article 8(1) ECHR issues of sufficient and particular gravity such that they are capable of outweighing the Minister's fixed interests in maintaining the integrity of the asylum system.

**41.** All of this is to say that one must not assume that just because a majority of the Court has concluded that the Minister's decision should not be quashed, the same will also necessarily be true of all other cases presenting the same legal errors. There may, for example, be other instances of whether the private life and associational ties of the claimant are far more deeply embedded in this State than appears to have been true of this particular claimant.

**42.** In the circumstances I would nevertheless conclude that the Minister's overall decision cannot be faulted, these legal errors notwithstanding. It follows, therefore, that I would dismiss the applicant's appeal.

# THE SUPREME COURT

**S:AP:IE:2021:000064**
**[2022] IESC 48**

**O'Donnell C.J.**
**MacMenamin J.**
**O'Malley J.**
**Baker J.**
**Hogan J.**

**BETWEEN:**

**MK (ALBANIA)**

**APPELLANT**

**AND**

**MINISTER FOR JUSTICE & EQUALITY**

**RESPONDENT**

**Judgment of Mr. Justice John MacMenamin dated the 24th day of November, 2022**

**Introduction**

1. This judgment is given in conjunction with that delivered in the linked case of *ASA v. The Minister for Justice & Equality* (S:AP:IE:2021:000070) ("*ASA*"). The two appeals were heard sequentially, as there was an overlap in the issues raised in the two cases. In this appeal ("*MK*"), the appellant raised two main issues. The first, a systemic challenge to the respondent Minister's administration and operation of the International Protection Act, 2015 ("the Act"), is addressed and determined by the *ASA* judgment.

2. A second issue which arises in this appeal, however, is distinct, and may be of some significance beyond this one case. It concerns the rights of unsettled migrants under the Constitution and The European Convention on Human Rights ("ECHR") when the respondent Minister is considering leave to remain and deportation decisions on foot of procedures outlined in the Act.

3. For clarity, as made clear in *ASA*, the decision in question was not made by the Minister personally, but by officials acting in the service of the Minister in the way described in the judgment in *ASA*.

4. The orders under consideration are a review of the decision made under s.49(4) of the Act refusing the appellant leave to remain in the State, which was made on 25th November, 2019 and notified to the appellant on the 4th December, 2019, and the subsequent decision by the Minister made pursuant to s.51(4) of the Act, to deport the appellant dated 4th February, 2020 issued to the appellant on the 17th February, 2020.

5. This appeal does not concern the constitutionality of an Act or provision. Instead, it concerns the Convention and constitutional rights of unsettled migrants. The issues arise on the basis of an important judgment of the Court of Appeal (*CI v. Minister for Justice* [2015] IECA 192, [2015] 3 I.R. 385). The appellant submits this judgment was wrongly decided in part. Though he submits that *CI* considered certain judgments of the European Court of Human Rights ("ECtHR"), the judgments in question did not represent the clear and consistent jurisprudence of the Strasbourg court. For that reason, the first area under consideration is whether *CI* was correctly decided, and if not, the consequences which should follow under the Constitution.

**Article 8 ECHR**

6. While the guarantees contained in the ECHR hardly need repetition, the wording, sequence, and scope of the protection, and its limitations, are all material to the issues in this appeal.

7. Article 8(1) provides that everyone has the right to respect for his private and family life, his home and his correspondence. The right arises in a wide variety of fields of application, from privacy in the sense of physical, psychological or moral integrity of an individual; to protection of good name and reputation, identity and autonomy; home and family life, and includes such issues as legal privilege. Its relevance in the present digital era is obvious.

8. The issues in this appeal, generally, arise under the rubric of "private and family life" in the ECtHR jurisprudence. In certain instances, there will be an overlap between the rights held by an individual, and the rights of a person as a member of a family, but this will not always be so.

9. Unlike Article 3 (Torture and Inhuman and Degrading Treatment), however, Article 8 does not contain an absolute protection. It is, in that sense, a right qualified by the limitation clause contained in Article 8(2).

10. Referring to the Article 8(1) right in the singular, Article 8(2) limits the scope of the protection. It provides that there shall be no interference by a public authority with the exercise of the right, except such as is in accordance with the law, and is necessary in a democratic society, in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. This limitation clause is, therefore, also quite expansive. It expresses the sovereignty rights of contracting states which subscribe to the Convention. How these two provisions are to be balanced in the case of the appellant, an unsettled migrant, lies at the centre of this appeal.

11. The question of scope arises in a further sense. This appeal concerns the extent to which the case law of this State in this field reflects ECtHR jurisprudence. As is now well-established, the Convention does not take direct effect within this State. The manner in which it applies is laid down in the European Convention on Human Rights Act, 2003 ("the ECHR Act") and in the jurisprudence of this Court, namely, *JMcD v. PL* [2010] 2 I. R. 199 and described more recently in the judgments delivered by the Court in *Simpson v. The Governor of Mountjoy Prison* [2020] 3 I.R. 113. In considering ECtHR principles or guidelines, the courts of the State will have regard to the principles enunciated in the consistent case law of the court in Strasbourg. For reasons set out later, I would take the view that the appeal falls to be decided by reference to the ECHR Act. I consider that significant question later.

12. The features of the Article 8 right in question in this case fall to be considered where, on the one hand, *each person* is said to enjoy the right as defined, albeit delimited, but where each member state has the entitlement to control its own borders and, for that purpose,

implement its own laws within those boundaries. The factual circumstances of the Article 8 case law on deportation reflects the wide variety of human experience, in an era where migration is often not a choice but a necessity caused by war or persecution. But, as the ECtHR has consistently asserted, these cases must be seen in the context of the principle that migrants are not entitled to a choice of their country of residence.

**Characterisation**

13. As in much court litigation, the way in which the issues are characterised is quite telling. As defined on behalf of the appellant MK, the question for this Court to determine was whether, in his case, "exceptional circumstances" must be established before he was entitled to a proportionality assessment under Article 8 ECHR. Alternatively, his counsel put the case another way: whether exceptional circumstances fall to be considered, in the context of a proportionality assessment in order to determine whether there has been a breach of Article 8 ECHR rights. The term, "exceptional circumstances", is therefore of some significance, both in its meaning and application. By contrast, counsel for the respondent Minister defined the issue as being one whether, in the absence of exceptional circumstances being established, an unsettled migrant was entitled to such a proportionality assessment.

14. At first sight, any distinction between these various characterisations might seem merely a matter of semantics, and perhaps inconsequential. But as will become apparent, the variations are significant; and bear upon the manner in which first instance decision-makers, and later, courts, should address the issues which arise for consideration concerning an "unsettled migrant" the subject of deportation. In this case, that term can be understood as referring to the appellant who, having unsuccessfully applied for international protection in the form of asylum or subsidiary protection, and having been refused leave to remain, is without authority to continue residing in the State, and is now subject to the deportation order, the validity of which is challenged. As now this judgment seeks to explain, the central issue is less about characterisation than whether the manner in which the Minister made the decisions under challenge complied with the law.

***Razgar* and subsequent UK Case Law**

15. As a starting point, it is necessary to say something about the approach which decision-makers in this State have adopted in applying Article 8 in cases such as this. For some years, both first instance decision-makers and courts in this State have referred to the judgment of *R (Razgar) v. Home Secretary (No. 2)* [2004] 2 AC 368 ("*Razgar*"). There, speaking on behalf of the appellate committee of the House of Lords, Lord Bingham recommended a series of

questions to be adopted in the context of Article 8 decision-making when an order for deportation is challenged.

16. These five eponymous *Razgar* questions can be summarised thus. I begin with the first two:

> *(i) Will the proposed removal of a person be an interference by a public authority with an applicant's right to respect for his or her private or (as the case may be) family life?*
>
> *(ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8 ECHR protection?*

17. Pausing there, at first sight, questions (i) and (ii) can be seen as essentially raising Article 8(1) issues. As the ECtHR commented in *Nnyanzi v. United Kingdom*, Application No. 21878/06, [2008] 47 EHRR 18, "*not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article* 8". (para. 73). Thus, once the right is engaged or established, question (ii) requires the degree of interference to be assessed. The wording of question (ii) itself raises questions as to what, precisely, is involved in assessing the "gravity" of the consequence. As will be seen later, the word "*potentially"* which occurs in question (ii), but not in question (i), is significant with regard to the form and sequence of the *Razgar* questions.

18. It is necessary to bear in mind that the existence of the right in Article 8 is stated in positive terms. To apply a proportionality, or "potentiality", test as to whether the right exists is to miss the point, and to make the right not just one that is not absolute – which is correct – but one the existence of which is contingent on some other consideration – which is incorrect.

19. The next *Razgar* questions (iii) and (iv) can be seen as falling for consideration under Article 8(2). They are:

> *(iii) If so, is such interference in accordance with law?*
>
> *(iv) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?*

20. The final question invokes a proportionality or weighing assessment, balancing the right of the individual as against the rights of the sovereign state:

> *(v) If so, is such interference proportionate to the public end sought to be achieved?* (*Razgar*, paras. 17 and 20)

21. The context in which the questions arose in *Razgar* is of some relevance to this appeal. Mr. Razgar was an individual subject to a deportation order. He did not raise any question of family rights. He was, rather, a person who, threatened with deportation, raised the issue of psychiatric illness, including threatening suicide. Having regard to ECtHR jurisprudence, he asserted that the right under Article 8(1) protected those features of a person's life which were integral to his identity or ability to function normally. He contended that protection of mental stability was an indispensable condition to the effective engagement of that right. The House of Lords, by a majority, accepted that such rights could be, and were, engaged by the foreseeable consequences of deportation where the appellant could demonstrate grave interference such as would amount to a flagrant denial of that right.

22. But, as Lord Bingham, speaking for the majority, pointed out, that removal could not be resisted merely because medical treatment in the removing country was better than those in the receiving country. His speech made extensive reference to earlier ECtHR decisions, including *Bensaid v. United Kingdom* [2001] EHRR 205; *Pretty v. United Kingdom* [2002] 35 EHRR 1; and *Costello-Roberts v. United Kingdom* [1993] 19 EHRR 112. Many of these were cases where, in the context of deportation, the private life of *individuals,* as opposed to families, was concerned. Lord Bingham observed that decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small number of what he termed exceptional cases.

23. But, as the House of Lords, including Lord Bingham, pointed out later, as a matter of UK domestic law, the test is not simply one of exceptionality in law (*Huang v. Secretary of State* [2007] UKHL 11; [2007] 2 AC 167). Lord Bingham here was, rather, addressing the result of a decision, but not making a general statement of the legal principles available.

24. Speaking of proportionality test, the House of Lords pointed out in *Huang*:

> *"20. In an article 8 case where this [proportionality] 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 above, 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."*

25. Later, this judgment also considers *R (Ali) v. Secretary of State* [2016] UKSC 60, [2016] 1 WLR 4799 ("*Ali*"), another deportation case, on this occasion concerning a person with criminal convictions, where the Supreme Court of the United Kingdom addressed the question of proportionality. While caution is necessary in referring to later UK precedents, as the area is also subject to immigration rules issued by the UK government, the approach considered in these cases, and earlier, in *AG (Eritrea) v. Secretary of State for Home Department* [2008] 2 All ER 28, is itself useful as a reference point in understanding how the Convention guidelines laid down by the ECtHR, in practice, can be applied in a common law jurisdiction.

26. In this appeal, the question arises as to how these *Razgar* questions should be raised and answered in a deportation decision made by the Minister. This can only be understood by considering what the Court of Appeal decided in *CI v. Minister for Justice* [2015] IECA 192, [2015] 3 I.R. 385.

**Judgment of the Court of Appeal in *CI* in summary**

27. *CI* is a closely reasoned judgment. It is fully considered later. But, in it, the Court considered the duties of first instance decision-makers, acting in the name of the Minister, in making deportation decisions. For the present, it can be summarised as holding that the relevant consideration regarding the consequence of deportation on the private life of the proposed deportee was not that such deportation would bring an end to such private life, in the sense of existing social and educational ties in the state; but, rather, the relevant consideration should be the gravity of the consequences of such deportation (including the severance of social and educational ties) for the individual, and in particular, how it would affect that person's "moral integrity".

28. In so concluding, the Court of Appeal is recorded in the report as approving *Razgar*, and considering *Costello-Roberts* and *Bensaid*). The Court held that what constituted sufficiently adverse events to engage Article 8 depended on individual facts and circumstances of the case. But it also made the observation that, in considering the gravity of consequences of deportation on the right to respect for private life of an individual who had never been permitted to reside in the State other than pending a decision on an asylum claim, it was

permissible to take into account that individual's private life, which consisted of relationships, including educational and social ties formed at a time when his or her right to remain in the state was precarious, citing *Bensaid* and *Nnyanzi.* These decisions are considered later.

29. The judgment was later interpreted as having a number of consequences for the approach to be adopted by first instance decision-makers on behalf of the Minister. First, by reference to the gravity of consequences, it was thought that the question of engagement of private and family life had a high threshold; second, that, if the first two *Razgar* questions were answered in the negative, it would be generally unnecessary to proceed to questions (iii), (iv) and (v) (proportionality); and, third, that for reasons set out, *Razgar* questions (i) and (ii) could be considered in reverse order.

30. The consequence was that decision-makers appeared to conclude that a precarious applicant could have had no expectation of Article 8 private or family rights, and, as a result, Article 8 was not engaged. This approach was adopted by first instance decision-makers, quoting *CI*, on the premise that the judgment, in turn, reflected statements of principle based on ECtHR jurisprudence in the field of deportation. That same approach was adopted in this case. The question to be addressed in this appeal is whether dealing with the questions in this way, did that actually reflect clear and consistent ECtHR jurisprudence, and, if not, what should the consequences be in this case.

31. I pause to observe that, in the course of the appeal, his counsel further refined the issue as he viewed it. In a carefully presented case, he suggested that the question to be asked was whether a migrant who has lived for a number of years in the State, even if precariously, should nonetheless normally be entitled to the procedural protection of a proportionality analysis before it is determined there are no exceptional circumstances preventing deportation. The reason for this further refinement becomes clear when the circumstances of the case are considered. At the time the appellant had exhausted his rights of appeal under the 2015 Act, on the 7th October, 2019, he had already been present in this State for three years. He has now been within this State for six-years, just more than double that three-year period.

**The Appellant's Application for International Protection: Overview**

32. What follows must be quite a detailed description of the way in which the decision was made. While it is the Minister's review of this decision which must be considered, that review cannot be understood without consideration of the Minister's first instance assessment. The review concludes that the findings of the assessment remained "valid". In response to a plea made by the appellant that the Minister had not stated her reasons adequately in the review, the

Minister pleaded that the reasons were clear, *inter alia*, by reference to the first instance assessment, as well as the review itself.

33. A number of questions then arise for consideration. The first is whether the "*CI* approach" reflects clear and consistent Article 8 Strasbourg case law on deportation. For this, it will be necessary to consider that case law in its appropriate field of application.

34. But it must be said at the outset that this was not an instance where decision-makers left out many relevant details, or gave careless consideration to an applicant's circumstances. In fact, to the contrary, the factual consideration of the assessment was quite detailed. Rather, the question at issue is whether the legal principles *as applied* by the decision-makers in decision-making, and said to be derived from *CI*, actually did represent the clear and consistent approach favoured by the ECtHR in assessing these issues.

35. Counsel for the appellant submits that considering all the five *Razgar* questions was necessary. This included a proportionality assessment. He contends this actually reflected the proper ECHR approach, and would at minimum, assist in transparency of decision-making. But he goes further, contending that such an approach is actually what is required in law, rather than simply desirable.

36. This judgment is of limited scope. In essence, what is considered here concerns procedure and methodology; that is, the *approach,* or *how,* questions concerning deportation should be Convention compliant. The question of course arises in a factual context, which must now be described. But, as this judgment seeks to explain, the question of methodology cannot be separated from the substance of the decision.

**The Facts**

37. The appellant, MK, arrived in this State on the 13th September, 2016 as an unaccompanied minor. He is a national of Albania. He later moved in with a foster family and attended a secondary school in an area close to Dublin. He completed 5th Year in school, and then took a break from his studies to engage in work. He applied for international protection on the 6th June, 2017. At this stage, he was in Transition Year.

38. In his application, he submitted then that he was afraid to return to Albania, as his father, a policeman, had been attacked by criminals in 2010. He made the case that he had helped his father in apprehending the criminals who had routinely terrorised him and his family, made threatening phone calls, and fired shots at his father outside their home. He said that for these reasons the family had organised his departure to Ireland.

39. Having attended school here for approximately two years, the appellant was granted permission to enter the labour market on the 13th August, 2018 up to the 13th February, 2019,

or until a final decision was made on his international protection application. He undertook training and worked full-time in catering at a location near Dublin and, at the time of the application, was expressing the hope that he could start his own business. The other members of his family continued to reside in Albania. The decision noted there was no evidence the family had suffered any other persecution or ill consequences arising from the events in 2010. They pointed out that he was given permission to remain in the State for the sole purposes of examination of his application for international protection, and, if necessary, an appeal. (Section 16 of the Act).

40. The legal procedures involved in applications for international protection have been set out in some detail in *ASA*, the companion judgment to this one. The appellant's application for international protection under ss. 13 and 14 of the Act was made with the assistance of TUSLA. On 17th August, 2018, he made further submissions about his private life. The application was considered by B.S., an international protection officer ("IPO"). By that point, the appellant had turned eighteen. He was, therefore, treated as an adult in the assessment. The officer did not find the appellant's explanation for seeking asylum to be either credible or reasonable. She held that the appellant was not at risk of persecution were an order made that he should return to Albania. Her recommendations were contained in a sixteen-page report dated the 26th September, 2018. The effect of the recommendation made under s.39(3) of the Act was that the appellant was found not to be entitled to political asylum or subsidiary protection.

**The Leave to Remain Application**

41. This appeal directly concerns the review of the leave to remain decision, and the order for deportation, following the unsuccessful international protection application. But, availing of the unitary process, the appellant also requested leave to remain in the State for humanitarian reasons. Such decisions are made by the Minister acting through her officers (see *ASA*). This request was made on a contingency basis, in the event that the application for international protection was unsuccessful. This procedure was carried out under s.49(3) of the Act. It involved an "Examination of File". In law, when deciding whether an applicant should be given permission or leave to remain in the State, the Minister is to have regard to his or her family and personal circumstances, the person's right to respect for his or her private and family life, having due regard to (a) the nature of the applicant's connection with the State, if any; (b) humanitarian considerations; (c) the character and conduct of the applicant both within and (where relevant and ascertainable) outside the State (including any criminal convictions); (d) considerations of national security and public order, and (e) any other considerations of the common good.

42. I should comment that I do not read these statutory provisions as suggestive of an approach that those private and family life rights only arise for consideration in exceptional cases.

43. The application was considered under these headings by SF, described as a 'case worker' in the International Protection Office. But, in fact the decision was made by that person in his capacity as an officer of the Minister. It was dated 31st October, 2018. Although it is not challenged, an outline of the facts is necessary.

44. The author referred to a number of legal authorities for guidance. It is not surprising that in such decision-making there may be elements of "cutting and pasting" from relevant legal authorities. But, even if the process may be somewhat formulaic, it is necessary to ensure that what is "pasted", that is, quoted, be placed in proper context, and fully reflects what is actually held in a judgment.

45. The report first made reference to the judgments of the Court of Appeal in *CI*. The author stated that:

> "*The Court of Appeal in CI … considered the principles set out in the case law of the ECtHR and stated the approach set out therein, namely,* ***(i) to identify a potential interference in the right to respect for private life within the meaning of Article 8, and (ii) to look at whether the proposed deportation would have such consequences of such gravity for the physical and moral integrity of the individual as to engage the responsibilities of the State under Article 8(1)****"*. (Emphasis added)

But this is not, in fact, the question posed in the judgment.

46. The Minister's decision-maker, in fact, inserted the word "potential" into question (i), while the original text of the *Razgar* judgment asks directly whether the "proposed removal *will* be an interference by a public authority …". The insertion of the word "potential" is not simply incidental. On the next page, the decision quotes the questions correctly. But then the author wrote:

> *"In considering the first question it is accepted that if the Minister decides to refuse the applicant permission to remain, this has the* ***potential*** *to be an interference with the applicant's right to respect for private life within the meaning of Article 8(1). This relates to the applicant's educational and other social ties that the applicant has formed in the State as well as matters relating to his personal development since his arrival in this State".* (Emphasis added)

The report went on:

> *"The applicant's legal representatives have submitted that any proposal to remove the applicant would engage Article 8 ECHR and* ***reach the threshold of gravity so as to engage its operation.****"* (Emphasis added)

47. As this judgment seeks to explain, these changes substantially altered the meaning and nature of the questions asked and the necessity for an answer as to whether Article 8 is engaged. To repeat, *Razgar* question (i) actually deals with whether the facts of a given case give rise to private and family life being interfered with (interference); whereas *Razgar* question (ii) asks whether an order for deportation would have such gravity for the physical and moral integrity of the individual (gravity) as to engage the responsibility of the State under Article 8(1). These are different questions raising different considerations. This is not simply a matter of semantics. The approach not only alters the sequence in which the questions are put, but changes the meaning and underlying assumptions of the question and the need for a direct answer to each of them.

48. As I seek to explain, it led to a test which commenced by asking whether Article 8 is engaged, which was answered by considering the gravity of the consequences, rather than whether the privacy and family right actually arose for consideration on the facts. The provenance of this alteration can be traced back to statements in *CI* discussed later, and before then, to passages from ECtHR case law, in particular, *Bensaid* and *Costello-Roberts* (cf. paras. 35 & 36 of *CI* also considered later).

49. The decision-maker interpreted *CI* as holding that Article 8 fell to be considered in the light of the individual facts and circumstances, and having regard to the context in which the allegations arose, and whether the *gravity of the consequences* for the appellant was over and above the normal consequences of the impact of the measure on an individual, *asking the question whether Article 8(1) was "engaged"*, but then stating that, if so, then any proposed removal must be examined under Article 8(2). The net consequence was that the test of whether Article 8 was engaged became understood as primarily a *Razgar* question (ii), gravity issue, thereby creating a significantly higher threshold for engagement and the need to deal with the other three *Razgar* questions.

50. The report acknowledged the *potential* for a refusal to be an interference with the right to respect for private and family life within the meaning of Article 8(1). But that was not the true issue. The consequence was that questions (iii), (iv) and (v) were not addressed or answered.

**Private Life**

51. The circumstances of the appellant's case were summarised under the heading "Private Life". The wording of what followed was revealing. The report then stated that, although the appellant had "*submitted evidence of personal ties in the State, no expectation was given to the applicant that he could form a private life in Ireland, [and therefore] it [was]* ***not open*** *to him* ***to seek to rely on Article 8*** *to circumvent the immigration rules he would normally be subject to*". (Emphasis added) The effect of this statement, therefore, inexorably led to the conclusion that the appellant simply could not rely on Article 8 on the basis of what was said to him when he applied for international protection, regardless of any events which may have followed in or during his life in this State. This approach is not consistent with ECtHR case law.

***PO & Anor. v. Minister for Justice***

52. The first instance decision also makes reference to, and quotes from, *PO & Anor. v. Minister for Justice & Equality & Ors.* [2015] IESC 64, [2015] 3 I.R. 164. The decision quoted my judgment as recording that, in *PO*, the High Court judge had recorded the Minister's conclusion that the deportation would not have the consequence of such gravity as to amount to a failure to respect the rights to private or family life as being a reasonable one. The report also refers to the fact that the *PO* judgment held that the fact that an unsuccessful applicant derives benefit from continuing residence in the State, whether such benefit be social or educational, did not amount to exceptional circumstances that would give rise to an entitlement to remain in Ireland.

53. Unfortunately, however, the report did not record the context in which these assertions were made; specifically the fact that the judgment stated that Article 8 was "*engaged*" in relation to the fourth appellant; or that, at the conclusion of the judgment, it was said that Article 8 was "properly engaged". Nor did the report quote statements in the same judgment that the Minister's decisions in this field had to be made having regard to ECtHR case law, and the "*principle of proportionality"*, or indeed that, in *PO*, the court exceptionally recommended that the Minister re-assess her deportation decision on humanitarian grounds. (cf. paras. 15, 30 and addendum). Later, it will be seen that the question of proportionality is a constant in relevant ECtHR case law.

54. I should also add that, in *CI*, the Court of Appeal also made this important observation:

> *"… in considering the gravity of the consequences of deportation, of the right to respect for private life of an individual who has never been permitted to reside in the host state (other than pending a decision on an asylum claim), it is permissible to take into*

*account that it is a private life consisting of relationships, including educational and social ties, formed at a time when the right of the individual to remain in the State is precarious"* (para. 41)

55. This significant passage, which comes closer to ECtHR case law, was indeed quoted, but its potential relevance to the issue of whether the appellant- even as a "precarious migrant" - nonetheless might have had a private life meriting consideration was not considered by the Minister.

**The Sequence of *Razgar* Questions**

56. Acting on an understanding of what was held in *CI*, regarding a considering of the gravity of the interference with Article 8 entitlements, the deciding officer then addressed *Razgar* question (ii) *first*. Answering that question, he concluded that:

*"Having considered and weighed all the facts and circumstances in this case, it is not accepted that such potential interference* ***will have consequences of such gravity as potentially to engage the operation of Article 8(1)****."* (Emphasis added)

57. The deciding officer then addressed but, in fact, had not answered, *Razgar* question (i):

*"... Having considered and weighed all the facts and circumstances in this case, a decision to refuse the applicant permission to remain does not constitute a* ***breach of the right to respect for private life under Article 8(1) of the ECHR.****"* (Emphasis added)

58. Two points arise. The first is that not only did the decision-maker obviously address the *Razgar* questions in the incorrect sequence, but, by a process of transposition and elision, concluded he did not need to address himself to the question as to whether Article 8 was engaged, because the position of the appellant had always been "precarious", and that he had never been given an expectation that he could remain in the State.

59. But, furthermore, relying on passages from the judgment in *CI* (para. 34), he held that, as Article 8(1) was not engaged in the appellant's case, it was unnecessary to go beyond these first two questions, or to not address any proportionality issue. In adopting this approach, the officer sought to apply certain dicta taken from *CI*, which, in turn, sought to apply and interpret the judgments of the ECtHR, including, specifically, *Nnyanzi,* as a guide.

**Family Life**

60. The officer then referred to the question of family life. He referred to the decision of *K v. The United Kingdom* [1986] 50 DR 199, where the European Commission had found that the existence of family life depended upon "*the real existence and practice of close personal ties*". The officer noted that the appellant presented as single, with no family connections to the State, that he was currently residing in private accommodation, and that his parents and

sister were then currently residing in Albania. It referred to the fact that the appellant was residing in the State with his foster family, having arrived here on the 13th September, 2016, and applied for international protection on the 6th June, 2017.

61. The officer then stated:

> *"The applicant has been given temporary legal permission to be in the State pending the outcome of his/her application, but could never be considered to have been allowed to settle as a result of this temporary permission."*

The report outlined principles summarised by the UK Court of Appeal in the judgment of *R (Mahmood) v. Home Secretary* [2001] 1 WLR 840, which refers to the rights of the State, the rights of families, and which, in fact, is not directly germane to this case.

62. Then, as earlier, the officer repeated that, although the appellant had submitted evidence of personal ties, no expectation had been given to him that he could form a family life in Ireland, and therefore it was "*not open to him to seek to rely upon Article 8 to circumvent the immigration rules to which he would normally be subject to"*. He stated that the ECtHR had held that it was likely only to be in the most exceptional circumstances that the removal of a non-national family member would constitute a violation of Article 8. There was no information that there were any insurmountable obstacles to the appellant's family life being (re)established in Albania.

**Subsequent Procedure**

63. The Minister's decision refusing leave to remain was made pursuant to s.49(4) of the Act. The appellant was notified of all refusals on 1st November, 2018. He lodged an appeal against the refugee and subsidiary protection refusal on 21st November, 2018. That appeal was unsuccessful, and rejected in a decision made by the International Appeals Tribunal on the 7th October, 2019, signed by EW, a member of that Tribunal.

**The review of the leave to remain decision**

64. I move then to consider the decisions challenged in the judicial review. These are the review of the leave to remain decision, and the deportation decision made on foot thereof. On 18th October, 2019, the appellant lodged an appeal against the refusal of permission to remain. Ms. RB, a case worker in the International Protection Office, carried out a review pursuant to s.49(7) of the Act, which referred back, and relied upon, the facts and approach as described in the first instance assessment and refusal decision.

65. She wrote a detailed report dated 25th November, 2019, giving consideration to the various factors set out under s.49(3) of the 2015 Act (see s.49(3)(a) to (e) recited earlier). The

report noted a number of submissions made which were favourable to the appellant, which referred to his honesty, integrity, hard work and reliability, and pointed out that he had been resident in the State for a number of years, was still working hard, saving money to open his own business, and was currently working in a restaurant. He was of good character. Thirteen letters of recommendation contained descriptions of his engagement with friends, work and social ties.

66. Dealing with the appellant's Article 8 rights, the review report stated:

> *"9. Article 8 (ECHR) - Private Life*
>
> *The applicant made the following submissions regarding their private life. The applicant is living in private accommodation and working in the _____ restaurant in _____. The applicant spent two years in _____ secondary school in _____, before leaving to try something different. The applicant is employed within the State at the _____ Restaurant. The applicant has made many friends in the state."*

67. Reflecting the same approach as that adopted in the first instance assessment and decision by Mr. SF, the author of the review again posed only *Razgar* questions (i) and (ii), and again eliding the first two questions, addressed them in reverse order. She wrote that:

> *"**Having considered and weighed all the facts and circumstances in this case**, it is not accepted that such potential interference will have consequences **of such gravity as potentially to engage the operation of Article 8(1)".*** (This was, of course, *Razgar* question (ii), but addressed first). Then she added that:
>
> ***"Having considered and weighed all the facts and circumstances** in this case, a decision to refuse the applicant permission to remain does not constitute a breach of the right to respect for private life under Article 8(1) of the ECHR"* (i.e., *Razgar* question (i)) (Emphasis added)

The reviewer did, therefore, pose *Razgar* questions (i) and (ii), but not in that order. She recorded that she weighed *all the facts and circumstances*, but only in the context of the answers to the first two *Razgar* questions posed in reverse order, based on a conclusion formed in response to Question (ii) that Article 8(1) was not engaged.

68. The report then dealt with family life. The author noted that the previous consideration had found that the circumstances of the appellant's case did not constitute a breach of Article 8(1), and that the appellant had not submitted any additional information under s.49(9), and therefore the previous consideration remained valid and required no additional consideration.

69. The author concluded:

*"While noting and carefully considering the submission received regarding the applicant's private life and family life and the degree of interference that may occur should the applicant be refused permission to remain, it is found that a decision to refuse permission to remain does not constitute a breach of the Applicant's rights. All of the applicant's family and personal circumstances, including those related to the applicant's right to respect for family and private life, have been considered in this review and it is not considered that the applicant should be granted permission to remain in the State."*

70. The appellant was notified of the outcome of this review on the 4th December, 2019. The Minister made a deportation order against the appellant on the same day, which was issued on the 17th February, 2020.

**Judicial Review**

71. The applicant commenced judicial review proceedings seeking orders of *certiorari* of the review of the leave to remain decision and the consequent deportation order. He claimed a breach of his rights under Article 8 ECHR, and a right to privacy under Article 43 of the Constitution, to be applied proportionately in accordance with Article 40.1 of the Constitution.

**The High Court Judgment**

72. The reasoned High Court judgment, now appealed, was delivered by Tara Burns J. on the 16th April, 2021. The judgment identified the orders challenged, and the judge considered the relevant authorities which bound her, *CI* and also *Razgar,* the judgment of this Court in *P.O. & Anor. v. Minister for Justice and Equality & Ors* [2015] 3 I.R. 164, and that of Humphreys J. in the High Court in *S.A. (South Africa) v. The Minister for Justice* [2020] IEHC 571 ("*SA*").

73. Relying on *SA*, Burns J. held that the jurisprudence of the Irish courts was "*extremely well settled",* to the effect that a migrant "*with a non-settled or precarious residential status* ***cannot assert Article 8 rights****, unless exceptional circumstances arise. Accordingly, a proportionality assessment does not arise*". (para. 27) (Emphasis added). The use of the word "assert" derives from *CI*. For the reasons outlined earlier, it is understood as having the consequence that a proportionality assessment need not be considered.

74. The High Court judge considered the ECtHR judgment of *Pormes v. The Netherlands* ("*Pormes*"), Application No. 25402/14, in some detail. She rejected the appellant's submission that that judgment represented a significant evolution in ECtHR jurisprudence, holding that the ECtHR had treated *Pormes* as simply a case which the court had found to be exceptional, where the youthful applicant had been unaware that his status was illegal, having lived in the

Netherlands since a very young age with family members who were, in fact, legal residents. As a result, the ECtHR had held that the applicant did not fall within the category of persons who were aware of their precarious status, and accordingly exceptional circumstances did not have to be established for Article 8 to be violated.

75. *Pormes* is considered later and in more detail, but it will be noted that because of other countervailing considerations in the form of the applicant's criminal offences, the ECtHR held that the Netherlands' courts had acted within the margin of appreciation allowed to member states, and that, as a consequence, there had been no Article 8 violation.

76. Applying the case law cited to her, including a binding authority in the form of *CI*, and what was quoted from *PO*, Burns J. rejected each of the appellant's submissions. She concluded that the ECtHR had not disapplied the requirement to establish exceptionality in the case of a non-settled migrant, or a person with a "precarious residence", so that Article 8 rights would be engaged. She concluded that, until such time as Article 8 was actually engaged, there was no necessity to conduct a proportionality assessment, as otherwise such an assessment would be conducted without the applicability of Article 8 having been established in the first place. The High Court judge rejected the submission that granting the appellant access to the labour market had altered his residency status. He remained an individual without permission to remain in the State, save for the purposes of the determination of his international protection application, which by then had been determined against him. The judge dismissed any argument to the effect that Article 14 ECHR (discrimination) grounds were engaged.

**Grant of Leave**

77. The appellant applied for leave to appeal to this Court on the basis that the issue of application raised issues of general public importance affecting other cases. In its determination ([2021] IESCDET 116), the panel of this Court granted leave on the basis that the application to this Court raised questions in relation to the proper application of the Convention and the Constitution in the context of migrants with precarious resident status, who have lived and worked in the country. The Court observed that the issues had the potential to affect other migrants' applications of the type under challenge.

**The Appellant's Case in this Appeal**

78. Before this Court, counsel for the appellant argued that the High Court had erred in holding that a migrant with non-settled residential status could not assert Article 8 ECHR rights, unless exceptional circumstances arose (para. 27 of the High Court judgment). He submitted that the High Court had erred in holding that the ECtHR jurisprudence was to the effect that there was a requirement to establish exceptionality in order for a non-settled migrant

to engage Article 8 rights (para. 32 of the High Court judgment). He argued that the High Court had erred in concluding the appellant had not acquired a procedural right under the Constitution to have a proportionality test conducted (para. 39 of the High Court judgment).

79. Counsel accepted that, were his argument to succeed, this Court would be obliged to disapply aspects of the Court of Appeal's judgment in *CI*, on the basis that the Court of Appeal had not, in fact, reflected ECtHR jurisprudence on the question of private and family life. He observed that, in *CI*, the Court of Appeal had stated as a fact that the ECtHR had not addressed the issue of private life in the case of unsettled migrants, and that it was generally appropriate to reduce the issue to the first two *Razgar* questions.

80. He submitted that, in fact, the ECtHR had given consideration to the private and family life right in its broad context in *Butt v. Norway*, Application No. 47017/09, 4th December 2012, [2012] ECHR 1905 *("Butt")*. Counsel added that the approach in *CI* differed from that expressed in case law of the neighbouring jurisdiction, including *VW (Uganda) v. SSHD* [2009] EWCA Civ. 5, and *AG (Eritrea) v. SSHD* [2008] 2 All ER 28, paras. 26 to 28. He referred to academic commentary which expressed doubt as to whether *CI* was consistent with ECtHR case law. He submitted that as a consequence, the High Court judge's reliance upon it, and on findings and observations made by the High Court in *SA*, were incorrect.

**The Minister's Case**

81. The respondent Minister's case, on the other hand, is relatively straightforward. Her counsel stands over the judgment of the High Court in its entirety, and that the Court of Appeal was correct in its decision in *CI*, and had applied the relevant ECtHR jurisprudence. Counsel submitted that *CI* concerned unsuccessful asylum seekers whose status within the State was precarious, who did not enjoy significant family ties within the State. He contended that, in this case, the High Court had correctly decided that Article 8 was not engaged, and had correctly applied *CI*. Thus, the decision made by the Minister in this case was correct in finding that it was necessary to address only Questions (i) and (ii) in *Razgar.*

82. The Minister disputed that the appellant was entitled to a proportionality assessment such as might arise in question (v) of *Razgar*. Her counsel submitted, rather, that, by reference to ECtHR jurisprudence, the approach is that a proportionality test arose only in exceptional cases, and that the case before the court in *CI*, and the case now before this Court, were in no sense exceptional. Counsel referred the Court to a series of ECtHR judgments which he contended supported his contention. He submitted the appeal could not succeed.

83. The Minister's case was that the examination of file considered each of the factors required by s.49(3) of the Act, and correctly cited *CI* and *Razgar* at the beginning of the

assessment, and that the assessment acknowledged a refusal to grant the appellant permission to remain potentially constituted an interference with his right to respect for private life within the meaning of Article 8(1). An observation to the same effect was made concerning the review decisions. Counsel submitted that none of the ECtHR cases relied on by the appellant (and discussed below) suggests that an unsettled migrant is entitled to a proportionality assessment, save in exceptional circumstances.

**Some Observations**

84. Prior to analysis of both national and ECtHR authorities, a number of observations arise. Save where necessary, this judgment does not directly address ECtHR case law regarding *settled* migrants. Furthermore, while it is true many cases are case-specific, few are more so than "unsettled migrant" decisions. As a result, it is unsurprising that both national and international decision-making also tends to be fact specific.

85. But it is not unfair to point to academic commentary (cited later), suggesting that there have been occasions in the past where the task facing national courts in having regard to ECtHR jurisprudence in this area has been challenging, on the basis of certain apparent inconsistencies. The fact that there are general guidelines to assist national courts occasionally can become submerged when there may be emphasis on exceptionality. In Article 8 judgments, the court in Strasbourg has itself observed that it is difficult to identify the boundaries between the private life of individuals in their interaction with the State and how certain divergences in the Article 8 (1) and 8(2) criteria should be addressed. But, as will be seen, there have been significant divergences in approach.

86. As the brief summary of case law which follows shows, there have been occasions, too, where national decision-making authorities and courts have actually engaged in a proportionality analysis, but where, later, applying the same type of assessment, the ECtHR has reached a different conclusion. Any underlying questions of the respective roles of national and international courts, and the jurisprudence of the ECtHR on subsidiarity, lie outside the scope of this judgment.

87. The questions now arising include whether the principles enunciated in earlier ECtHR case law, such as *Nnyanzi* and relied on in *CI*, remain more generally applicable; whether, in fact, the Court of Appeal did not address established private and family life case law in the case of unsettled migrants; and whether observations by the Court of Appeal in *CI* concerning the approach to be adopted in addressing these issues are correct.

88. Counsel for the appellant submits that it was significant that the Court of Appeal did not refer to *Butt*, which dealt with private and family life. One might also mention in this

context *Slivenko v. Latvia*, Application No. 48321/99, ECHR, 9 October 2003 ("*Slivenko*"); *Mendizabal v. France* [2006] ECHR 34 ("*Mendizabal"*). It is necessary, first, to consider what was held in *CI*, and the basis in ECtHR jurisprudence for the Court of Appeal's conclusions.

***CI:* The High Court**

89. In *CI*, the first, second and third applicants were citizens of Nigeria. The fourth applicant, a minor, was born in this State but was not an Irish citizen. The applicants were, therefore, members of the same family. But the case did not involve a description of family ties or links with other persons who would continue to reside in Ireland. They sought asylum in the State which was refused. The Minister ordered their deportation.

90. In the High Court, on judicial review, MacEochaidh J. concluded that the Minister had erred in finding that deportation "may" interfere with the rights pursuant to Article 8, while also determining that their deportation would not have consequences of sufficient gravity as to engage the operation of that Article. He held the Minister had erred in only addressing *Razgar* question (i) in reverse order, and that such an approach failed to address whether Article 8 was actually engaged. He concluded that on a proper reading, all five *Razgar* questions fell to be considered, in the sequence outlined by Lord Bingham. In his view, it was not open to the Minister to "*equivocate*" on whether Article 8 was engaged, when there was not an especially high threshold.

91. The judge held that, on the facts in *CI*, the answers to the first two *Razgar* questions could only be in the affirmative, and that it then fell to the Minister's officer to carry out a proportionality analysis. He concluded that it was insufficient for a decision-maker to say, without anything else, that deportation would not have a consequence of such gravity as to engage the operation of Article 8. It was difficult to discern why the removal of the children from their school would not constitute a grave consequence sufficient to *engage* Article 8. The consequences of the removal of the children from an environment which they knew was a matter which should be addressed by the decision maker - but only for the purpose of identifying whether rights under Article 8 were engaged (para. 29).

92. MacEochaidh J. explained that the mere engagement of a right under Article 8 did not mean the State's proposed action would breach that right, nor did it mean that the State's proposed action would not be protected by the rule of necessity established in Article 8(2) of the Convention or by the principles of proportionality which might protect a decision, however negative the consequences might be for its addressee. He observed that the issue of "consequences of such gravity" had been dealt with in a previous judgment, *AMS*, where he interpreted the question as asking whether the interference could be described as "merely

technical or inconsequential". (See *AMS v Minister for Justice and Equality* [2014] IEHC 57; *AG (Eritrea)* [2007] EWCA Civ. 801, ss. 26-28 and *V. W. (Uganda) v. The Secretary of State for the Home Department* [2009] EWCA Civ. 5.). If the consequence was not technical or inconsequential, then Article 8 was engaged.

***CI*: The Court of Appeal**

93. The judgment of the Court of Appeal was closely reasoned. It was delivered by a distinguished judge whose many judgments, including in this area, are respected and authoritative. Be it said, the judgment reflected a common perception as to Convention law. But, having considered that judgment in detail, and for the reasons now outlined, I have to conclude that it did not fully reflect the full range of ECtHR case law, insofar as it applied to the facts of that case. While characterisation of cases between private and family rights is not always easy, it did not reflect the general approach adopted in cases in the field of application of Article 8 private and family rights arising in deportation, rather than the private rights of individuals under the same Article.

94. In allowing the appeal, the Court of Appeal held that, in accordance with judgments of the ECtHR to which it referred, it would require wholly exceptional circumstances to engage Article 8 in relation to a proposal to deport persons who had never had permission to reside in the State, other than being permitted to remain pending determination of an asylum application, and that the consequences of deportation had to be in the context of the long standing principles stated by the ECtHR, that Article 8 did not entail a general obligation of the State to respect the immigrant's choice of country of residence.

95. Rejecting what was found by the High Court judge, the Court of Appeal held it was not appropriate, in the context of unsettled migrants to simply enquire whether the "interference" could be described as "technical or inconsequential". What was required, rather, was to ask whether the facts of the case showed that there would be sufficiently adverse effects, or consequences of such gravity, to engage Article 8.

96. In reaching this conclusion, the court referred in particular to *Bensaid v. United Kingdom* and *Nnyanzi v. United Kingdom*. It held that, in relation to interference with a right to respect for private life, it followed that, in order to engage Article 8, the gravity of the consequences for an illegal immigrant had to be above the normal consequences of the impact on an individual of enforcement of immigration law, including deportation (para. 42, *C.I.*) The court took the view that, a person opposing his or her deportation on the basis of the right to respect for private life pursuant to Article 8 would, at minimum, need to adduce evidence that the bringing to an end of that private life in the State would have a significant or grave impact

on his or her right to personal development, including social and educational ties, and his or her "physical or moral integrity" on return to the country of origin. It is clear this was considering a higher threshold for determining engagement than that considered by the High Court.

97. Seeking to analyse the ECtHR case law referred to it, the Court of Appeal held that it was permissible and legitimate to pose *Razgar* questions (i) and (ii) in reverse order. A central finding is to be found at para. 35, where the court concluded that the trial judge primarily fell into error in deciding that the relevant consequence of deportation to be examined (for the purpose of determining whether the interference by deportation would have consequences of such gravity as to engage the operation of Article 8) was the bringing to an end of the private life in the sense of existing social and educational ties in Ireland. Rather, what the case law of the European Court of Human Rights required was for the adjudicator (and on review the court) to consider the gravity of the consequences of deportation (including severing social and educational ties or relationships) for the individual, and in particular how it affected his or her moral or physical integrity.

98. The court observed that it was the individual's right to respect for his or her *private life* which is guaranteed by Article 8. The prohibition against interference by a public authority is with the exercise of this right. Where the relevant aspect of the right to *private life* is the right of the individual to establish and develop relationships with other human beings and insofar as it concerns education, the right to personal development, then what an adjudicator must consider was the gravity of the consequences for the individual of deportation including the inevitable rupture of relationships and social ties formed whilst in the State. I emphasise the usage of the words "private life", rather than private and family rights.

99. Having referred to Article 8 on a number of occasions as concerning "the right of privacy", the Court of Appeal concluded that, where a proposed deportee opposed his or her deportation by asserting a right to private life under Article 8, it was permissible for the Minister to first consider whether the gravity of the interference was such that there were wholly exceptional circumstances as to engage Article 8 (para. 42, *C.I.*; quoting *Razgar* question (ii), and ECtHR case law). This placed a high premium on gravity as a *condition precedent* to engagement.

100. In so concluding, the court referred to *Costello-Roberts, Bensaid v. United Kingdom* as well as *Razgar*; and *Nnyanzi v. United Kingdom.* In emphasising a test relying on the gravity of the order for deportation, rather than its effect on social or educational life, the court relied on each of the authorities cited. The court had to address jurisprudence cited to it which, it must

be said, was not always consistent in approach. To do total justice to the judgment would take up many pages. The court considered *Nnyanzi,* where the appellant did have social, educational and work ties to the United Kingdom, albeit not exceptional, but where, without detailed consideration of Article 8(1), and therefore engagement, the Strasbourg court moved almost directly to an Article 8(2) assessment, presumably on the assumption that the decision to deport the appellant where there were no exceptional circumstances which might have engaged Article 8(1) private life, but where Article 8(2) considerations outweighed any private life consideration.

101. The court also referred in detail to *Bensaid,* where the ECtHR did consider the Article 1 (right to life) "health evidence", but observed that the physical and moral integrity test which it identified, required a substantial level of proof, not hypothesis. The Court of Appeal sought to reconcile the approach adopted in *Nnyanzi* with that in *Bensaid*, but concluded that, at the level of principle, what had to be considered was the gravity of the impact on the applicant of his or her physical or moral integrity. Ultimately, the court concluded that the question of gravity was a central conclusion precedent to engagement.

102. Referring to *V.W. (Uganda) v. Secretary of State for the Home Department* [2009] EWCA Civ 5, and *Razgar*, the court concluded that the High Court judge had erred in finding that the term "*consequences of such gravity*" in question (ii) in *Razgar* raised the question as to whether could be described as merely technical or inconsequential. Rather, it required "*something quite grave or exceptional*", that is, a high threshold.

103. It is easy to be critical with the benefit of hindsight, and where this Court has had the benefit of considering a wider range of case law. But it seems the judgment in *CI* sought to identify an approach which was over-focused on the authorities cited. But those authorities which led to the conclusions must also be seen within their field of application.

104. By way of illustration, *Costello-Roberts* was not an immigration case. It might best be described as raising a "human dignity" question. The issue was the potential effect on the private life of an individual of a corporal punishment regime in a school. Rejecting the contention that there had been a violation of Article 3 (Torture or Inhumane and Degrading Treatment), or Article 8, the Strasbourg court held that to be "degrading", in the sense of Article 3, the humiliation or debasement must attain a level of severity higher than that inherent in any punishment. But the court then went on to find that, while the notion of private life was broad, the previous finding under Article 3, taken together with the fact that sending a child to an independent school interfered with their private life, led the court to conclude that the trespass

in question did not entail adverse effects for the complainant's physical or moral integrity within the scope of Article 8 (para. 38).

105. In *Bensaid*, the applicant was a man who alleged serious mental and psychological sequelae in the event of deportation. The ECtHR first assessed whether there was evidence or proof of interference with private life. It held this had not been established. The court then proceeded to consider Article 8(2) factors. This approach is consistent with *Razgar* in the U.K. In *Nnyanzi*, the applicant was a woman without family ties, albeit involved in a relationship, undertaking accountancy studies in the United Kingdom, where the ECtHR section concluded that, even were the question of private life to be considered, the Article 8(2) considerations in the case clearly outweighed any private life claim. *Razgar*, itself, concerned potential health effects upon an individual of an order for deportation.

106. Each judgment arising in that context, therefore, addressed the question of gravity as a prior condition to engagement of private life in that field of application. In doing so, the court appeared to reject the mere fact of private and family life, work or social life, or the life of children in education establishing social or educational connections with others, as raising engagement. The applicants in *CI* were not simply a group of adult individuals, they were a family, where the children had social ties and were in education. The *CI* judgment did refer to Article 8 rights in the context of settled migrants: *Balogun v. United Kingdom*, Application No. 60286/09, [2013] 56 EHRR 3 (para. 27), but it did not refer to other authorities addressing private and family rights in the case of unsettled migrants, including those dealt with below.

107. In short, I think that the case law to which the court was referred, and upon which it relied, was inapposite. The cases relied on were ones which laid emphasis on the gravity upon the individual of the incursion into private life, with a serious effect upon the individual's physical or moral integrity. On this basis, it held Article 8 was not engaged. But, as I hope to show, those conclusions do not represent Strasbourg jurisprudence as to the approach to be adopted in the field of the right to respect for private and family life regarding unsettled migrants. ECtHR case law, both then and subsequently, followed a different approach.

108. But these were not the only difficulties. It is also correct to say that the judgment of the Court of Appeal did not refer to ECtHR case law such as *Butt v. Norway*, or other decisions which did, actually, set out indicia or guidelines for private and family life in the case of unsettled migrants. This was a pivotal factor in the *CI* judgment. In the apparent absence of ECtHR case law on the issue, the Court of Appeal proceeded on the basis that the ECtHR had consciously refrained from addressing the question in the context of unsettled migrants. This was not so. In fact, as I seek to show, the facts in *CI* should have given rise to a consideration

of the actual engagement of Article 8, not its *potential* engagement. Strasbourg had, indeed, given consideration to the position of unsettled migrants in asserting rights under Article 8 to private and family life, as I now seek to outline.

109. Counsel for the appellant submits that the Court of Appeal erred in not referring to *Butt v. Norway*, which dealt with private life. In fact, in its judgment, the Court of Appeal commented that in *Nnyanzi* the ECtHR had the opportunity to develop the concept of what constituted private life, but did not do so (para. 31 *C.I.*). This observation was true, but only in the sense of private life, as distinct from private *and family life*, whereas in *Butt v. Norway*, the ECtHR was not simply assessing private life, but, as in very many of what can be characterised as "exceptional cases", a private and family life which arose where there were strong family ties within the host state which would be disrupted in the event of an order compelling the applicants to leave the state. But, in *Butt*, the question of the gravity, in the sense of effect of the measure upon the physical and moral integrity of the family members, did not arise. While a general definition is difficult, it can certainly be said it did arise in "health" cases, or physical integrity cases.

110. *Butt* does not appear to be the only case where these issues had arisen prior to *CI*. These include *Slivenko* and *Mendizabal*. *Slivenko* concerned the Article 8 rights of the wife and children, who were ethnic Russians, of a former Russian military officer required to leave Latvia in the period post-independence in 1994, despite long residence in that country. Here, the ECtHR did not engage in a minimum gravity analysis of the type described in *CI*. Interestingly, in her speech in *Razgar*, Baroness Hale of Richmond described this as a private life case, as the whole family had been deported to Russia (para. 4). *Mendizabal* was a different type of case where the applicant had been subject to a regime of constant reviews in France, consequent upon withdrawal of an original refugee status which had been granted to her over many years. Again, the court in Strasbourg did not engage in a minimum gravity approach, but rather a proportionality analysis.

111. The *CI* judgment, and the issue of ECtHR case law, generally, has been considered in a number of interesting articles and essays. (See A. Desmond "*Private Life of Family Matters: Curtailing Human Rights for Migrants",* EJIL 2018, Vol. 29, 261 – 179, A. McMahon "*The Right to Respect for Private Life under Article 8 ECHR; the Irish cases of Dos Santos and CI*; European Database of Asylum Law, March 8th 2016 "*Between Facts and Norms, Testing Compliance with Article 8 ECHR in Immigration Cases"*; Netherlands Quarterly of Human Rights 2019 Volume 37(2) 157- 177; "*A Matter of Humanity?", Emerging Principles relating to deportation and human rights"*, Murphy, Dublin University Law Journal, 39 No. 1 2016,

259-270; "*Membership without Naturalisation*", Murphy in "Questioning EU citizenship, Thym ed. Hart p.287 et. seq.).

***Butt*: Private and Family Life: Circumstances and Exceptions**

112. While deprecating the unnecessary description of facts, it is necessary to describe the ECtHR's approach in *Butt* in its full context. First, the court set out the circumstances. The applicants were brother and sister, and had moved from Pakistan to Norway in 1989 with their mother when they were young children. They were granted residence permit on humanitarian grounds. The mother and children returned to live in Pakistan for four years in the 1990's before resettling in Norway. The immigration authorities granted the family a settlement permit in 1995, whilst unaware of their stay in Pakistan. When the authorities discovered that the applicants had lived in Pakistan for those years, they withdrew the permits. The brother was subsequently sentenced to prison for a number of crimes. The authorities sought to expel him indefinitely. Both applicants sought to challenge the deportation orders and the decision to expel the brother.

113. The ECtHR then moved to consider private and family life. Having been processed through the Norwegian courts, who refused the applicants leave, the ECtHR accepted that family and social ties had been formed. But then the Strasbourg court went to another feature, awareness of illegal status: these ties had been formed before the applicants had become aware of their precarious status, and that the authorities had not expected the applicants to leave the country on their own whilst their mother was in hiding, until they reached adulthood in 2003/2004. Here, the court was not only considering non-cooperation with immigration authorities, but also unawareness of status, recurrent themes.

***Links to Country of Origin***

114. The court then considered links to country of origin. It took note that the applicants' links to Pakistan were not particularly strong.

***Criminal or Anti-Social Conduct***

115. The ECtHR then considered anti-social or criminal conduct. Concerning the brother's criminal offences, the court noted that this had not been given much consideration by the Norwegian High Court when it upheld the earlier decision for deportation; but the ECtHR noted that the applicant had not re-offended in the long period of time which had since elapsed, and as a result came to the view that this factor ought not to have carried weight.

***Legal Status***

116. The court then dealt with legal status. It observed that the applicants' stay in Norway was, in reality, unlawful and that the applicants were not settled migrants.

***Proportionality***

117. Weighing all these factors, the court concluded that the applicants' deportation would entail a violation of Article 8 (paras. 79 to 91). This can only be seen as the weighing and balancing appropriate in a proportionality analysis.

***Choice of Residence***

118. The judgment reiterated one of its guiding criteria, that is, that, while Article 8 did not entail a general obligation for a state to respect an immigrant's choice of the country of their residence and to authorise family reunion in its territory. "*Nevertheless in a case which concerned family life, as well as immigration, the extent of a state's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest. …".*

***A Summary of Factors***

119. The court then listed a series of those factors:

> "*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, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion ... Another important consideration is 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 … Where this is the case the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances …".*

These guidelines are a consistent point of reference in subsequent case law in the area.

120. But, using words previously identified in *Antwi & Others v. Norway,* No. 26940/10, para. 89, the ECtHR also identified a further guideline:

> *"68. …[W]hile the essential object of [Article 8] is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective 'respect' for family life. However, the boundaries between the*

*State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to* ***the fair balance that has to be struck between the competing interests of the individual*** *and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation …".* (Emphasis added)

This is, inescapably, the identification of a proportionality analysis.

121. In *Butt*, therefore, the ECtHR did embark upon a proportionality analysis of the circumstances of unsettled migrants, based on their conduct, that of their mother, and the extent of the links established between the applicants and Norway. While there are many other illustrations, *Butt* is, in fact, a classic outline of the ECtHR's approach in the case of unsettled migrants. It is, therefore, correct to say that, pre-*CI*, the ECtHR had given consideration to the concept of *private and family life*, and not just in *Butt*. The court identified an approach identifying factors giving rise to a particular analysis of first engagement, then distinguishing features, then "pro" and "con" considerations involved in a balancing exercise, weighing the right contained in Article 8(1) against the limitation factors in Article 8(2). This process gave effect to the entirety of Article 8, not just an elliptical approach to Article 8(1).

122. But the survey of case law which now follows also shows that a "minimum gravity or physical and moral integrity" test does not appear to be part of ECtHR jurisprudence in the general field of deportation cases. It cannot be said, either, that the approach in *Nnyanzi,* apparently warranting posing the second *Razgar* question regarding gravity *prior* to the first *Razgar* question concerning engagement, forms part of the consistent Strasbourg approach.

123. Furthermore, there is no ECtHR judgment which holds that it will be sufficient to address only the first two *Razgar* questions, even though, in a given case, an applicant's status was precarious. A question of "minimum level of severity" might, hypothetically, form part of a proportionality analysis, but it does not form part of a consideration whether Article 8 was engaged in the first place.

124. While normally it would be sufficient to merely identify other cases to the same effect by name, I think more is needed for a number of reasons. First, the appellant cites these cases in support of his case that a proportionality assessment is made while identifying whether there are exceptional circumstances. Second, and more fundamentally, the process is necessary to show a consistency of approach which, questionably was not to be found between *Bensaid* and *Nnyanzi*, were it thought these were cases directly on point.

125. Notably, in *none* of the cases now considered did the ECtHR refer to "minimum gravity" or effect of the measure in question on the "physical and moral integrity" of the individual or individuals in question.

***Rodrigues da Silva***

126. A very similar approach to *Butt* was adopted in *Rodrigues da Silva v. The Netherlands*, Application No. 50435/99, where the applicant, an unsettled migrant, subject to deportation to Brazil, would have had to leave her daughter behind in the Netherlands. The court's analysis again involved a close consideration of the relationship between the mother and the child, and other family members. It observed that authorities of a contracting state could not be faced with a *fait accompli*. But the court then laid weight on the far-reaching consequences which expulsion would have, and the responsibility which the first applicant would have as a mother as well as on her family life. On balance, it concluded that, in the particular circumstances of the case, the economic wellbeing of the respondent state did not outweigh the applicant's rights under Article 8, despite the fact that the first applicant (the mother) was residing illegally in the Netherlands at the time of the child's birth. The court observed that, by attaching such paramount importance to this latter element of illegal residence, the authorities may be considered to have indulged in "excessive formalism". The Strasbourg court concluded that no fair balance had been struck between the different interests at stake and, accordingly, there had been a violation of Article 8.

***Nunez v. Norway***

127. The same general approach was adopted in *Nunez v. Norway* (Application No. 55597/09), judgment 28/09/2011, where again, in the case of unsettled migrants, the court considered close family connections, the long period which had elapsed before the immigration authorities took their decision to order expulsion with a re-entry ban, leading the court to conclude that "*in the concrete and exceptional circumstances of the case that insufficient weight [had been] attached to the best interests of the children for the purposes of Article 8 of the Convention. ...*". The court was not satisfied that the respondent authorities had acted within their margin of appreciation when seeking to strike a fair balance between public interest and the entitlements of the applicant. Thus, there had been a violation of Article 8.

***Unuane v. United Kingdom***

128. While *Unuane v. United Kingdom*, Application No. 80343/17 was cited in this appeal, it must be said that that judgment concerned the deportation of a *settled* migrant. Similarly, in *Mendizabal v. France*, Application No. 51431/91, while the issue of Article 8 private and

family rights was considered, the applicant was, actually, an EU national with a direct entitlement in EU law to reside in France, and was not an unsettled migrant in the true sense.

***Jeunesse v. The Netherlands***

129. In *Jeunesse v. The Netherlands*, Application No. 12738/10, [2014] ECHR 1409 an important Grand Chamber decision, the ECtHR pointed out that the appellant's status was precarious, first, as an overholding visa holder, and thereafter as an unlawful resident. Thus, the applicant was not a settled migrant.

130. *Jeunesse* was a case where the applicant's spouse and her three children all had a right to reside in the Netherlands. She herself had held that nationality at birth, and then lost it and become a Surinamese national, not by her own choice, but by the fact of Surinamese independence and Article 3 of an agreement made between the Netherlands and that Republic concerning the assignment of nationality. It was in those unusual circumstances that the court concluded that her position could not be simply considered as on a par with other potential immigrants who had never held Dutch nationality. *Jeunesse* was a truly exceptional case therefore, and one where the court noted different treatment allowed by Article 8 between settled and unsettled migrants.

131. However, in its judgment the court again emphasised the margin of appreciation afforded to states in immigration matters; that a fair balance had to be struck between the competing interests; the public order interests of the respondent in controlling immigration. But, having identified those relevant factors, "cumulatively" (para. 122), it held the circumstances of the applicant's case must be regarded as exceptional. The court then went on to point out that a fair balance had not been struck between the competing interests involved, and that there had been a failure by the Dutch authorities to secure the applicant's right to respect for her family life as protected by Article 8 of the Convention. This was a proportionality analysis. The minimum gravity and physical and moral integrity criteria did not arise in this field of application either.

***Pormes v. The Netherlands* [2020]**

132. Counsel for the applicant in his argument laid particular emphasis on the ECtHR judgment of *Pormes v. The Netherlands* (Application No. 25402/14), 28th July, 2020, [2020] ECHR 572. He submitted *Pormes* represents a sea change in the ECtHR's approach. For this reason, it must be dealt with in some detail.

133. The applicant was born in 1987 in Indonesia. He travelled from Indonesia to the Netherlands *with his presumed father*, a Dutch national, in 1991. The presumed father travelled

to Indonesia from the Netherlands several times, leaving the applicant in the care of a *paternal uncle and aunt, both Dutch nationals*. The applicant's presumed father died in April, 1999. The applicant continued living in the Netherlands, and attended primary school, secondary school, and a culinary school afterwards. He discovered he was not a Dutch national in 2004. He did so in circumstances where he was unable to obtain a certificate needed for his school. He engaged in the use of drugs, and was unable to concentrate on academic work or training work. He committed four sex offences. In September, 2006, he applied for a temporary residence permit for an extended family reunion with his foster parents. At that point, he stated that he had always assumed that he was Dutch. The authorities, however, rejected the application and a temporary residence permit because of the offences he had committed. In June, 2008, the applicant was convicted of further offences. The courts in the Netherlands found that there was no registration of the applicant and no proof that his deceased presumed father was actually his father.

134. Ultimately, the Council of State in the Netherlands engaged in a balancing of rights protected under Article 8 of the Convention against the seriousness of the offences committed by the applicant and decided that the offences were too serious to be ignored. In 2016, after the application before the court, the applicant went to Indonesia where he signed a declaration and agreed to the discontinuation of any pending proceedings aimed at obtaining a resident's permit.

135. In those circumstances, the applicant complained to the ECtHR that the refusal by the Dutch authorities to grant him a residence permit amounted to a violation of Article 8 of the Convention. Against these unusual facts, the court concluded that there had been no violation of Article 8 of the Convention. The court noted that the applicant did have a private life in the Netherlands.

**The Guidelines Reiterated in *Pormes***

136. But, again, reiterating its consistent approach, the ECtHR held that *what was under challenge was whether he had a family life to be protected under Article 8 of the Convention,* and that the protection of Article 8 should be granted to adults whose dependency involved *more than normal emotional ties*. Again reiterating its long-established case law, the *court also recalled the right of a state to control the entry of persons within its territory and their residency rights.* It yet again reiterated that *the Convention did not guarantee the right* of a foreign national to enter or to reside in a particular country. It reiterated that contracting parties had the right to expel foreigner convicted of criminal offences in order to maintain public order. It made clear that, hitherto, persons who had already been granted a right of residence in a host

country were not formally "settled migrants", and that there were rules protecting them. If they were settled migrants there would have to be grave reasons to justify expulsions. But the applicant could not be considered a settled migrant.

137. Against that unusual, perhaps unique, background, the court examined whether Article 8 imposed positive obligations on the contracting state to allow him to exercise his private life in the Netherlands. But, in doing so, the court again took into account the established criteria: the extent to which family life was effectively ruptured; the extent of ties in the Netherlands; whether there were insurmountable obstacles in the way of the family living in the country of origin of one or more of them; whether there were factors of immigration control; or considerations of public order weighing in favour of exclusion.

138. For present purposes, what is significant is that the ECtHR concluded that the applicant did not enjoy a "settled status", therefore, the Dutch authorities did not have to apply "very serious reasons" to justify the applicant's expulsion. Even while observing that the applicant had formed strong ties with the Netherlands, and had no such connection with Indonesia, the court held that the criminal offences committed by the applicant militated against his claim and in favour of the Dutch authorities.

139. The ECtHR conducted a proportionality analysis, balancing the applicant's relations with the Netherlands, and the risk that the crimes committed posed to society. It found in favour of the government, making the observation that the outcome of the balancing exercise would have been different if the applicant had not committed the offences in question. But, on the facts of the case, the court held the interest of the state outweighed the interests of the applicant.

140. While it is evident that the ECtHR in this case yet again did carry out a proportionality analysis, the court did not apply a predetermined weighting process on the unusual facts. The ECtHR decidedly did not adopt an approach where to answer the first two *Razgar* questions might be determinative. On the facts of this highly unique case, the court felt justified in adopting a "neutral test".

141. But there is nothing to show this was a new approach. This was a unique case where the applicant qualified neither as a settled migrant, *nor* as an alien who had to be aware of the precariousness of his immigration status from the outset. Consequently, as regards the balancing of interests, it could neither be said that the refusal of a residence permit would require very serious reasons to be justified under Article 8 of the Convention, nor that it would violate that provision only in very exceptional circumstances. Instead, on those highly unusual facts, the assessment had to be carried out from a neutral starting point, *taking into account the specific circumstances of the applicant's case*.

142. There is nothing in *Pormes* to indicate that it constitutes a substantial sea change in the clear and constant jurisprudence of the ECtHR. Rather, it is an analysis of an extremely exceptional case where, again, the issue of proportionality was discussed *only* after an identification of the relevant facts and circumstances, with a view to determining whether they were exceptional; then the countervailing factors; and, finally, the issue of proportionality. This has been the consistent approach. No minimum gravity or physical and moral integrity test arose.

**Criminality more generally**

143. The question of the effect on family life of deportation in "criminality cases" does not arise in the appeal now before this Court. It was considered in a number of cases, including *Boultif v. Switzerland* [2001] ECHR 497; *Uner v. The Netherlands* [2007] 45 EHRR 14; and *Bajsultanov v. Austria* (Application no. 54131/10) 4 October 2013, (paras. 91-93); and see Stanley, *Immigration and Citizenship Law*, 2017, Thomson Reuters, C.11.33, et. seq.

***Hoti v. Croatia; Keita v. Hungary***

144. The cases of *Hoti v. Croatia*, Application No. 663311/4, 26 April 2018, and *Keita v. Hungary*, Application No. 42321/15, 6 July 2021, [2022] EHRR 5, both fall into a very exceptional category, that is, very long-term residence in host states over a period of decades of persons who were denied legal status, and who found themselves effectively rendered stateless.

***C v. Belgium***

145. I mention for completeness that, in *C v. Belgium*, Application No. 21794/93, 7 August 1996, the ECtHR had, much earlier, an occasion to consider whether the respondent state had infringed the applicant's right to the respect for his private and family life under Article 8. The court found the applicant did have a private life in Belgium, based on his family ties, schooling, and the fact that he worked there (para. 25). But this was after the applicant had been in Belgium for 20 years. The court then went on to consider that the applicant, although married and had a child, was later divorced.

146. A factor to which the court attached particular significance, however, was that the applicant had been convicted on serious drug charges, and sentenced to prison for five years, subsequent to which he was issued with a deportation order. The court attached great importance to the seriousness of the offences. Bearing all the circumstances in mind, the court held that the Belgian authorities had not failed to strike a fair balance between the relevant interests, and accordingly there had been no violation of Article 8. Such private life was not seen as determinative. Engagement in the labour market may be a factor only in cases where

there has been a very long period of residence. (See also *Niemietz v. Germany,* judgment of 16 December 1992, Series A, No. 251-B, p.33, para. 29; *Fernandez Martinez v. Spain*, Application No. 56030/07, 12 June 2014, paras. 109 – 116, and 152).

**A Summary of the ECtHR Approach**

147. In summary, then, it is true the Strasbourg case law in this field is fact intensive. It is nuanced, as might be expected. But *the approach* adopted is consistent. It seeks to identify the circumstances of each case in an open-ended way. In the course of doing so, the court may, on occasion, adopt an approach of simultaneously identifying the facts, along with the exceptional circumstances, such as family or other links, which distinguish the case at hand from the general norm.

148. The ECtHR takes into account what may be seen as countervailing factors, such as anti-social activity or a serious criminal record, which may count against any exceptional circumstances in a proportionality analysis, balancing the rights of the individual versus the rights of the community and the common good. But also relevant is the fact that, in its consideration of individual cases, the ECtHR applies a relatively low threshold as to when Article 8(1) is actually "engaged". The questions of minimum gravity or effect on physical and moral integrity do not arise in answering the question of whether the rights exist, but fall for consideration in the assessment of whether there is likely to be an impact of sufficient gravity to require the decision maker to weigh the factors for and against granting the application.

149. One of the difficulties in the argument for which the State contends is the fact that only a small number of applications to remain by unsettled migrants are likely to succeed. This occurs in what have been called "exceptional cases". But this does not mean that before a person is entitled to have the application dealt with in accordance with the legal principles in the authorities, and the requirements of s.49, that the circumstances of the individual must, in themselves, be "exceptional". This fact is noted in Hogan J.'s judgment and commented upon in a great number of the authorities. However, the latter is an observation regarding the "result" of the decision-making process, and not the method to be engaged.

150. It is not that exceptionality has to be shown before the decision-maker should embark upon a consideration of whether Article 8 rights exist, or are likely to be breached, but, rather, that the test, involving, as it does, a requirement to reconcile the right of the individual with that of the State to control its borders, imposes a high bar which is met "in its application" in relatively few cases. It is important, therefore, not to conflate the results of the process with the test that is applied, and the decision of the High Court relies on an analysis of binding authorities which do precisely that. The quotation from *Huang* earlier makes the point well.

151. The task of first instance decision-makers is not always easy. Without in any way seeking to derogate from or confuse the *Razgar* questions, it appears that the issues which fall to be considered are engagement of Article 8(1); any distinguishing Article 8(1) features in the context of private and family life or other links within the receiving state; countervailing Article 8(2) considerations, or obstacles to removal, followed by a proportionality analysis. The fact that the process is sometimes telescoped does not detract from the generality of application.

152. But an approach posing the *Razgar* questions (i) and (ii) out of sequence, and going no further, at minimum, risks creating what might be an insurmountable bar, when considering whether Article 8 ECHR rights are in question. Still more so when these are the only questions considered. As the ECtHR jurisprudence makes clear, there *may* be limited exceptional circumstances in which an unsettled migrant may establish an entitlement to protection under Article 8.

153. But, absent such circumstances, the procedure will very frequently lead to the consequence that, as the status of a migrant is unsettled or precarious, he or she will not ultimately be entitled to an Article 8 protection, even following a proportionality analysis. In short, it seems to me that the *Razgar* questions, if used, should, when posed in the case of an individual or family, be asked in the sequence in which they were placed by Lord Bingham. But, in the context of private and family life cases, the question of physical and moral integrity does not arise. What was enunciated in *Costello-Roberts* and *Bensaid* must be seen in the context of their respective fields of applications. *Nnyanzi* does not form part of a clear and consistent ECtHR approach. Thus, the judgment in *CI* cannot now be said to reflect clear and consistent ECtHR jurisprudence.

154. Insofar as the High Court judgment in *SA* deals with these same issues, similar observations apply to it. But this is not all. If *Razgar* is to be applied, what follows is that decision-makers should address all five questions in sequence; beginning with directly answering the *Razgar* question (i): whether the proposed removal will be an interference by a public authority with an applicant's right to respect for his or her private and family life Avoiding the question or rephrasing it is not an application of the test, and does not reflect ECtHR case law. But the fact that the answer to the first question is "yes" is, in no sense, determinative of whether there is a violation of Article 8 seen as a whole. Persuasive case law from the neighbouring jurisdiction affirms this conclusion.

**Persuasive Authorities**

***AG (Eritrea) v. Secretary of State for the Home Department***

155. The essentiality of the fifth, proportionality, test is discussed in case law from the neighbouring jurisdiction. Proceeding chronologically, in *AG (Eritrea) v. Secretary of State for the Home Department* [2008] 2 All ER 28, the Court of Appeal of England and Wales (Sedley, Maurice Kay, and Lawrence Collins, LJJ.) pointed out that, as a matter of United Kingdom law, there was no actual test of exceptionality in the application of Article 8 of the Convention, but that removal from the United Kingdom would only exceptionally be found to be disproportionate. It is important to emphasise this is the *result* of applying the approach: but it is not an expression of the test to be applied. There was, however, no formal test of exceptionality, and no hurdles beyond those contained in Article 8 itself. While an interference with private or family life had to be real if it were to engage Article 8(1), the threshold of engagement was not especially high. Once the Article was engaged, the focus moved to the process of identification under Article 8(2) which, in all cases which engaged Article 8(1), would determine whether there had been a breach of the Article.

156. In normal circumstances, interference with family life would be justified by the requirements of immigration law, but a different approach could be justified in a small minority of exceptional cases, identifiable only on a case-by-case basis. Whether a particular case fell within that limited category was a question of judgment for the tribunal of fact, and normally raised no issue of law. The expectation that it would be exceptional for recourse to Article 8, read as a whole, to overcome the otherwise lawful removal of a claimant from the jurisdiction turned on the relative weight of Article 8(1) interference against that of relevant factors that went to justification under Article 8(2), including, in particular, the public interest in maintaining an effective system of immigration control. Exceptionality, to the extent that it survived as a consideration, came in at the Article 8(2) stage in drawing the balance between the severity in the nature and consequences of the facts constituting the Article 8(1) interference, and the importance in the circumstances of the countervailing Article 8(2) factors present going to justification.

157. The court went on to observe that in the determination of proportionality, courts and tribunals should have a proper and visible regard to the relevant principles in making a structured decision case-by-case. It was not sufficient for a tribunal simply to characterise something as “proportionate” or “disproportionate”; to do so could well be a failure of reasoning amounting to an error of law. But there would be many cases in which it could

properly be said by an appellate tribunal that, on no view of the facts, could removal be disproportionate, and, in such cases, even if an Asylum and Immigration Tribunal had applied the wrong test, permission to appeal to the Court of Appeal was unlikely to be given. Suitably adapted to the procedure in this State, this is a succinct and helpful summary.

***Ali v. Secretary of State for the Home Department***

158. The importance of a proportionality analysis was considered in depth in the judgments of the Supreme Court of the United Kingdom in *R. (Ali) v. Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799. *Ali* concerned an application of a person who was characterised as a "foreign criminal" for the purposes of s.32 of the UK Borders Act, 2007. But the observations of Lord Reed JSC are highly relevant, and impressively reasoned.

159. Having first identified the ECtHR criteria applicable in cases of deportation of a settled migrant, such as *Boultif v. Switzerland* [2001] 33 EHRR 50; *Üner v. Netherlands* [2007] 45 EHRR 14; and *Maslov v. Austria* [2009] INLR 47, Lord Reed went on to point out that the Grand Chamber had noted in *Jeunesse v Netherlands* (2015) 60 EHRR 17, para 105, these criteria could not be transposed automatically to the situation of a person who is not a settled migrant but an alien seeking admission to a host country: a category which included, as *Jeunesse* demonstrated, a person who has been unlawfully resident in the host country for many years.

160. The ECtHR analysed the situation in *Jeunesse* of a person facing expulsion for reasons of immigration control rather than deportation on account of criminal behaviour, as raising the question whether the authorities of the host country were under a duty, pursuant to Article 8, to grant the person the necessary permission to enable her to exercise her right to family life on their territory. The situation was thus analysed not as one in which the host country was interfering with the person's right to respect for her private and family life, raising the question whether the interference was justified under Article 8(2). Instead, the situation had been approached as one in which the person was effectively asserting that her right to respect for her private and family life, under Article 8(1), which arguably imposed on the host country an obligation to permit her to continue to reside there, and the question then was whether such an obligation was indeed imposed (para. 27).

161. Lord Reed summarised the criteria identified in *Jeunesse,* pointing out that, in addition to identifying the issue there as concerning a positive obligation under Article 8(1) rather than a negative obligation under Article 8(2), the court in Strasbourg also identified a number of factors as being relevant: the extent to which family life would effectively be ruptured; the extent of the ties in the contracting state; whether there were insurmountable obstacles in the

way of the family living in the country of origin of the alien concerned; and whether there were factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion.

162. The judgment pointed out that another important consideration was said to 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. Where that was the case, the court in Strasbourg had said that "*it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8*" (*Jeunesse*, para 108).

163. Lord Reed observed that Strasbourg had found there to be exceptional circumstances in situations where, notwithstanding the importance of that consideration, removal failed to strike a fair balance between the competing interests involved. In the *Jeunesse* case, for example, a prolonged delay in removing the applicant from the host country, during which time she had developed strong family and social ties there, constituted exceptional circumstances leading to the conclusion that a fair balance had not been struck (paras 121-122 of *Ali*).

164. The Supreme Court of the United Kingdom dealt with proportionality. Whether the situation was analysed in terms of positive or negative obligations was unlikely to be of substantial importance. The "weighing process" which involved an assessment of whether the person enjoyed private or family life depended on the facts relating to his relationships with others: whether, for example, he was married or had children. Where a person did enjoy private or family life in the UK, he or she had a right under Article 8 to respect for that life, whatever their immigration status might be (although that status might greatly affect the weight to be given to the Article 8 right, as *Jeunesse* made clear).

165. A structured approach to decision-making is always helpful. In *Ali*, the then Lord Chief Justice, Lord Thomas of Cwmgiedd, suggested that first, the judges should, after making their factual determination, set out, in clear and succinct terms, their reasoning for the conclusion arrived at, through balancing the necessary considerations. One way would be for the decision-maker would be to set out the "pros and cons", and then set out reasoned conclusions as to the countervailing factors, and then set out the reasoned conclusions as to whether the countervailing Article 8 factors outweighed the importance attached to the public interest in the deportation of foreign offenders.

**Limited Category of Exceptionality**

166. The ECtHR approach has been summarised earlier. But as the Strasbourg jurisprudence makes clear that exceptionality is, in fact, found in a very limited category of cases, as in *Butt*, *Rodrigues da Silva*; and *Jeunesse*. On the case law considered, the existence of substantial family ties in the receiving state, with the effect that deportation would substantially disrupt those family ties can be a factor. So, too, can ignorance or unawareness of legal status (*Butt*/*Pormes*). Effective statelessness was held to come within the description, as in *Hoti* and *Keita*, although neither of these were, in fact, immigration cases in the true sense, but rather *sui generis* instances concerning persons rendered stateless, where the applicants had been residing in the host state for many years. So, also, social ties might be a factor, but there is nothing in the case law to indicate that, seen alone, as opposed to cumulatively, such ties form part of the consistent jurisprudence of the court. Similarly, with economic ties. The fact of working within a state may also be a factor, but no more, in cases where an applicant has been in residence for decades. Against these, there must be weighed the general State interest in maintaining the integrity of its borders, a sovereignty consideration.

167. In fact, in this appeal, how the case was characterised by the parties partially missed the point. The true issue did not lie in exceptionality of the facts, rather, the approach itself which must involve proportionality in decision-making, in order to balance the factors to be weighed between Article 8(1) and Article 8(2) considerations. It is a process which will be subject to margin of appreciation (*Pormes*).

168. It is also important to emphasise that duration of stay or residence does not itself form part of the consistent Strasbourg jurisprudence, but may only become a factor in exceptional cases of very lengthy residence.

169. But what follows from the fact that Article 8 is "engaged", whether it be in the case of an individual or a family, is that, operating within the margin of appreciation, which is fundamental to the Convention, a decision-maker may have to take *into account* such factors, even though the status of a migrant or migrant family is unsettled. These factors, of varying weight, must be weighed against the important general State interest in maintaining its borders and, the integrity of an orderly immigration system, a right of sovereignty. But the fact that the balance will not frequently be resolved in favour of the unsettled migrant does not mean that the process should, in effect, be "short circuited". At the outset, it should be open-ended in its description of the circumstances and approach to engagement of the right.

170. It should be emphasised, however, that the effect of this judgment should not be over-interpreted. In the past, even the fact of posing the first two *Razgar* questions, including considering gravity, would frequently have resulted in a consideration of what were, in substance, many of the same factors as would have arisen in a formal, question (v), proportionality analysis. I turn to the facts of this case.

**Application to the facts**

171. The *Razgar* questions are, it is true, a recommendation. They are also hierarchical. But, it must be noted, *Razgar* is not part of ECtHR case law. The question in this case of whether Article 8(1) was engaged is a relatively simple one, but was not directly addressed in the decision-making in this case, even though there was some material before the decision-makers upon which conclusions on that first question might have been drawn. The question of "engagement" does not involve an especially high threshold. It is unnecessary to repeat the manner in which questions (i) and (ii) were elided and inverted.

172. The fact that engagement of Article 8.1 was not considered led to the consequence in this case that any formal consideration of the *Razgar* questions ended after the first two had been outlined, but not, in fact, directly answered so far as engagement was concerned. The appellant was not granted the formal procedure of assessment which has been identified by the ECtHR in its jurisprudence, or, for that matter, in the case law of England and Wales.

173. If *Razgar* was to be applied, all five questions should have been addressed, including that of proportionality. The question of the rights of the State, of course, remains a significant and weighty consideration. An applicant's circumstances will seldom outweigh the rights of a contracting state. But, if the first question is answered positively, it does not at all follow that the "*remaining questions somehow fall like a house of cards*", as the High Court judge put it in *CI* (High Court in *CI*, para. 27). But, if question (i) gives the answer "yes", then all remaining questions should be addressed.

174. Put in a more detailed and hopefully succinct way: the first instance decision impugned contained the following flaws. First, the word "*potential*" was transposed from question (ii) to question (i). Second, questions (i) and (ii) were then addressed in reverse order, with the consequence that engagement was never directly addressed. Third, the decision-maker only answered the first two questions. Fourth, as a result, the Minister denied the appellant a proportionality assessment to which he was entitled.

175. With all respect to the decision-makers, a consideration of the decisions in this case leaves the disturbing impression that the legal principles quoted, and qualifications to them, were not always fully understood. Had they been understood, their applicability to the decision

would have been evident. Whether the appellant was in a position to show exceptionality is not the point. It is not necessary to repeat the passage quoted from para. 41 of the *CI* judgment on the possibility of private life arising from relationships, including educational and social ties formed at a time when the appellant's status was precarious, was sufficient for the issue to have been given consideration. (See para. 31 of this judgment.) But that was said in the context of considering the gravity of the consequences of deportation. I do not think that the flaws in this decision were merely technical and, therefore, remediable. The decision-making process was not in accordance with law.

176. In the ultimate analysis then, the form of procedure identified in, or drawn from, *CI* did not accord with relevant ECtHR principles on private and family life. While the *CI* judgment must be seen in its full context, and with hindsight, it cannot be said, either that it did so in a manner compatible with the clear, consistent ECtHR approach, either then, or in subsequently enunciated case law.

177. The High Court judge in this case actually did follow the law as cited. But it must follow that the decision by the High Court in this case, which applied a "*CI* approach", itself, did not take regard of the appropriate ECtHR case law, though the judge applied *CI* as a binding authority. This was no fault of the trial judge. It follows that the High Court judgment must be set aside.

178. The position regarding remedy was not cured by the decision-maker later utilising some language of proportionality in speaking of a consideration of "all the facts and circumstances". Any subsequent part of the decision began from an incorrect starting point, not asking whether Article 8 was engaged, but whether any interference with the appellant's Article 8(1) rights would be of such gravity as to engage Article 8 ECHR. Whatever might be the position as to the merits of the case, and how the factors might have been weighed in a proportionality assessment, it must be said that the actual procedure was incorrectly premised, thereafter flawed, and not in accordance with law. It follows that the Minister's decision must in my opinion be quashed. In my view, the denial of rights is too serious to be dealt with simply by a reference in the decision to what might, or might not, have been the evidence on private and family life before the decision-maker. This issue is further considered under the heading of remedy. The question of constitutional rights must now be considered.

**The Constitution**

179. Article 40.3.1 of the Constitution provides:

> *"1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.*

*2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."*

180. Article 40.6.1(iii) guarantees, subject to public order and morality, "*the right of the citizens to form associations and unions*". In the first national language, the same sub-section provides: *"iii Ceart na saoránach chun comhlachais agus cumainn a bhunú."* It goes on to provide: *"Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right."* In cases of doubt, the Irish language version is to be preferred over the English version.

181. In his judgment, my colleague, Hogan J., would locate the "*right to private life*" arising in this case, as derived from Article 40.6.1(iii) of the Constitution (hereinafter "the sub-section"). He takes the view that the right in question differs from the concept of privacy considered by this Court in cases such as *McGee v. Attorney General* [1974] I.R. 284; *Norris v. Attorney General* [1984] I.R. 36; or, in the High Court, in *Kennedy v. Ireland* [1987] I.R. 587. Hogan J. expresses a view that the right to a private life is essentially associational in nature, and therefore similar in language to Article 8.

182. While I entirely respect the reasons underlying this proposal, and though I see force in his view, I am unable to fully agree. In my view, the rights in this case very largely derive from the right to privacy, which is derived from Article 40.3 of the Constitution. But, I think, further consideration of this issue should be reserved to another case. Subject to that proviso, I would make the following observations.

183. The more limited scope of Article 40.6.1(iii) can be discerned from its wording in English or Irish. I do not think that the sub-section deals with "freedom of association" generally. Rather, Article 40.6.1(iii) protects the right of citizens to form *associations* (plural) and unions. The usage of the Irish word "*bhunú*" in the Irish language is highly significant. This translates into English as "*to establish or found*". It does not mean to "*make*" friends, or to "associate" in that way.

184. The usage of the word "*comhlachais*" (association) supports this view. As in the English text, it is phrased in the plural. What is in question in the constitutional sub-section, in my view, is the right to establish or found, associations, or unions, such as clubs or trade unions. The term "associations" can also be interpreted by reference to its neighbouring word "unions". The sub-section is, therefore, in my view, significantly more limited in its scope than my colleague would propose.

185. The relevant chapter of Kelly on The Constitution sets out the matter succinctly (cf. Kelly, *The Irish Constitution*, 5th Edition, Hogan, White, Kenny, Walsh, Bloomsbury, 2018, Chapter 7.6.170).

186. In the first paragraph of that text, the learned authors write that the guarantee of "freedom of association" has been considered primarily in relation to the role of trade unions, though there is also some jurisprudence in respect of the guarantee in the law regulating political parties and social clubs.

187. I entirely agree with that description of the case law as to scope. There is a passage quoted when Murnaghan J. wrote that each citizen is "free to associate with others of his choice". But, there, the judge was speaking in the context of trade union membership, the matter in issue in *National Union of Railwaymen v. Sullivan* [1947] I.R 77. The context is clear from the surrounding text.

188. When Hardiman J. discussed freedom of association, as a pre-existing natural right inhering in humankind, in *Equality Authority v. Portmarnock Golf Club* [2010] I.R. 671, he was discussing the Article 40.6.1(iii) right in the context of freedom of speech, to organise for industrial purposes, take part in elections, or to participate in sports. But there, although the scope is slightly wider, he was speaking in the context of membership of a club.

189. Rather than the broad scope envisaged in Hogan J.'s judgment, it seems to me that the thinking behind the sub-section directly addresses rights of association, dissociation, and negotiation, in the industrial relations context, with regard to the conduct of elections, and the potential political activities of civil servants. While there may be some overlap, I do not think the text of the sub-section to allow a broad interpretation of the type now suggested.

190. Moreover, I consider the intended limited scope of the sub-section makes clear that the right is to be exercised subject to public order and morality. It is not easy to conceive how a general right to make friends, pursue a course of education, advance one's career, or engage in a variety of recreational and sporting activities, should be governed by public order or morality, or should, generally, require regulatory laws.

191. Indeed, it might be said that the description of the elements of the Article 40.6.1(iii) right said by my colleague to be derived from the sub-section bears strong resemblance to those features enunciated by O'Higgins C.J. in *G. v. An Bord Uchtála* [1980] I.R. 32, where the then Chief Justice referred to the rights of children to be fed, to live, to be reared, and to be educated, and to have the opportunity of working, and realising his or her full personality and dignity as a human being. But, significantly, the then Chief Justice located such rights as falling to be protected and vindicated by the State under Article 40.3 of the Constitution, and not elsewhere.

192. The broad range of the right of privacy was identified in the minority judgment of Henchy J. in *Norris*, now recognised as containing an authoritative description of the right involving "*a complex of rights, varying in nature, purpose, and range, each necessarily a facet of the citizen's core of individuality within the constitutional order*".

193. In *NHV v. The Minister for Justice & Equality* [2018] I.R. 246, O'Donnell J., as he then was, addressed the rights of a non-citizen, including an asylum seeker, to invoke an unenumerated derived personal right, including possibly the right to work as guaranteed under Article 40.3 of the Constitution.

194. I should say immediately that, in my view, a categorisation of the right involved under Article 40.3 of the Constitution would not deprive the decision-makers' process in question of a balancing consideration. The critical word in Article 40.3 is the term "practicable". What is "practicable" must necessarily be subject to public order and morality. The concept of "unjust attack" could only arise as being where there is an "attack" not in accordance with law. There would not be an injustice if a right in question was delimited according to the concepts of common good, public order and morality, all of which underlie the entirety of the Constitution from the Preamble to its conclusion.

195. Therefore, any decision-making, were it under Article 40.3 or Article 40.6, would necessarily involve a balancing exercise based on the concept of proportionality, balancing the rights of the individual, on the one hand, and considerations of common good, public order and morality, on the other. For my own part, I would locate the rights in question as arising under Article 40.3, although I concede the potential for some degree of overlap with the Article 40.6.

**Remedy**

196. This leads back to the question of remedy. What has occurred in this case, unfortunately, appears to reflect a systemic problem. This is profoundly to be regretted from every standpoint, and not just that of the appellant. The Minister did not apply ECtHR principles correctly. The decisions in question were made in 2019. This was not, of course, the fault of the then Minister, or the present Minister, personally. But what is in issue in this case is the integrity of the immigration system of the State. The State is entitled to control its borders, and make laws concerning immigration and international protection. That is an aspect of sovereignty. But, the integrity of the immigration system also hinges on the application of the rule of law. In my view, a fundamental issue arises here regarding that concept.

**A Constitutional Remedy**

197. My colleagues, the Chief Justice, Hogan J. and O'Malley J. would not grant the appellant a remedy. Unfortunately, I respectfully disagree. For convenience, I refer to them on this section as the "majority on remedy", or, simply, "the majority".

198. The constitutional remedy of *certiorari* has, as its primary purpose, the preservation of order in the legal system by preventing excess and abuse of power, *rather than the final determination of rights*. Whether the law applied in this case be through the Convention, or the Constitution, the principle of where there is a wrong there must be a remedy applies. In *The State (Abenglen Properties Ltd.) v. Dublin Corporation* [1984] I.R. 381, O'Higgins C.J. described *certiorari* as "*the great remedy available to citizens*" concerning those who have legal authority to affect the rights of such citizens who have the duty to act judicially in accordance with the law and the Constitution, whose acts in excess of such legal authority are contrary to law.

199. In this case, it cannot be in dispute that the appellant has been denied his rights to a decision in accordance with law. Whether viewed from a Convention or Constitutional standpoint, the Minister's decision was not in accordance with law. It contains errors of law, which all other things being equal, would render it void, not voidable. There are, too, serious errors on the face of the record of the decision.

200. The appellant himself did not engage in any misconduct in the proceedings which might go to the issue as to whether or not he should be granted the relief of *certiorari*, as a matter of discretion, or for compelling legal reasons. (cf. *Smith v. Minister for Justice and Equality & Ors*., [2013] IESC 4discussed later). The appellant has been the subject of a legal wrong, in the sense that the Minister's decisions were not in accordance with law. He is entitled to a legal remedy.

201. The legal maxim *ubi jus, ibi remedium* (where there is a right, there is a remedy) is of immense antiquity. It finds its origins as an ancient maxim of the common law. It is quoted in Blackstone's Commentaries, Volume 3, 1723-1780. It was repeated by Chief Justice Marshall in the United States Supreme Court, as long ago as 1803, in *Marbury v. Madison* [1803] 5 US 137. There, quoting Blackstone, Marshall C.J. stated, in terms:

> "*It is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded …*".

The great jurist identified this rule as a settled and invariable practice, to the effect that "*every right when withheld must have a remedy, and every injury its proper redress*".

202. Whether or not myself and Baker J. (with whose clearly reasoned, concise judgment I entirely agree), are correct, or the majority are correct on remedy, the appellant had the *right* to have his application dealt with in accordance with the Convention and the Constitution. The Minister did not do so under either heading. It is undisputed that the impugned orders did not contain any consideration of the appellant's constitutional rights at all. The purported application of Article 8 of the Convention was fundamentally defective, in the ways sought to be identified in this judgment, and acknowledged in the other judgments. The decision is not of devoid of consequence: To the contrary, if not quashed, the decisions render the appellant amenable to an order for his deportation.

***Certiorari***

203. It is true that *certiorari* is a discretionary remedy. A court will refuse the remedy when it is just and proper to do so (*State (Cusson) v. Brennan* [1981] I.R. 181). The courts recognise that there may be transcendent considerations of public policy which make the remedy "*undesirable, impractical or impossible*". (*Murphy v. Attorney General* [1982] I.R. 241). But, unlike in *Murphy*, what has happened in the appellant's case could be undone by remittal. This is not either a situation where for public policy reasons force must be given to a void statute. (*A v. Governor of Arbour Hill Prison* [2006] I.R. 88). Nor is it a case where the appellant failed to make his case in a timely way (*Q v. Mental Health Commission* [2007] 3 I.R. 755). Instead, it is said, the result on remittal would necessarily be the same.

***Luximon***

204. The judgment of this Court in *Luximon v. The Minister for Justice & Equality* [2018] 2 I.R. 542 has a considerable bearing on the issue and the remedy. There, this Court (Clarke C.J., O'Donnell, MacMenamin, Dunne and O'Malley JJ.) accepted that, when considering the Minister's "function" under s.4(7) of the Immigration Act, 2004, such function should be "*performed*" in accordance with the clear tenor of the relevant ECtHR jurisprudence. The Court held that the provision fell to be interpreted in the light of that jurisprudence, and that the Minister's consideration of the decision not to renew the application of non-nationals to be in the State should have been carried out in accordance with Article 8 ECHR rights where necessary at the time of that assessment, and at a time when the applicants remained in the State. The Court held that this was not done. The section was not, therefore, being applied, or operated, in a manner compliant with s.3 of the 2003 Act (para. 85). The Court granted *certiorari* and remitted the case for reconsideration.

**The judgments of my colleagues in the majority**

205. I have had the opportunity of reading the judgments of the Chief Justice, O'Malley J. and Hogan J. I hope it is no disservice to the full and comprehensive judgment of the Chief Justice to summarise his findings as being, first, that, for reasons he sets out, there was no breach of Article 8, and that the claim should not be remitted for rehearing on the basis that, even on the correct application of Convention legal principles, the outcome would inevitably be the same. O'Malley J. and Hogan J. concur. I respectfully differ from that conclusion for a number of reasons.

**Elapse of Time**

206. First, a period of three years has elapsed between the decision and this judgment. This Court is unaware of what has happened in the appellant's life during that time. The Court has not heard any evidence in relation to what has happened during that period. But in a merits consideration there is a duty to obtain up-to-date information concerning an applicant such as the appellant.

**Conduct of the Appellant**

207. Second, I think there is a departure from precedent regarding the *grant* of *certiorari*. The Court granted that relief in *Luximon*. Baker J. also fully deals with this question. It is true that *certiorari* can be refused for what were described in *Smith v. Minister for Justice & Equality & Ors.* as "*compelling legal reasons*". There, the conduct of the appellant was so egregious that it was inconceivable that, on remittal, a deciding officer would reach a conclusion other than deportation, despite the fact that Article 8 rights were invoked. The appellant had misconducted himself in the proceedings. His own conduct was directly at variance from the Article 8 right which he sought to assert. He had been guilty of serious criminal conduct in the United Kingdom, for which he had been sentenced to prison. He had not supported his family, whose rights he sought to invoke under Article 8.

208. It is sufficient to say that the facts of this case are very different. There is no evidence that the appellant, MK, misconducted himself in the proceedings, or at any time during his residence in the State.

209. While one can accept that, in some instances, a situation might arise where remittal might be superficially comparable to a mathematical equation, I would respond that what is mathematically right is different from what is legally right. The more so, when what is placed at one side of the equation is altered by the judgment of this Court, but as to the other side of the equation – the appellant's private life – any description of change is not taken into account

and, for the purposes of assessment, remains "frozen" in 2019. A mathematical outcome which is the product of a flawed algorithm may, occasionally, produce the "correct" mathematical result, but, in law, the process here was still flawed from the outset and, in my view, remained so, tainting the decision.

**Statutory Application: Section 2 of the 2003 Act**

210. Third, both the Minister's decision-makers and the courts are bound by statute, albeit in different ways. The statute in this instance is the European Convention on Human Rights Act, 2003. That Act imposes a number of statutory duties.

211. There is no doubt that the Minister is "an organ of State", as defined in s.1 of the Act. Thus, her decisions are governed by Convention principles. The deciding officers, and reviewers, are persons who operate under a system "established by law" ( see, *Luximon*).

212. Under s.2(1) of the same Act, the courts are to apply statutory provisions, *in so far as possible*. It may well be that, in certain instances, there could be a tension between the question of application, and that which is possible. (See *Judicial Interpretation of the European Convention on Human Rights Act 2003, Reflections and Analysis*, Doyle & Ryan, DULJ (2011)). But I am unable to discern any basis upon which it could be said that the remedy of *certiorari*, which is a discretionary remedy, could in this case be impossible. Administrative difficulty is not an appropriate touchstone.

213. In *Donegan v. Dublin City Council* [2012] 3 I.R. 600, this Court (Murray C.J., Hardiman, Fennelly, Finnegan and McKechnie JJ.) observed that the legislature had directed that every statutory provision or rule should be given a construction compliant with the State's obligations under the European Convention on Human Rights. The Court went on to hold that if such a construction was reasonably open, it should prevail over any other construction, which although reasonably open, was not compliant with the Convention. Even in cases of doubt, an interpretation in conformity with the Convention should be preferred; however, this task must be performed subject to the rules of law regarding interpretation and application, which included common law and statute law. (See para. 109.) No question arises that the application of the ECHR would be *contra legem* or contrary to some core principle of law which has been laid down by statute. I do not understand, therefore, how it can be said that there is any rule of law precluding a finding that the Minister acted contrary to that statute and granting what in normal course would be the usual remedy.

**Statutory Application: Sections 3 and 4 of the 2003 Act**

214. Fourth, there is a question of statutory interpretation and application under s.3(1) of the 2003 Act. It is provided that, subject to other provisions and the law, or rule of law:

"*Every organ of the State shall perform its functions* ***in a manner compatible*** *with the State's obligations under the Convention provisions*". (Emphasis added)

215. Under s.4, it is provided that judicial notice shall be taken of the Convention provisions and any judgment of the European Court of Human Rights and, when interpreting and applying the Convention provisions, a court *shall* "*take due account of the principles … laid down by those … judgments*". As I find I am bound by views of the majority, I nonetheless consider the following observations must be made.

216. As this Court held in *Luximon*, the term "*manner*" in s.3(1) obviously relates to *how* the State's obligations are to be performed by the Minister. In this appeal, the Court is, as I understand matters, unanimous that the Minister did not perform her obligations in a way compliant with Convention provisions, as explained in ECtHR case law of which this Court *shall* take judicial notice. The term "compatible" is defined in the Concise Oxford Dictionary as "*able to exist or to be used together without problem and/or conflict*".

217. But the two words "*manner*" and "*compatible*" cannot be divorced from each other. Whether or not a decision, or series of decisions, are *compatible* with the Convention must hinge on the decision in question being carried out in a manner laid down by Convention principles. The form of performance is identified in the ECtHR case law referred to in this judgment. For this reason, no distinction can be made between the approach and the outcome.

218. It must follow that, in applying the flawed approach said to be derived from the judgment of the Court of Appeal in *CI*, the decision in question was not consistent or compatible with ECHR principles, not least because the way in which the decision was arrived at was not on the basis of principles laid down in ECtHR case law. In my view, it must follow that the Minister was in breach of her statutory duty as provided under s.3(1) of the 2003 Act.

**A Departure from Principle**

219. Fifth, while this issue has been dealt with in part earlier, there is a further aspect to the question of principle. Both this judgment, and the judgment of Baker J., set out what I consider are strong arguments for concluding that the approach proposed to be adopted in this case constitutes a departure from accepted principles governing the important remedy of *certiorari*. *Certiorari* does not permit of a merits-based assessment. Rather, it raises the antecedent question of whether the decision in question was within jurisdiction.

220. In my view, the decision in this case was made in excess of jurisdiction. The fundamental question is, therefore, whether the decision was lawful. The answer can only be in the negative, and cannot, in my view, be remedied by a process of severing form and substance, in a manner be it said, which stands in some contrast with *Luximon*, although there,

it is true, the Minister had not given any consideration to Article 8 ECHR rights. In *Luximon*, an order was granted, even though presumably the facts to be considered on remittal were the same.

**The Question of the Approach in Pending Cases**

221. Finally, what is proposed by my colleague Hogan J. as an approach for cases pending before the courts demonstrates the consequence of the departure from recognised principle. It is suggested that the courts dealing with pending cases should engage in a case-by-case analysis, with a view to determining whether or not a correct balancing process was carried out. This, too, must necessitate a merits-based assessment. But, moreover, one can foresee such a process may well place the courts seized with such a task in a difficult position. They will, simultaneously, be carrying out judicial review, *and* also, on occasions, having to carry out assessments which should have been performed by first instance decision-makers or reviewers.

222. I make no comment whatever about the procedures which may have to be adopted, or adapted, for courts to perform this function. Nor do I make any comment in relation to what rights applicants in court would hold for the purposes of such a procedure.

**The Choice**

223. I fully recognise that the Court here is faced with an invidious choice. But it must be acknowledged that, whether or not cases are remitted, there will still be administrative difficulties either way. But I do not think such difficulties can be such as to weigh the balance against remittal. As well as placing courts in a difficult situation, the proposed approach, in my view, sets to one side the correct place for such decision-making, that is, by the first instance decision-makers and reviewers performing statutory functions under the 2015 Act. One could hardly envisage that, in the light of what has been held in this judgment, the same flawed procedure as heretofore would continue to be adopted by the Minister. Thus, there will inevitably have to be a readjustment. None of this renders the remedy of *certiorari* impossible. The term "*so far as possible*" in s.2(1) must have objective meaning. It cannot simply convey that the remedy may have significant consequences.

224. I make two other observations. The 2003 Act places a time limit on any actions which might be brought more than one year prior to an alleged contravention. But, not only that, proceedings for judicial review in other cases would be subject to the strict time limits provided for under the Rules of the Superior Courts.

225. Finally, I acknowledge that the decision of remittal, or non-remittal, will have significant impact on the operation of the immigration process. But I take the view that what is in question here is something more fundamental, that is, the operation of the rule of law. What

has been said before stands repetition: Courts must not only look to the present, but to the improbable future. I also ask, can it be said that, under the Constitution, the appellant's rights have been vindicated so far as "*practicable*" under Article 40.3.

**Remedy under the Convention**

226. Absent an effective remedy under the Constitution, it is necessary to refer specifically to the Convention on the question of remedy, as well as the question of the right. The violation of the appellant's Article 8 rights cannot be in dispute. The issue is not whether judicial review is an effective remedy generally, under ECHR (*Vilvarajah & Ors. v. The United Kingdom*, Application No. 13163/87, 30 October 1991). It is, rather, whether the absence of an order is an effective remedy *in this case*. (*Hatton & Ors. v. The United Kingdom*, Application No. 36022/97, 8 July 2003).

227. In *Hatton*, the Strasbourg court had to consider whether the applicants had a remedy at national level to "*enforce the substance of the Convention rights ... in whatever form they may happen to be secured in the domestic legal order*". (See *Vilvarajah and Others v. the United Kingdom* judgment of 30 October 1991, Series A no. 215, §§ 117 to 127). The scope of the domestic review in *Vilvarajah*, which concerned immigration, was relatively broad, because the importance domestic law attached to the matter of physical integrity. It was on this anxious scrutiny and rigorous basis that judicial review was held to comply with the requirements of Article 13. But, in this case, the *substance* of the right involves a consideration in accordance with the procedure provided for in Convention jurisprudence. That is what the 2003 Act provides for a s.31(1).

228. By contrast, in *Smith and Grady v. the United Kingdom,* Nos. 33985/96 and 33986/96, §§ 135 to 139, ECHR 1999-VI, the Court concluded that judicial review was not an effective remedy on the grounds that the domestic courts defined policy issues so broadly that it was not possible for the applicants to make their Convention points regarding their rights under Article 8 in the domestic courts. (para. 141). The court observed that judicial review proceedings were capable of establishing that the legal scheme in question was unlawful because the gap between government policy and practice was too wide. (See *R. v. Secretary of State for Transport, ex parte Richmond LBC (No. 2)* [1995] Environmental Law Reports p.390). The question in this appeal now is whether, in Convention terms, the order proposed by the majority affords the appellant an effective remedy in accordance with Article 13 ECHR?

**Article 13 ECHR**

229. Seen from a Convention standpoint, I consider this appeal now not only raises issue under Article 8, but so far as concerns remedy, Article 13, ECHR. This Article provides that:

*"Everyone whose rights and freedoms as set forth in [the] Convention are violated* ***shall have*** *an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".* (Emphasis added)

230. The appellant has sought to obtain an effective remedy before this Court. The threshold for Article 13 is simply that an applicant should have an arguable complaint under the Convention (*Boyle & Rice v. The United Kingdom* [1988] ECHR 3 ). Here, the violation of the process contained in Article 8 of the Convention is not in dispute.

231. In *De Souza Ribeiro v. France* [GC] 22689/07, 13th December, 2012, the ECtHR observed that the discretion which contracting states were afforded regarding the manner in which they conform to their obligations under Article 13 could not be exercised in a way that deprived applicants of the minimum procedural safeguards against arbitrary expulsion.

232. In *De Souza*, the ECtHR held that the applicant had not had access in practice to effective remedies in respect of his complaint under Article 8 of the Convention when he was about to be deported. The situation had not been remedied by the eventual issuance of a residence permit. The ECtHR dismissed the French government's preliminary objection concerning the applicant's loss of "victim" status within the meaning of Article 34 of the Convention, and nonetheless found a violation of Article 13, in conjunction with Article 8. It is true that each state engages a margin of discretion when applying Convention case law. But I do not understand the principle to be such as would have the effect of introducing a discretionary element, thereby denying this appellant an effective remedy.

233. Just as Article 8, Article 13 imposes duties through the portal of the ECHR Act, 2003. There is a duty under Article 8 and under Article 13 of the Convention, having regard to the provisions of the ECHR Act, 2003, which, in my view, requires the State to make available to the appellant, as an individual concerned, the effective possibility of not only challenging the deportation, but also of having relevant issues examined with sufficient procedural safeguards and thoroughness, by an appropriate domestic forum, offering guarantees of independence and impartiality. (*Al-Nashif v. Bulgaria* [2002] § 133; *M & Others v. Bulgaria* [2011] §§ 122-133; *De Souza*).

234. It is true that national authorities, as the high contracting parties to the ECHR, have the primary duty to guarantee Convention rights and freedoms. But, under the principle of subsidiarity, it is the national court which is effectively a guarantor of the right, but only when domestic remedies have been exhausted.

235. Under Article 35.1 of the Convention, the only remedies which are required to be exhausted are those that relate to the breach alleged and which are available and sufficient. The existence of such remedies must be sufficiently certain, not only in theory, but also in practise.

236. In the absence of an effective remedy, granted by a national authority, complaints may be referred to the court in Strasbourg. As long ago as *Kudla v. Poland* [GC] Application No. 30210/96, the ECtHR pointed out that the question of whether an applicant had a legitimate complaint under an antecedent Article of the Convention, as well as Article 13, should be considered separately from the question of whether the applicant was also provided with an effective remedy, which right, incidentally, arises under Article 47 of the Charter.

237. In the instant case, the appellant has sought a remedy under the Constitution. As a consequence of the order proposed by the majority, I would respectfully argue he is not to receive an effective remedy. The inescapable fact is that, as a result of a legally flawed decision, he could now be subject to deportation, despite the unanimous conclusion that the legal procedure leading to those decisions under s.49 and s.51 of the Act of 2015 are legally flawed under the Convention and the Constitution.

**Rule of Law**

238. The appeal raises the question whether the denial of any remedy can be consistent with the rule of law. The appellant is effectively left in a situation where his legal status is profoundly unclear. I do not believe this accords with legal certainty. An effective remedy involves the provision of redress for a Convention violation. This involves what must be identified as a genuine intervention by a court in a contracting state.

239. In *Gorry v. Minister for Justice* [2020] IESC 55, this Court, when faced with a choice between a constitutional and Convention remedy, elected to provide for a remedy under the Constitution, in light of the fact that it was Article 41 of the Constitution which identified a higher level of protection for the family rights in question. I would respectfully suggest the same principle should apply by an order quashing the decision here. But, conversely, if the appellant is not to be granted a remedy under the Constitution, it seems to me, he is entitled to a declaration under the ECHR Act, 2003.

240. In *Keaney v. Ireland*, Application No. 72060/17, there is contained in a concurring ECtHR judgment in what, on that occasion, was a systemic delay case, that the result, in favour of the applicant, was not a victory for him, and for that reason not accompanied by just satisfaction, due, in that case, to the manner in which the appellant's case had been conducted. It was, Judge O'Leary observed, instead, a judgment of principle, identifying a systemic problem of delay which, in relation to some levels of the domestic court system, might have

subsequently been remedied. It was also, she said, a judgment which required the respondent state to act in relation to the provision of an effective domestic remedy in cases of delay. But she observed "*Not all sound legal principles find the appropriate champion*".

241. I would apply the same observation here. There is, at the heart of this appeal, a fundamental question of legal principle concerning rights and remedies. I respectfully, therefore, dissent from the judgment of the majority as to the absence of any remedy. In the first instance, I would have granted the appellant an order of *certiorari* of the Minister's orders in this case. But, failing that, I would, alternatively, have granted a declaration that, by virtue of the respondent's breach of his rights under Articles 8 and 13 of the ECHR, the appellant was entitled to a declaration that the respondent had breached her statutory duty under s.3(1() of the 2003 Act. In my view, such a conclusion must follow from the application of the soundest of all legal principles, that is the protection of the rule of law.

# AN CHÚIRT UACHTARACH
# THE SUPREME COURT

S:AP:IE:2021:000064

**O'Donnell C.J.**
**MacMenamin J.**
**O'Malley J.**
**Baker J.**
**Hogan J.**

**Between/**

**MK (ALBANIA)**

**Appellant**

**-and-**

**MINISTER FOR JUSTICE & EQUALITY**

**Respondent**

**Judgment of Mr. Justice O'Donnell, Chief Justice dated the 24th day of November, 2022**

**Introduction**

**1.** The facts in this case can be stated briefly. MK arrived in this State from Albania on 13 September, 2016 aged 16. He moved in with a foster family, attended school and later took a break from his schooling in order to work. He made friends at school and at work. He applied for international protection with the assistance of Tusla - Child and Family Agency in June, 2017. His application for refugee status and subsidiary protection was unsuccessful. This case solely concerns his application for leave to remain on humanitarian grounds under section 49(3) of the International Protection Act, 2015 ("2015 Act"). The initial decision was made on 31 October, 2018. At that point he had been in the State for less than 2 years, and of that period only the period between June, 2017 and October, 2018 he can even be said to have lawful albeit, in the language of the European Court of Human Rights ("ECtHR"), "precarious" residence, in that his permission to be in Ireland was for the currency of his application for international protection. There was no question of refusal of leave to remain affecting any family ties or anything unusual in his life or history. He had lived almost 16 years in Albania and subsequently two years as a teenager in Ireland. Refusal of leave to remain meant that he would have to leave Ireland, and if he did not do so voluntarily, that he could be deported.

**2.** The analysis of the case worker in the International Protection Office of the Minister for Justice and Equality's (the "Minister") Department (which, for reasons addressed by MacMenamin and Hogan JJ. in their judgments, is to be treated as the decision of the Minister) was conducted by reference to the then applicable case law and, in particular, the decision of this Court in *P.O. & Anor. v. The Minister for Justice & Equality & Ors*. [2014] IESC 5, [2014] 2 I.R. 485, and the decision of the Court of Appeal (Finlay Geoghegan J., Ryan P., and Peart J.) in *C.I. & Ors. v. The Minister for Justice, Equality & Law Reform*

[2015] IECA 192, [2015] 3 I.R. 385 ("*C.I.*"), and the decision of the House of Lords in *R (Razgar) v. Secretary of State for the Home Department* [2004] UK HL 27, [2004] 2 A.C. 368 ("*Razgar*"). At paragraph 17 of his judgment in *Razgar*, Lord Bingham of Cornhill set out five questions that should be addressed when removal is resisted in reliance of Article 8 of the European Convention on Human Rights ("the Convention"). Those questions were set out in the Minister's analysis. The *Razgar* questions are as follows:-

i. "Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

ii. If so, will such interference have consequences of such gravity as potentially to engage the operation of Art. 8?

iii. If so, is such interference in accordance with the law?

iv. If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

v. If so, is such interference proportionate to the legitimate public end sought to be achieved?"

**3.** Having considered the decision in *C.I.*, the International Protection Officer concluded that the potential interference with private life would not have consequences of such gravity as to potentially engage the operation of Article 8 and accordingly a decision to refuse the applicant permission to remain did not constitute a breach of the right to respect for private life under Article 8(1) of the Convention. The case officer addressed first, private life and then family life under Article 8 and that the ECtHR had concluded that it is likely only in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8. He continued; "[h]aving considered all information

submitted on behalf of the applicant, it is not accepted that there are any exceptional circumstances arising… [and] it is not accepted that such potential interference will have consequences of such gravity as potentially to engage the operation of Article 8(1)". No issue arises in relation to the assertion of interference with family life. In respect of the question of interference with respect for private life, it is apparent that the decision was made that the applicant's case did not satisfy the second question posed by Lord Bingham: that is, whether removal would be an interference with private life having consequences of such gravity as to potentially to engage the operation of Article 8.

**4.** The applicant's appeal to the International Protection Appeal Tribunal in relation to international protection was dismissed by a decision dated 7 October, 2019. By a letter dated 18 October, 2019 solicitors on behalf of the applicant sought a review of the Minister's decision under section 49 of the 2015 Act, revisiting some of the contentions made in the course of the application for international protection but also contending that refusal of leave to remain would be extremely disruptive to his life and deportation would represent a disproportionate interference with his private life in the State and therefore a breach of both Article 8 of the Convention and Article 40.3 of the Constitution.

**5.** A detailed letter of decision was issued dated 25 November, 2019. Insofar as is relevant to the present case, it stated that it was not accepted that such potential interference will have consequences of such gravity as potentially to engage the operation of Article 8(1). It appears clear that this was a finding that the claim failed to satisfy the second limb of the analysis set out in *Razgar* and adopted in this jurisdiction in *C.I.*

**6.** The applicant's claim was that a refusal of leave to remain would be a breach of his right to respect for his private life guaranteed by Article 8 of the Convention, and/or his asserted right to a private life protected by the Irish Constitution. As such, his claim is one based on what might be said to be the basic unit of private life protection under either the Convention

or the Constitution. The life in question, and which was likely to be affected by a refusal of leave to remain, was the life he had lived in Ireland between 2016 and 2019. A consequence of the refusal of leave to remain would be that he would have to leave that life and live elsewhere. It was not suggested, however, that there was any other feature of his life which had to be taken into account in that analysis, such as considerations of physical or mental health, or sexual orientation, or an intimate or other relationship and still less, any family ties. Furthermore, the life the applicant had enjoyed in Ireland and, therefore, the private life capable of being affected by the refusal of leave to remain, was one where his residence in this country was, in the terminology adopted by the ECtHR, "precarious", that is, his only entitlement to be in Ireland during that time was while his application for asylum and subsidiary protection was being addressed and determined. The case raises neatly, therefore, the issue debated in this appeal: how should the question of the impact upon the applicant's private life of a decision of a refusal of leave to remain and/or removal from Ireland be approached and analysed under Article 8?

**7.** As set out in the judgment of MacMenamin J., the basis of the Ministerial decision was an application of the five-part *Razgar* test which is set out at paragraph 17 of the judgment of Lord Bingham in that case and adopted by the Irish Court of Appeal in *C.I.*, and indeed by the Irish High Court in a number of cases since then. The Ministerial decision followed *C.I.* and determined that the applicant's case did not exhibit any exceptional feature, such that the decision to refuse leave to remain could be said to have consequences of such gravity for the applicant as potentially to engage the operation of Article 8, and thus the case failed at the second hurdle of the *Razgar* test. For reasons set out in the careful judgment of MacMenamin J., with which I agree, it cannot be said that this approach is required by the Convention, or the case law of the ECtHR and should not be adopted.

**8.** The point has been reached where I think it should be recognised that it is in the nature of any decision which refuses leave to remain in the country and renders future residence unlawful and perhaps, even more clearly, where the decision is one for forced removal, that such a decision is normally likely to have an impact of such gravity on an individual who has been living lawfully in Ireland for any appreciable time to engage the operation of Article 8. This is so even if that residence is precarious on the basis of a permission that is necessarily temporary and limited and where the decision to refuse leave to remain, or indeed to deport, is no more than the enforcement and application of the limitation of that permission or its termination in accordance with its terms. To that extent, I agree that the applicant's analysis is correct and, accepting for the moment the *Razgar* test as a template for the Minister's decision in this case, the applicant's case ought to have been assessed under the fifth limb of the test, that is, whether such interference was proportionate to the legitimate public ends sought to be achieved. It is not in doubt in this case that the third and fourth limbs of the test would be satisfied, that is, that the refusal of leave to remain was in accordance with the law being provided for under section 49(2) of the 2015 Act, and that such interference with private life by a refusal of leave to remain was, at least in general, necessary in a democratic society in that it maintained a functioning immigration system which is a basic attribute of a sovereign state.

**9.** However, I respectfully disagree with MacMenamin J. that this means that the decision of the Minister must be quashed. Rather, I agree with O'Malley and Hogan JJ. that *certiorari* should be refused in this case, in essence because the analysis which ought to have been carried out at stage five is, in effect, the very analysis that was carried out by the Minister albeit under the rubric of stage two of the *Razgar* test. There is, therefore, as a matter of logic, no way a different conclusion could have been reached either in theory or in fact if that test was applied at *Razgar* stage five rather than *Razgar* stage two. The analysis which

should have been carried out at stage five was, in fact, carried out at stage two, and the legal error in nomenclature and sequence, therefore, can have no consequence for the substance and therefore the validity of the decision. There is no question of the rights protected by Article 8 being breached in this case – the only thing in issue is the manner in which that conclusion should have been reached.

**10.** It is not irrelevant in this context to observe that the Minister did not devise the five-part appraisal or decide that it was appropriate to analyse this case at stage two of the *Razgar* test. Rather, as the law stood, she was obliged to approach the case in this way by binding authority, and therefore by law. *C.I.* was decided by a unanimous Court of Appeal and was based upon a judgment of Lord Bingham, one of the most respected judges of recent times, and whose judgment, in turn, was delivered in the context in which it was understood as effecting a significant expansion of the grounds upon which immigration decisions could be challenged. For good measure, the flaw which has now been identified in the rigid application of the *Razgar* test – that is, both the creation of a second stage in the test, and the consequent implication that it established a significant hurdle for applicants to surmount – is one which can, in turn, be traced to the jurisprudence of the ECtHR. Where an erroneous approach in an administrative decision can be traced not just to a judicial decision, but to decisions which are binding upon the administrator, then there may be a particular obligation on a subsequent court to correct the error, but any such correction should be surgical if feasible and should, if possible, avoid compounding the difficulties created by an earlier decision. It is necessary therefore to understand what the Convention requires administrators to assess and courts to review, the nature of any error, and its consequences for the performance of that function.

***Razgar***

**11.** *Razgar* was one of the early cases decided by the U.K. House of Lords on the interpretation and application of the Human Rights Act, 1998, which had come into force in the U.K. in 2000. Mr. Razgar was an Iranian citizen of Kurdish origin who entered the U.K. from Germany and sought to claim asylum. It was proposed to return him to Germany under the Dublin Convention, and to allow his asylum application to be processed in that jurisdiction. However, it was contended on Mr. Razgar's behalf, and on the basis of psychiatric evidence, that there was a risk that he would commit suicide if sent to Germany, and that he would not receive appropriate mental health treatment, which he was then receiving in the U.K., unless he was considered in Germany to constitute a suicide risk. It was contended that his removal to Germany in such circumstances, while otherwise lawful, could constitute a breach of his Article 8 right to respect for his private life.

**12.** The Home Secretary decided that the case was manifestly unfounded. The subsequent litigation therefore focused on the preliminary question of whether it could be said that removal from the country of a person in Mr. Razgar's position was capable of engaging the right to respect for private life so as to require analysis under Article 8. It is important to place *Razgar* in its context and, particularly in light of subsequent developments, to recognise that it did not address the interference in private life in the sense of the ordinary life lived by the applicant and the fact of removal from it. Instead, it was addressed to the specific question of impact on mental health.

**13.** The control of borders, and the capacity to control entry and removal from a state are well understood to be key features of national sovereignty. Removal from a state of a person who is not entitled to remain there is normally both a lawful, and an important exercise of State power. The issue in any case, therefore, is whether removal, otherwise lawful, can nevertheless be a breach of rights protected under the Convention and, in Ireland, under the Constitution. Prior to *Razgar* it was accepted that if removal had the consequence of a breach

of the absolute guarantee under Article 3 of the Convention against torture or inhuman and degrading treatment, that removal would become unlawful. It was also accepted that in certain extreme circumstances, the impact on the health of an individual of removal could, if sufficiently severe, amount to a breach of Article 3. However, it was accepted that Mr. Razgar's case did not satisfy this test. Instead, it raised the question of whether the impact on the health of an individual, which did not reach the level envisaged by Article 3, nevertheless could give rise to a claim that there was an interference with the guarantee of respect for private life under Article 8. The majority for the House of Lords agreed this was at least possible, with however significant dissents from Lord Walker and Lady Hale, which considered that if the facts were not such as to give rise to a complaint under Article 3, they could not ground a separate challenge under Article 8.

**14.** The genesis of the second stage of the *Razgar* test is to be found in the close analysis of the case law of the ECtHR, which was carried out by the U.K. House of Lords, and also analysed by the Court of Appeal in *C.I.* In *Bensaid v. U.K.* (2001) 33 EHRR 205 ("*Bensaid*"), it was proposed to remove an Algerian national from the U.K. where he had lived for several years and who had been diagnosed with schizophrenia. There was evidence that repatriation would likely have significant and lasting adverse effects. The court decided, first, that notwithstanding the seriousness of his medical condition, the case did not reach the high threshold set by Article 3. It then turned to consider the complaint based on Article 8 and found that it would not violate Article 8, observing at paragraph 46 that "not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8." It accepted that mental health might be regarded as a crucial part of private life associated with the aspect of moral integrity but considered that it had not been established that the applicant's moral integrity would be substantially affected "to a degree falling within the scope of Article 8 of the Convention."

These observations seemed to suggest that there was a threshold, and perhaps quite a significant one, before interference with an Article 8 right to private life could be established. Even assuming that the dislocation caused to the applicant by removal was to be considered as affecting his private life, the court went on to conclude that such interference complied with the requirements of the second paragraph of Article 8, namely that it was the application of a measure in accordance with law, which pursued the aims and protection of the economic wellbeing of the country and the prevention of disorder and crime and being necessary in a democratic society for those aims.

**15.** The facts of *Bensaid* were quite telling: he had been in the U.K. for eleven years, suffered from a serious condition, and there was some evidence that it would be significantly aggravated by his removal from the U.K. to Algeria. Nevertheless, it appeared that the court held that, on these facts, Article 8 was not engaged considering that the impact on mental health was, at least to some extent, speculative. It bears observation, however, that apart from the question of impact on mental health, the applicant's lengthy residence in the U.K. did not raise private life issues sufficient to render the deportation a breach of his Article 8 rights.

**16.** A later case, *Nnyanzi v. United Kingdom* (2008) 47 EHRR 18 ("*Nnyanzi*"), was analysed in *C.I.* As Finlay Geoghegan J. there observed, the ECtHR had not until then squarely addressed the possibility that an unlawful migrant might during a stay develop social ties which could be considered as constituting private life under Article 8(1). *Nnyanzi* was a case in which the ECtHR had an opportunity to do so and did not. The applicant had been in the U.K. pursuing an asylum claim for almost ten years. Her residence, therefore, had always been precarious. Nevertheless, she contended that she had an established private life in the U.K. involving close ties with her church and her educational pursuits, and she had established friendships and at least one relationship of some significance, and all over a

considerable period of time. The ECtHR did not, however, address the question of whether Article 8(1) was engaged. Instead, it said that the court's case law did not exclude the possibility that treatment which did not breach the severity of Article 3 treatment could nevertheless breach Article 8, if "there are sufficiently adverse effects on physical and moral integrity", citing *Costello – Roberts v. The United Kingdom* (1995) 19 EHRR 112 ("*Costello-Roberts*") at paragraph 36. The ECtHR in *Nnyanzi* continued at paragraph 76 of its judgment that it did not consider it necessary to determine whether the applicant's accountancy studies, involvement with her church and friendship of unspecified duration with a man during a stay of almost ten years constituted a private life, because it considered that any such private life when balanced against the legitimate public interest and effect of immigration control could not render her removal a disproportionate interference under Article 8(2).

**17.** In *C.I.*, Finlay Geoghegan J. deduced from the fact that the court left unanswered the question of whether removal from the U.K. in such circumstances was capable of interfering with Article 8 rights, that it was at least possible that removal of a person from the private life they were living, and without any features such as impact on physical or mental health, could amount to a breach of the individual's right for respect for their private life. Accordingly, she rejected the argument made on behalf of the Minister that persons whose residence in the State was precarious were not capable of establishing a private life in the sense of education or other social or community ties potentially capable of protection pursuant to Article 8. But two other conclusions might be drawn from the approach of the ECtHR in *Nnyanzi.* It appears to follow from the court's reasoning that, at a minimum, it considered that it was at least arguable that a person who had been in a country for ten years and whose residence was precarious, and who had nevertheless developed social ties within the community might not even engage Article 8(1) such that removal from the country could

not be said to affect the individual's private life so as to require justification, in accordance with law, and a balancing of that justification, with the impact upon the individual. This, together with the explicit reliance on the decision in *Costello-Roberts* seemed to suggest that not only was there a threshold before it could be said that Article 8(1) rights were engaged, but furthermore, that threshold was quite high. Second, it seemed to follow from the conclusion of the ECtHR that the removal of the applicant was in any event justified under Article 8(2) even in circumstances where Article 8(1) could be said to be engaged by the impact of removal on the social or community ties built up by an individual, and it would require wholly exceptional circumstances to find that the impact on such private life was disproportionate having regard to the interest of the State in maintaining its immigration system and controlling its borders. Here, ten years residence and the development of social ties was itself insufficient.

**18.** The upshot of this was that the Court of Appeal held that the second limb of the *Razgar* formulation was not satisfied merely by establishing that removal from the State would have an inevitable effect upon the life that the applicant had established here; it was necessary to go further and consider the gravity of the impact on the individual of severing the social ties established, or on his or her physical or moral integrity, borrowing in this respect from the language of both *Bensaid* and *Nnyanzi*. While, as already noted, it could not be said that a person whose life in Ireland had only been established at a time when his or her residence was precarious, could *never* establish a private life or interference with it sufficient to engage Article 8, Finlay Geoghegan J. considered:-

> "that it would require wholly exceptional circumstances to engage the operation of Article 8 in relation to a proposal to deport persons who have never had permission to reside in the State (other than being permitted to remain pending determination of an asylum application). This appears to follow from the fact that any consideration of the

gravity of the consequence of expulsion must be in the context of the long standing principles stated by the ECtHR, that Article 8 does not entail a general obligation for a State to respect the immigrant's choice of the country of their residence."

**19.** In retrospect, it was perhaps unhelpful to analyse the judgments of the ECtHR so closely, and as if they were precedents in a common law system, and to seek to draw clear conclusions from the fact that the ECtHR did not address a particular issue or express itself in a particular way. This is particularly so when some of the case law had been decided in the context of the impact of removal or deportation on health and the interaction in this regard between Article 3 and Article 8 of the Convention and was decided in the early stages of the consideration of private life in the context of removal and deportation. The treatment of the so called *Razgar* test as canonical was also perhaps unhelpful, particularly because it differed from the classic formulation of a proportionality test only in the fact that it identified a second and separate question as to the gravity of consequences of interference before Article 8 was engaged, which perhaps tended to suggest that this was a particularly significant hurdle.

**20.** I am prepared to agree that in reversing the decision of the trial judge in *C.I.,* that the Court of Appeal established a test for engagement of Article 8 that was not itself required by the jurisprudence of the ECtHR. If the *Razgar* template is to continue to be applied (and that itself is not required), it should be recognised that it is a preferable analysis to accept that while in every case there may be a real question as to whether Article 8 can be said to be engaged and there is a real effect on private life, that in the case of deportation, and perhaps where a person who has been living in Ireland is refused leave to remain, it would normally follow that the consequences would be such as to satisfy the first two stages in *Razgar*, even where the person's life has been pursued while their residence here was precarious. As MacEochaidh J. put it in the High Court in *C.I.*:-

"the removal of the applicant from Ireland will comprehensively end the private life experienced by the applicant in Ireland. This could never be anything other than an interference with that private life… deportation will always engage the right to respect for private life once it is established that private life as understood in Convention terms was experienced in the state."

**21.** This approach is consistent with that outlined by the ECtHR in *Balogun v. the United Kingdom* (2013) 56 EHRR 3, where, admittedly in the context of settled migrants, the court said:-

"It will be a rare case where a settled migrant will be unable to demonstrate that his or her deportation would interfere with his or her private life as guaranteed by Article 8… Not all settled migrants will have equally strong family or social ties in the Contracting State where they reside but the comparative strength or weakness of those ties is, in the majority of cases, more appropriately considered in assessing the proportionality of the applicant's deportation under Article 8(2)."

**22.** The fact that this statement is made expressly by reference to the case of settled migrants is important, and should not be ignored or elided; see in this regard *Jeunesse v. the Netherlands* (2015) 60 EHRR 17 ("*Jeunesse*"). It is possible that someone whose residence in Ireland was both short and precarious, in the sense understood by the ECtHR, could not be said, without something more, to have established a private life in Ireland. However, I agree with MacMenamin J. that normally it is preferable to address all these issues in the context of the proportionality assessment which in the *Razgar* template comes at stage five, albeit that the weight to be accorded to private life established during precarious residence is less than would be accorded to the same private life when established by a settled migrant or a citizen, and therefore more readily outweighed by the legitimate interests of the State.

**23.** In that context however, it is also clear that the weight to be given to the legitimate public objective sought to be achieved by a lawful deportation or a decision to refuse leave to remain is fixed, and moreover, its relative weight in relation to a claim for a private life which involves no issue of health both physical or mental, or of sexual identity and consists solely of ties formed with others while resident in the State and when that residence is precarious, has also been determined. While it will be the case that considerations such as State security or criminal behaviour will add significant weight to the State's interest in deportation in individual cases, it is not necessary to have resort to such considerations to justify refusal of leave to remain to a migrant whose residence has been precarious and who cannot point to something more than such residence. The jurisprudence of the ECtHR establishes that it will only be rarely, and in exceptional circumstances, that the State's interest will not justify the interference with that private life. That is precisely what MacEochaidh J. held in the High Court in *C.I.*:-

> "Decision makers are not required to find that a deportation measure offends proportionality because it comprehensively interferes with established private life in Ireland. Given that it is lawful for the State to regulate the presence of nonnationals on its territory and that immigration control does not per se offend rights protected by the Convention, something other than the natural consequences of deportation involving, as it does, the cessation or termination of private life in the deporting state, will be required if the proportionality analysis is to yield a positive result for an applicant".

**24.** This in turn is consistent with the established case law of the ECtHR: See *Jeunesse*, at paragraph 108, and *Pormes v. Netherlands* App. No. 25402/14 (ECHR 27 July 2020) ("*Pormes*") at paragraph 58:-

> "Equally, if an alien established a private life within a State at a time when he or she was aware that his or her immigration status was such that the continuation of that private life in that country would be precarious from the start, a refusal to admit him or her would amount to a breach of Article 8 in exceptional circumstances only."

I agree that exceptionality is more of a description and not a legal test, but it is a formulation here which describes something that is important in the present context.

**25.** It must be remembered that it has been consistently stated that Article 8 does not give any right to choose the country in which you wish to live. The private life an individual establishes necessarily involves pursuing that life in circumstances most of which are not within the control of the individual. An individual may wish to live in a certain country or in a certain area, and may wish to become friends and associate with other individuals, but cannot compel that outcome. The choice and desires of an individual in this respect are themselves important and have a value as part of a person's development and therefore, their private life. However, it is now well established that their choices and desires, unless accompanied by something more, can never outweigh the State's interest in maintaining an orderly immigration system.

**26.** These weights and their relative relationship are, as it were, preloaded. Where on one side of the balance there is the State's interest in maintaining an orderly immigration system, and on the other side there are the social ties established by the fact of residence. But where that residence is precarious, then the State's interest prevails, and will always justify the interference with private life that a refusal of leave to remain in the country, or indeed, deportation, necessarily involves, unless, adopting the language of MacEochaidh J., there is *something more*. The case law establishes the type of thing which may be *something more*, and which may have the capacity to tip the balance. This may be because of circumstances relating to the health of the individual, whether physical or mental, or the impact upon the

individual by reason of their sexual identity, or orientation, or perhaps because of the manner in which they came to the country and their awareness or lack of it of the precarious nature of their residence, or the depth, length and intensity of the relationships they have established, and the particular circumstances of the persons involved in the nature of those relationships. I would not like to try to set out a definitive list of such circumstances. It is sufficient that without *something more*, that the State interest in maintaining the integrity of the immigration system will justify interference with private life when all that can be asserted is that a life has been lived in a country where that residence is and is known to be precarious.

**27.** It has to be observed, that this is precisely the same approach as that which the judgment in *C.I.* would have applied at the second stage of the *Razgar* test. Thus, at paragraph 41 of *C.I.,* it was stated, as set out above, that it would require wholly exceptional circumstances to engage the operation of Article 8 in relation to a proposal to deport persons who never had permission to reside in the State.

**28.** Here it is clear and unavoidable that there was nothing in the facts of this case which was capable of amounting to such exceptional circumstances, and which could conceivably have led to a different conclusion. However, the matter goes further. In this case, the question as to whether there were exceptional circumstances over and above the necessary interference with any private life which would be a consequence of a refusal of leave to remain *was* addressed *and* answered. The relative weights the Convention assigns to the legitimate state interest in maintaining the integrity and effectiveness of its immigration system and the private life of a precarious resident are well established, and it will only be in exceptional circumstances, and where there is something more than the inevitable disruption of removal from a country in which a person has lived that it can be argued the Article 8 rights can prevail, or more precisely that interference with that private life will not be justified by the

state interest involved. This was the question addressed in this case, albeit it was addressed in order to consider if the applicant could satisfy the stage two test, rather than as I consider appropriate, in the context of stage five of the *Razgar* analysis. This however is not a difference of substance, it is one, at best, of sequence. It cannot be suggested that the outcome of the assessment was affected by addressing the question at stage two rather than stage five.

**29.** In some cases, it may indeed be important that issues are addressed in a particular order, and if that sequence is not followed, that different outcomes might ensue. Thus, for example, in the particular context of a proportionality test, if it were possible that the State would not be able to establish either that the interference was effected by law (*Razgar,* stage three), or that it pursued a legitimate state interest (*Razgar,* stage four), then it is certainly conceivable that addressing the question of exceptional circumstances in the context of the question of the engagement of the right might lead to a different conclusion than if that issue was only addressed at stage five. Here, however, it is clear that if a decision maker considered that stages one and two were satisfied and the right was engaged, stages three and four would not detain him or her. It is self-evident that both are satisfied in this case. The analysis would move to stage five. It thus would become necessary to address the self-same question which, in this case was both addressed and answered.

**30.** The jurisprudence of the ECtHR makes it clear that removal of a precarious resident in accordance with law will only be a breach of the Article 8 right to private life in exceptional circumstances. This was the test addressed by the decisionmaker, the error was to do so in order to determine if there was impact of sufficient gravity to engage Article 8 rather than to assess proportionality. The height of the hurdle at stage two was too high, but the hurdle which the applicant failed to surmount was that which would have been addressed at stage five. The finding that there were no such exceptional circumstances was therefore fatal to

the applicant's contention that his Article 8 rights were breached by refusal of leave to remain. In these circumstances it cannot be said that any flaw in the sequencing has led to an unlawful outcome. The question of whether a refusal of leave to remain would be an unlawful interference with the applicant's Article 8 rights was addressed by the application to the same facts, of the approach which the law requires. In those circumstances it would, in my view, be an act of futility, and worse, to quash the decision of the Minister in this case.

**31.** A useful authority in this regard is *Smith & Ors. v. Minister for Justice and Equality & Ors.* [2013] IESC 4 (Unreported, Supreme Court, Clarke J., 01 February 2013) where it was contended that a change in the jurisprudence could give rise to an entitlement to seek the revocation of a deportation order. Clarke J. was prepared to accept that a *materially different* legal framework within which the decision was to be made could give rise to an obligation to reassess but that the decision relied on in that case could not be said to be such a material change in the framework. That approach can be applied to the present case. In my view, a material change is one which is *capable* of leading to a different conclusion on the particular facts. That cannot be said to be the case here. Furthermore, it might be noted that Clarke J. went on to consider whether even if there was such a material change, the decision of the Minister should be quashed, having regard to the fact that the applicant had been convicted of a serious offence. In the circumstances, he agreed with the High Court that the case was not one where *certiorari* should be granted because "… on the facts of this case, there are compelling legal reasons why, even it if it were arguable that the Minister did not completely comply with his full legal obligations, it nonetheless remains the case that the Minister's decision should not be quashed as there are compelling reasons to believe that, even had the Minister considered any such additional factors, no difference in the result could have occurred." Here the position is, if anything, stronger.

**32.** I believe it is an error to convert the substantive right under Article 8 – to respect for private life – into a contended for "right to a proportionality assessment" which is procedural in nature. For all the reasons set out above, I consider it is more correct to approach the question of an interference with Article 8 by considering the proportionality assessment and factoring in the precarious nature of the applicant's residence in that balance. But the Convention does not require decisions in national law to be approached in a particular way – what it requires is that the rights protected are respected and not breached. If a national court did not use the language of proportionality or refer to the jurisprudence of the ECtHR (as might have been the case in Irish law prior to the enactment of the European Convention on Human Rights Act, 2003) the issue for the ECtHR would remain whether the decision made had failed to respect the private life of the applicant. Applying the unbroken case law of the ECtHR, that is simply not the case here. The obligation of an Irish court under section 3 of the European Convention on Human Rights Act, 2003 is to ensure that functions are performed in a manner that is compatible with the State's obligations in international law, so that, in simple terms, a claimant can obtain a remedy in Dublin without having to travel to Strasbourg. If the ECtHR would not find that the decision here infringed Article 8 and no one, as I understand it suggests it would – then an Irish court should not either. I do not accept that any right of the applicant protected by Article 8 has been breached. I do not understand, therefore, how any right to an effective remedy under Article 13 can arise. Reference to Article 13 in this regard is a "fifth wheel" type argument; if the Article 8 rights have been breached then the applicant succeeds, and Irish law provides ample remedies; if not, then the applicant having failed on Article 8, cannot succeed under Article 13.

**33.** Similarly, the suggestion that the applicant has been deprived by the decision of this Court of the possible consideration of events and matters which might have occurred in the three years that this matter has been in the court system and which might affect the Minister's

consideration of an application for leave to remain if made today is really question begging: it assumes that the decision refusing leave to remain was invalid which is the very thing that is to be decided in this case, and the majority of the Court have decided there was no invalidity. It simply cannot be said by reference to the facts of those decisions of the ECtHR in which precarious or unsettled migrants did, exceptionally, succeed in demonstrating that a refusal of residence, or deportation was a breach of Article 8 (such as *Butt v. Norway* App. No. 47017/09 (ECHR, 4 December 2012) and *Jeunesse)* or those cases where such claims have been rejected *(Bensaid, Nnyanzi* and *Pormes)* that it could be plausibly asserted in this case that there has been any breach of the substantive rights protected by Article 8. Moreover, in the event that matters have occurred since the decision of the Minister and the commencement of these proceedings which the applicant could contend alters the balance so that removal from the State would be a breach of those rights, he is not precluded by this decision from raising them with the Minister. The only issue for this Court, on this aspect of the case, however, is whether or not the decision made on 25 November, 2019 was invalid because it breached the rights guaranteed by Article 8 of the Convention. It did not do so, and accordingly is not invalid. I hope it is clear that I do not decide this case on the basis that while accepting the decision is invalid, I would refrain from ordering *certiorari*, on the grounds that the outcome would inevitably be the same. Instead for the reasons I have tried to set out, I do not consider that the decision of the Minister was invalid.

**The Constitution**

**34.** I have read the judgments of MacMenamin and Hogan JJ. in draft on this aspect of the case. For my part I am prepared to accept that it is probable that the Constitution protects the same type of interests addressed by the Convention in the concept of private life protected by Article 8. In particular, I do not consider that the freedom to form associations guaranteed

by Article 40.6.1°(iii) is limited to a right to form unions or other formal associations. Murnaghan J. in the first case which considered this provision in *National Union of Railwaymen v. Sullivan* [1947] I.R. 77 expressed the right in notably broad terms: "each citizen is free to associate with others of his choice for any object agreed upon by him and them." Individual personal relationships form an important part of the development of the human person which the express rights in the Constitution seek to protect. The rights the Constitution protects can be seen as designed to permit the development of the human person in thought and conscience, in speech and expression and also in the personal relationships engaged in, particularly, but not limited to those of an intimate and family nature, as well as the more formal associations joined, or activities engaged in within the classic sphere of civil and political rights. Indeed, it can be said that more formal associations whether clubs or trade unions are worthy of protection precisely because they are more formal expressions of the associative impulse of human beings. There is, in my view, a significant resonance between the language of the decision of the ECtHR in which it is explained that the Convention protection of private life is "primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings" (*Botta v. Italy* App. No. 21439/93 (1998) 26 EHRR 241 at paragraph 32, and *Niemitz v. Germany* (1992) 16 EHRR 97) and the observations of Henchy J., in *Norris v. The Attorney General* [1984] I.R. 36, at pages 71-72:-

> "The essence of those rights is that they inhere in the individual personality of the citizen in his capacity as a vital human component of the social, political and moral order posited by the Constitution.
>
> Amongst those basic personal rights is a complex of rights which vary in nature, purpose and range (each necessarily being a facet of the citizen's core of individuality

within the constitutional order) and which may be compendiously referred to as the right of privacy…

There are many other aspects of the right of privacy, some yet to be given judicial recognition…

It is sufficient to say that they would all appear to fall within a secluded area of activity or non-activity which may be claimed as necessary for the expression of an individual personality, for purposes not always necessarily moral or commendable, but meriting recognition in circumstances which do not engender considerations such as State security, public order or morality, or other essential components of the common good."

While, therefore, it is clear to me that this is a zone in which Constitutional rights arise, the precise nature of those rights, their derivation, contours and limits are matters that require careful scrutiny and assessment.

**35.** However, I do not think it is necessary, or perhaps advisable, to seek to address the question in this case, whether the Constitution can be said to protect exactly the same rights as the Convention does under Article 8, and in exactly the same way. That, I think, would be to address the interpretation of the Constitution almost in the abstract, and to interpret the rights which it protects, laterally by analogy with the Convention, rather than vertically from the ground up, and driven by the concrete circumstances of a case in which it is necessary to do so. In this case, it is argued that constitutional rights are affected but it is accepted, and in any event, I would conclude, that whatever rights the Constitution protects and however they are deduced, they could not, on the facts of this case, have any discernibly distinct impact on the outcome of this case than would be reached by the application of the extensive jurisprudence under Article 8 of the Convention. There may be cases where it is necessary to consider the precise nature of the constitutional protection in the area which is described

as private life by the Convention. One such area may be if the validity of an enactment was challenged by reference to the Constitution. I think it is helpful to maintain the analysis of Convention and Constitution in separate channels, and to ensure that claims are analysed by reference to the distinct jurisprudence of each. There is a danger in an approach that asks whether the Constitution protects the same rights in the same way as the Convention. That would tend to cede the interpretation of the Constitution to the decisions, present and future, of the ECtHR, and since any interpretation of the Constitution takes place in the context of the domestic legal system there is also a risk of creating a sort of hybrid approach which neither system envisages. I should say, I do not consider that this is the result of my colleagues' judgments in this case, but it must be recalled that this Court is not the only court in which these issues arise and there is a possibility of confusion rather than clarity if the development of Constitutional interpretation were to proceed in this way more generally.

**36.** I have previously addressed the question of the circumstances in which a non-citizen is entitled to assert constitutional rights such as those under Article 40.6.1°(iii) and/or Article 40.3, which by their terms expressly relate to citizens (see, *NHV v. Minister for Justice and Equality* [2017] IESC 39, [2018] 1 I.R. 246 and extrajudicially, "International Aspects of the Constitution" [2018] 59 Ir. Jur. 1). In essence the basis upon which I consider non-citizens are entitled to assert the protection of constitutional rights lies in the guarantee of equality as human persons. In those matters where persons are essentially the same, they must be treated equally and citizenship will not be a relevant distinction. It is, however, manifest that there are areas in which citizens are different from non-citizens, and one such area is the right to enter the State and reside there. It is manifest, that the position of a citizen and non-citizen is different in this respect and difficult questions arise as to the extent to which the Constitution requires that rights of entry to the State be afforded or rights to resist removal might arise in the context of non-citizens seeking to challenge what is otherwise an

important aspect of the sovereignty established by the Constitution itself. Given the fact that Article 8 would provide a complete remedy for the applicant in this case, if successful, and however analysed the Constitution could not lead to a different result, I would prefer to leave the question of constitutional interpretation to a case in which that analysis could be said to be demanded.

**37.** I would, accordingly, dismiss the appeal.

# THE SUPREME COURT

**[Record no. 2021/64]**

**[2022] IESC 48**

**MK**

**Appellant**

**v.**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**Respondent**

**Judgment of Ms. Justice Iseult O'Malley delivered the 24th November 2022**

1. I do not propose to add anything substantive to the debate in this appeal. However, as the Court is divided on both the issues and the outcome, it may be helpful if I indicate my position.

2. I agree with all the other members of the Court that the sequencing of the decision made by the respondent in the appellant's case was flawed, insofar as it was based on the judgment of the Court of Appeal in *C.I. & Ors. v. The Minister for Justice, Equality & Law Reform* [2015] IECA 192, [2015] 3 I.R. 385 and the decision of the House of Lords in *R (Razgar) v. Secretary of State for the Home Department* [2004] UK HL 27, [2004] 2 AC 368.

3. I agree with the Chief Justice and with Hogan J. that the flaw, which is most fully explained in the judgment of MacMenamin J., does not have the effect in this particular case of invalidating the decision of the respondent. I would therefore not agree that an order of *certiorari* is necessary or appropriate.

4. An issue has been raised as to the potential role of Articles 40.1, 40.3 and 40.6 of the Constitution in the context of proposed deportations. Having regard to the particular circumstances in this appeal, I do not see that such considerations could add to the well-established principles relating to Article 8 of the European Convention on Human Rights in a way that would have any discernible impact on the appellant's case. I do not, therefore, consider it to be necessary to determine the inter-relationship between these provisions and prefer to reserve my position for a more appropriate case.

5. Accordingly, I would dismiss the appeal.