THE SUPREME COURT

Keane C.J.
Denham J.
Murray J.
McGuinness J.
Hardiman J.
Geoghegan J.
Fennelly J.
109/02 & 108/02

BETWEEN

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

APPLICANTS/APPELLANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT/RESPONDENT

BETWEEN

ANDERW OSAYANDE AND OSAZE JOSHUA OSAYANDE (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, FLORA OSAYANDE)

APPLICANTS/APPELLANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT/RESPONDENT

[Judgments by all seven judges; Keane C.J., Denham, Murray, Hardiman and Geoghegan JJ. dismissed the appeal; McGuinness and Fennelly JJ. would have allowed the appeal; the judgments were amended to include the names of the parties after a court ruling of 28.01.03]

JUDGMENT delivered the 23rd day of January 2003, by Keane C.J.

Introduction

The facts in these two cases, which were heard together in the High Court and this court, are not in dispute.

The first and second named applicants in the first case (hereafter "Mr. & Mrs. Lobe") arrived in the State on March 31st 2001 with their three children. All of them are nationals of the Czech Republic. At the time of her arrival, Mrs. Lobe was pregnant. An application having been made for asylum in this State, the applicants were informed by letter dated 24th July 2001 that a decision had been reached in accordance with Article 8 of Dublin Convention to transfer their application for asylum to the United Kingdom. An appeal was brought to the Refugee Appeals Tribunal from that decision and was rejected on the 29th August, 2001. Representations having been made by a solicitor on their behalf to the respondent (hereafter "the Minister") that Mr. and Mrs. Lobe and their children should not be deported because the applicant was in an advanced state of pregnancy, severely anaemic and unable to travel, they were informed on the 3rd October 2001 that they were required to present themselves to the gardaí on the 4th October 2001 to make arrangements for their removal from the State.

The present proceedings were begun on October 5th 2001. The sixth named applicant was born on the 2nd November 2001 in Galway. The proceedings were then adjourned in order to enable the applicants to make submissions to the Minister as to why the remaining applicants should not be deported in the light of the birth of the sixth named applicant in the State. By letter dated 20th December, they were informed that the Minister had decided to refuse the application for the reasons set out in a memorandum by Mr. John Lohan, a Principal Officer in the Immigration Division of his department dated the 19th December (hereafter "the Lohan Memorandum").

While it will be necessary to refer in more detail to that document at a later stage, it is sufficient at this point to say that the reasons given in the memorandum for recommending that the application be refused were:-

"- the length of time the family had been in the State – only nine months,

- *the Lobe family and Kevin Lobe can adapt to the family's return to the United Kingdom and the Czech Republic and that their lives or well being would not be endangered,*
- *the application of the Dublin Convention[1] to which Ireland is a party,*

[1] For the Dublin Convention, see pp 53/55 below.

- *the overriding need to preserve respect for and the integrity of the asylum and immigration systems."*

The first named applicant and the next friend in the second case are Nigerian nationals who arrived in the State with their daughter, Emmanuella on May 6th 2001. The first named applicant made an application for refugee status on May 15th in which he denied having resided in any country other than Nigeria or having claimed asylum in any country other than Ireland. This was not, in fact, the case: he had entered the United Kingdom on September 15th 1999 and sought asylum there on September 23rd 1999, which claim was refused on March 17th 2001. That refusal was not appealed.

The first named applicant arrived in Ireland approximately three weeks after having been refused asylum in the United Kingdom. Thereupon the staff of the Refugee Appeals Commissioner requested the authorities in the United Kingdom to receive the first named applicant and the next friend and their daughter in the United Kingdom in accordance with the provisions of the Dublin Convention, which those authorities agreed to do. The first named applicant having been notified of this, appealed the decision which was considered by the Refugee Appeals Tribunal and rejected by them on August 29th 2001. A deportation order was then made in respect of the first named applicant and, by letter dated October 2nd 2001, he was informed of that fact and

asked to present himself to make arrangements for his removal from the country.

On October 4th 2001, the next friend gave birth to the second named applicant in Castlebar. These proceedings were issued on the 5th October 2001 and were adjourned in order to enable a similar application to be made to the Minister as was made in the first case. That application was refused by the Minister on the 19th December 2001, again on the basis of the memorandum prepared by Mr. Lohan. The reasons given for recommending that the application be refused were identical to those given in the first case, save that there was no reason corresponding to the second reason given in the first case.

In the case of Mr. and Mrs. Lobe's application, the Lohan memorandum said that, in view of the fact that the deportation of the family could result in the removal of the minor applicant from the state in circumstances which could be interpreted as "a constructive deportation", the Minister should weigh up the rights of that Irish citizen against the needs of the common good. It said it was accepted that he was an Irish citizen and "may have rights to reside in the State". It also said that it would appear that the minor applicant had the protection of the Constitution in terms of guaranteeing him the right to the company, care and parentage of family/ parents. The memorandum went on

> "*However, against those factors are the need for the Minister to preserve the integrity of and respect for the State's asylum and immigration laws. The Lobe family have not been in the State for a lengthy period – they arrived in March 2001, a period of nine months. They applied for asylum in the State even though [the applicants other than the minor applicant] had already applied for asylum in the UK. That asylum claim in the UK was refused".*

Having referred to the fact that the State's right to expel or deport non-nationals was regarded as an aspect of the common good "related to the definition, recognition and protection of the boundaries of the State", the memorandum went on to state again that the maintenance and integrity of the immigration and asylum systems was a factor which the Minister was entitled to have regard to in this case. The memorandum continued

> *"In this context, the Minister is entitled to take into account the manner in which the family entered the State. The fact that the actions of the applicants in the proceedings are designed to circumvent the operation of the Dublin Convention, to which the State is a party, and to which it is the policy to apply the provisions, (sic) is a factor which the Minister should take into account."*

Having said that the deportation orders should not be revoked, but should be enforced, the memorandum stated that

> "*It should be presumed that the applicants will preserve the family unit on enforcement of the orders by taking [the minor applicant] with them, thereby preserving his right to the care and protection of his family as per article 41 of the Constitution.*"

The memorandum then went on to set out the reasons for the recommendations, which have already been quoted. A similar approach was adopted in the second case.

The proceedings, as originally instituted in the second case and as amended following the birth of the fifth named applicant in the first case, took the form of an application for leave to apply by way of judicial review for *inter alia* an order quashing the deportation order on the ground that the fifth named applicant in the first case and the second named applicant in the second case were minors and citizens of Ireland who were entitled to the company, care and parentage of their parents and siblings in the State, and that, in the result, the Minister was not entitled to deport the other members of his family. In addition, declarations were claimed that the Dublin Convention (Implementation) Order 2000 SI 343/2000 was *ultra vires* the Refugee Act 1996 as amended, but that challenge was not pursued in the appeal to this court.

By agreement, the application for leave to apply for judicial review was treated in the High Court as the application for judicial review itself. It was heard by Mr. Justice T.C. Smyth and on the 8th April 2002 he delivered judgment in both cases rejecting the applicants' claim. From his judgment and order, an appeal has now been brought to this court and, in view of the fact that a number of other cases in which the same issues arise are pending in the High Court, the appeal was given an expedited hearing in this court.

The Judgment in the High Court

In his judgment, the learned High Court judge summarised the contention on behalf of the applicants in both cases as being that they were a family recognised by the Constitution by virtue of one of them being a citizen of Ireland and that, as such a family, they enjoyed the rights acknowledged by the Constitution to exist in the case of the family and were entitled to the benefit of the guarantee in the Constitution by the State to protect and vindicate such rights. That guarantee, it was urged, would be meaningless if the State could deport the parents of Irish citizens who were still minors.

In considering that contention and the response on behalf of the Minister, the trial judge referred to the provisions of the Constitution concerning the family and a number of authorities of this court in which they had been considered. He then went on to consider in more detail the decision of the High Court and this court in **Fajujonu –v- Minister for Justice and Another** [2]. That case was also a case in which the rights of non- national parents and their children to continue to reside in the State, where three of the children had been born in Ireland and were in the result Irish citizens, were considered. He concluded, however, that **Fajujonu** was distinguishable from the instant cases, in that the family in that case had been resident in the State for what Finlay CJ described as "an appreciable time" and that in the instant cases, unlike **Fajujonu,** there was evidence of careful consideration having been given to whether the factors referred to in the Lohan Memorandum were of such a nature that the Minister was entitled to hold that they outweighed the constitutional rights of the Irish born children.

The trial judge was satisfied as a result that the Minister in both cases was entitled as a matter of law to reach the conclusion that he did and to make the deportation orders in question.

Submission of the Parties

[2] [1990] 2IR 151

On behalf of the applicants, Mr. Gerard Hogan SC submitted that the fifth named applicant in the first case and the second named applicant in the second case (hereafter "the minor applicants") had an unqualified right to reside in the State. That right arose by virtue of, and was protected by, Articles 2, 9, 40.1 and 40.3 of the Constitution. It was a fundamental, absolute and imprescriptible right of citizenship and it followed that, as Walsh J had observed in **Fajujonu,** citizens of the State, including the minor applicants, could not be deported.

Mr. Hogan further submitted that the minor applicants also had the right to the care and company of their parents in the State if, in the case of children of tender years, such a right was asserted on their behalf by its parents.

Mr. Hogan submitted that, while the minor applicants were citizens, they would be unable in practical terms to enjoy their right of residence in the State and their right to the care and company of the other members of the family in the State, unless their parents were also resident in the State. The deportation of the other members of their family, in those circumstances, constituted an attack on the rights of minors as members of a family identified in the judgments in this court in **In Re: JH, an Infant**[3], and **North Western Health Board –v- HW and CW**[4].

[3] (1985) IR 375
[4] [2001] 3 IR 622

Mr. Hogan further submitted that it had been authoritively decided by this court in **Fajujonu** that the parents of Irish citizens who were minors could only be themselves deported in exceptional circumstances associated with the common good. He urged that a general desire to maintain the integrity of the immigration system could not, on any view, constitute such a circumstance: there would have to be some specific factor associated with the parents concerned which could reasonably be regarded as rendering their continued presence in the State inimical to the common good, eg., the fact that they were likely to indulge in some criminal or anti-social activity. He said that this clearly emerged from the judgments of both Finlay CJ and Walsh J in that case: in the words of Finlay CJ it had to be a "grave and substantive reason associated with the common good."

As to the Dublin Convention, Mr. Hogan and Mr. Shipsey SC submitted that this could only be operated by the Minister in a manner which observed the rights of citizens acknowledged in the Constitution. In any event, it was not the case that the State was obliged by virtue of the convention to transfer the applicants, or any other person, to another convention country, although the State might well be obliged to accept the transfer of an individual from another convention country.

Mr. Hogan further submitted that the length of time for which the minor applicants or their parents had resided in the State could not be relevant for the purpose of determining whether they had the constitutional rights asserted on their behalf in the present proceedings. The reference by Finlay CJ in **Fajujonu** to the plaintiffs having resided for "an appreciable time" afforded no basis for the proposition that only citizens whose parents had resided in the State for an appreciable time were constitutionally entitled to reside there in the care and company of their parents. Any other view would lead to the startling and anomalous conclusion that an individual's rights of citizenship could be dependent, not on the fact of citizenship itself, but on the circumstances of other individuals.

On behalf of the Minister, Mr. Paul Gallagher SC accepted that the minor applicants were entitled to claim Irish citizenship. The issue which arose for determination in the High Court and this court was as to what extent the fact that a child is entitled to Irish citizenship necessarily confers an automatic right of residence in the State on the parents and siblings of that child.

Mr. Gallagher submitted that it was clearly established that the rights of individual citizens acknowledged by or conferred by the Constitution must, on occasions, yield to the requirements of the common good, which requirements were reflected in the fundamental right of the State itself to protect its

boundaries, citing the decisions of the High Court in **Osheku –v- Ireland**[5] and **Pok Sun Shun –v- Ireland** [6] and of this court in **Laurentiu –v- Minister for Justice**[7] and **In Re Article 26 of the Constitution and the Illegal Immigrants (Trafficking) Bill, 1999** [8]. He said that it was clear from the those decisions that the right of the State to deport non-nationals who had entered the State illegally and whose claim to be afforded asylum as refugees had been rejected was unaffected by the fact that their deportation might, in practical terms, have as its consequence the departure from the State of members of their family who were Irish citizens.

Mr. Gallagher further submitted that decision in **Fajujonu** was clearly distinguishable. In that case, the plaintiffs had been resident in the State for eight years at the time the case was heard in this court, during which time three children had been born to them, each of whom were Irish citizens. The judgments of Finlay CJ and Walsh J in this court all laid stress, he said, on the particular circumstances which had arisen in that case. The statutory context, moreover, in which the present cases fell to be decided, was entirely different: a corpus of law affecting immigrants and refugees had appeared on the statute book to which the Minister was obliged to have regard in reaching his decision.

[5] [1986] IR 733
[6] [1986] ILRM 593
[7] [1999] 4IR 27
[8] [2000] 2IR 360

Mr. Gallagher also submitted that the jurisprudence of the European Court of Human Rights was of no assistance to the applicants: it was clear that the cases decided by the Commission and the court clearly recognised that the family rights acknowledged by the European Convention of Human Rights and Fundamental Freedoms might, on occasions, have to yield to the right of the State to control the entry of non-nationals into its territory. He cited in support the decisions of the Commission in **Poku –v- United Kingdom**[9] and of the English Court of Appeal in **The Queen (ex parte Mahmood) –v- Secretary of State for the Home Department**[10].

Mr. Gallagher further submitted that the Minister was entitled, and indeed obliged, to take into account the obligations of the State under the Dublin Convention in determining whether to make the deportation orders now being challenged. The convention had been entered into by the states concerned to ensure that applicants for asylum were not referred successively from one member state to another without any acknowledgement by the member states of their competence to deal with the applications, resulting in the phenomenon sometimes called "refugees in orbit".

[9] [1996] 22 EHRRCD 94
[10] [2001] UKHRR 307

The Applicable Law

(a)The rights of the minor applicants as Irish citizens

Section 6 of the Nationality and Citizenship Act, 1956 provided as follows:

"(1) Every person born in Ireland is an Irish citizen from birth.

(2) Every person is an Irish citizen if his father or mother was an Irish citizen at the time of that person's birth or becomes an Irish citizen under subsection (1) or would be an Irish citizen under that subsection if alive at the passing of this Act.

(2) In the case of a person born before the passing of this Act, subsection (2) applies from the date of its passing. In every other case, it applies from birth.

(3) A person born before the passing of this Act whose father or mother is an Irish citizen, under subsection (2), or would be alive at its passing, shall be an Irish citizen from the date of its passing.

(4) Subsection (1) shall not confer Irish citizenship on the child of an alien who, at the time of the child's birth, is entitled to diplomatic immunity in the State."

This legislation was in force at the time when the minor applicants in these proceedings were born and is still in force. It is, accordingly, clear beyond argument, and accepted on behalf of the Minister, that they were and are Irish citizens and are entitled to whatever constitutional and legal rights flow from that status.

I am satisfied that, in these circumstances, Article 2 of the Constitution is of no relevance in these proceedings. As amended, it provides that

> *"It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage."*

It is unnecessary, for the purposes of this case, to determine what the effect, in purely legal terms, is of the amendment thus effected to Article 2 of the Constitution. It is difficult to conceive of any legislation which, prior to its enactment, could have been validly enacted by the Oireachtas purporting to deprive persons who were already Irish citizens of their citizenship. It is sufficient to say that the minor applicants in this case are and were Irish citizens

and their constitutional and legal rights as such citizens are no greater and no less than those enjoyed by all Irish citizens, whether born in Ireland or otherwise qualified in law to be Irish citizens, prior to the amendment of Article 2 of the Constitution.

Our law of nationality and citizenship, it will be seen, is based in part on what has been called the *jus soli*, a principle traditionally associated with common law countries under which nationality is based on birth within the state territory. This is in contrast to the civil law countries where the *jus sanguinis*, based on descent from a national has traditionally been of more significance. It is clear, however, that the two principles are not mutually exclusive and that the legal systems of some countries, including Ireland, incorporate both principles.[11]

Every citizen, including the minor applicants in the present case, enjoys, in general terms, the right not to be expelled from the State. It would seem, however, that, like so many other rights acknowledged by or conferred by the Constitution, this is not an absolute right. Irish citizens, as a matter of law, may be extradited to other countries to undergo trial on criminal charges where an extradition treaty exists between Ireland and the requesting country. The voluminous jurisprudence of recent decades on the topic of extradition gives no

[11] Brownlie, Principles of Public |International Law, 5th edtn, pp 391/2.

support to the proposition that the extradition by the State of its own citizens to other countries unconstitutionally abridges the right of those citizens to remain in the State. It is, however, clear and again accepted on behalf of the Minister that the State has no right to deport any Irish citizen, including the minor applicants in the present case.

In the case of adult citizens, it is, of course, a corollary of the right of citizenship that they are also entitled to, although not obliged to, reside in Ireland. The position of the minor applicants in the present case is, however, significantly different. At the time the claim was first made in these proceedings that they were entitled as a matter of legal right to reside in Ireland by virtue of their citizenship, they had only just been born. Infants of that age are incapable of making, still less articulating, any decisions as to where they will reside. The decision as to where they will reside will inevitably be taken by those in whose care they are at the relevant time, normally, of course, as in this case, their parents.

That consideration is of paramount importance when one is determining the nature of the rights claimed in this case on behalf of the minor applicants to have been infringed by the making of the deportation orders. Irish citizens who are adults, and not subject to any unusual constraints, can exercise a choice as to whether they will reside in Ireland or some other country. If, however, they are

under a legal constraint which effectively prevents them from exercising that right – as where they are in prison – the right is, at best, one that is in abeyance. [12] The position of children of the age of the minor applicants is significantly weaker than that of adult citizens who are in prison or otherwise constrained from exercising a choice of residence, since the children have never been capable in law of exercising the right and in practical terms, as distinct from legal theory, it may reasonably be regarded as a right which does not vest in them until they reach an age at which they are capable of exercising it and, it may be, of asserting a choice of residence different from that which their parents would desire.

A constitutional right which the minor applicants in this case undoubtedly enjoy is the right to be in the care and company of the other members of their families, including their parents and siblings, and that right is not contested in these proceedings. What is in contest is whether they have the constitutional right to that care and company in the State in circumstances where their parents have no legal right to reside in the State and can lawfully be expelled from the State. If there were no authority to the contrary, I would have little difficulty in reaching a conclusion that children in the position of the minor applicants in this case have no automatic constitutional entitlement to the care and company of

[12] Thus, in Murray and Murray v Ireland (1991) ILRM, 465, the right of a married prisoner to beget children, although recognised by the court as an unenumerated right , was described by both Finlay CJ and McCarthy J as being suspended or in abeyance while they were in custody.

their parents in the State for an indefinite period into the future simply by virtue of their having been born in the State.

Thus, it would seem to me that it cannot be said, as a matter of law, that, in a case such as the present, the parents of the minor applicants can assert a choice to reside in the State on behalf of the minor applicants, even if that could be said to be in the interest of the minor applicants. That presupposes that the minor applicants are, in law, entitled to choose where they reside. They are both factually and in law incapable of making such a choice and, if their parents were lawfully entitled to choose to reside in Ireland rather than in Nigeria or the Czech Republic - which they are not – the right of the minor citizens to reside with them in Ireland would derive, not from the fact that they are Irish citizens, but from their constitutional right to be in the care and custody of their parents.

I think it is helpful to consider in this context the approach adopted by Finlay P, as he then was, to the somewhat analogous right to travel as it affected young children in **The State (M) –v- The Attorney General** [13] . In that case, an unmarried woman and citizen of Ireland who had given birth in Ireland to a female child in October 1977 wished to go to Nigeria. The father of the child was a Nigerian national and both he and the mother were in agreement that it would be in the best interests of their child if she were to go to Nigeria where

[13] [1979] IR 73.

her grandparents were willing to provide a home for her. The mother's application, however, for a passport enabling the child to travel to Nigeria for that purpose was refused by the Minister for Foreign Affairs and the learned President was satisfied that the reason for the refusal was that, if the passport were granted, the Minister considered that he would effectively be aiding and abetting a breach of the adoption laws then in force. He went on to hold, however, that the right to travel outside the State was one of the unenumerated personal rights of the citizen guaranteed under Article 40 of the Constitution. The learned President continued as follows:-

> "*In the instant case, where I am dealing with a child who is under the age of one year and is, therefore, under the age of reason, such a personal right must be construed, in my view, in the same way as the courts have consistently construed the right of liberty of such child, that is to say, as being a right which can be exercised not by its own choice (which it is incapable of making) but by the choice of its parent, parents or legal guardian, subject always to the right of the courts in appropriate proceedings to deny that choice in the dominant interest of the welfare of the child. So construed, the right of travel constitutionally arising for this particular child on the existing legal provision for its welfare consists, in my view, of the right to travel with the approval or consent of its mother*

provided that such travelling, and the purpose of it, do not appear to conflict with the welfare of the child."

The learned President in that passage laid significant emphasis on the fact that the child in that case could not choose to travel to Nigeria. That fact, the constitutional right of her mother to travel to Nigeria and the absence of any challenge on the ground that it would not be in the welfare of the child to travel to Nigeria led him to the conclusion that the Minister had no right to frustrate the constitutional right of the mother to travel with her child to Nigeria by refusing to grant a passport to the child.

The contrast with the present case is clear. Not merely are the minor applicants incapable in law and in fact of choosing whether to reside in Ireland, Nigeria or the Czech Republic: their parents are incapable in law of choosing to reside in Ireland rather than the Czech Republic or Nigeria, a choice which would have as its necessary consequence the minor applicants residing in Ireland.

This view of the law – that adult non-nationals threatened with deportation cannot in general acquire a right to remain indefinitely in the State by purporting to decide on behalf of their minor children born within the State that they should reside in the State – has also been taken by the courts in the

United States. Arguments to the contrary were rejected in **Perdido –v- Immigration and Naturalization Service**[14]; **Acosta –v- Gaffney**[15]; and **Schleiffer –v- Meyers**[16]

In the second of these cases, two immigrants to the United States, who were natives and citizens of Colombia, and had been married in the United States, but had overstayed the period of their authorised visits, were the subject of deportation orders. The wife, who was pregnant at the time, was unable to travel, but following the birth of their daughter, the couple were found to be liable to deportation. They then applied for a stay of the deportation order asserting *inter alia* that its implementation would result in their daughter being unconstitutionally deprived of the equal protection of the laws which, it was said, was her right as a United States citizen. That claim succeeded in the District Court, but was rejected when an appeal was brought to the Court of Appeals for the Third Circuit. Delivering the opinion of the court, Judge Maris said:

> *"The constitutional right upon which [the daughter] relies, is somewhat broader than she describes it. It is the fundamental right of an American citizen to reside wherever he wishes, whether in the United States or abroad, and to engage in the consequent*

[14] [1969] US App. : (United States Court of Appeals for the 5th Circuit)
[15] [1977] US App.: (United States Court of Appeals for the 3rd Circuit)
[16] [1981] US App. : United States Court of Appeals, for the 7th Circuit).

> *travel. (**See <u>Schneider –v- Rusk</u>**, 377 US; **<u>Kent –v- Dulles</u>**, 357 US. It is the right to exercise a choice of residence, not an obligation to remain in one's native country whether one so desires or not, as is required in some totalitarian countries. In the case of an infant below the age of discretion, the right is purely theoretical, however, since the infant is incapable of exercising it. As the Court of Appeals for the Fifth Circuit pointed out in **<u>Perdido –v- Immigration and Naturalization Service</u>**, a minor child who is fortuitously born here due to his parents' decision to reside in this country, has not exercised a deliberate decision to make this country his home, and Congress did not give such a child the ability to confer immigration benefits on his parents. It gave this privilege to those of our citizens who had themselves chosen to make this country their home and did not give the privilege to those minor children whose non-citizen parents make the real choice of family residence…."*

The learned judge went on to point out that, as had been observed in the **<u>Perdido</u>** case, an infant of tender years cannot make a conscious choice of residence, whether in the United States or elsewhere, and merely wishes, if he or she can be thought to have any choice, to be with his or her parents. He said that, while it was true that the infant's parents could decide that it would be best

for her to remain in the United States with foster parents, if such arrangements could be made, that would be the decision of the parents, involving the custody and care of their child, taken in their capacity as her parents, and not an election by the child herself to remain in the United States. He continued:

> "*The right of an American citizen to fix and change his residence is a continuing one which he enjoys through his life. Thus while today [the daughter], as an infant 22 months of age, doubtless desires merely to be where she can enjoy the care and affection of her parents, whether in the United States or Colombia, she will as she grows older and reaches years of discretion be entitled to decide for herself where she wants to live and as an American citizen she may then, if she so choose, return to the United States to live. Thus, her return to Colombia with her parents, if they decide to take her with them, as doubtless they will, will merely postpone, but not bar, her residence in the United States if she should ultimately choose to live here".*

I would also accept, unless I was constrained by binding Irish authority to hold otherwise, that the law is the same in this jurisdiction. In particular, I would reject the proposition that the value of these decisions as persuasive precedents is significantly eroded by the absence of articles in the United States Constitution corresponding to those in our Constitution dealing with the rights

of the family. Those rights are upheld by courts throughout the civilised world irrespective of whether they are embodied in written instruments and I see no reason to deny to courts in other jurisdictions an appreciation of the importance of children being in the care and company of their parents and siblings, unless the legitimate requirements of society, including the welfare of the children themselves, require otherwise.

Whether there is Irish authority which compels the court to hold in the present case that the parents were capable in law of asserting such a right on behalf of infants in the position of the minor applicants is another matter. It is true, however, that in **Fajujonu,** where three of the children of the plaintiff, who was a non-national, had been born in the State, Finlay CJ said:

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

We were not invited by the Minister to overrule the decision of the Court in **Fajujonu.** Accordingly, if the dictum which I have just cited from the judgment of the learned Chief Justice formed part of the *ratio decidendi* of the

decision in that case, this court would be obliged to give effect to it. As Geogehgan J points out in his judgment, it is not entirely clear that Finlay CJ was intending in that passage to indicate his assent to the proposition that the non-national parents of young children born within the State can, by their decision, confer on such children a constitutional right to remain in the State in the company of their parents and children. If that were the effect of the passage, then, for the reasons I have already given, I would, with the greatest respect, decline to follow it, if I were free to take that course. Whether the dictum did form part of the ratio in **Fajujonu** is a matter to which I shall return.

As I have already noted, the minor applicants enjoy the constitutional right to be in the care and company of the other members of their families, including their parents and siblings. The right was defined by Finlay CJ, speaking for this court, in **In Re J.H., an infant.** as the right:-

> *"(a) to belong to a unit group possessing inalienable and imprescriptible rights antecedent and superior to all positive law(Article 41.s1);*
>
> *(b) to protection by the State of the family to which it belongs,(Article 41.s2);*
>
> *(c) to be educated by the family and to be provided by its parents with religious, moral, intellectual, physical and social education(Article 42.s1.)"*

It was also said by Finlay CJ, giving the judgment of the court in **The Adoption No.2 Bill 1987** [17], that

> "*the rights of a child who is a member of a family are not confined to those identified in Articles 41 and 42 but are also rights referred to in Article 40, 43 and 44.*"

Those principles were the subject of further discussion and elaboration in the decision of this court in **North Western Health Board –v- H.W. and C.W.** Since it is properly acknowledged on behalf of the Minister that the minor applicants in this case enjoy these rights, it does not seem to me to be necessary to consider them in any greater detail. I would, however, reiterate that, in my view, these rights are universal and not the preserve of any particular legal system. The articles in question reflect a philosophy which treats them as existing independently of the existence of civil society itself and as not being at the disposal of such societies.

(b) The Right of the State to Control Immigration

The inherent power of Ireland as a sovereign State to expel or deport non-nationals (formerly described in our statute law as "aliens") is beyond argument. In **Pok Sun Shun –v- Ireland**, Costello J, as he then was, said

[17] [1989] IR 656

"(the) State ..... must have very wide powers in the interest of the common good to control aliens, their entry into the State, their departure and their activities within the State."

In **Osheku –v- Ireland**, Gannon J said at p. 746:-

"*the control of aliens which is the purpose of the Aliens Act, 1935 is an aspect of the common good related to the definition, recognition and protection of the boundaries of the State. That it is in the interest of the common good of a State that it should have control of the entry of aliens, their departure and their activities and duration of stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual citizen, and the protection of the former may involve restrictions in circumstances of necessity on the latter. The integrity of the State constituted as it is for the collective body of its citizens within the national territory must be defended and vindicated by the organs of the State and by the citizens so that there may be true social order within the territory and concord maintained with other nations in accordance with the objectives declared in the preamble to the Constitution."*

This statement of the law by Gannon J was expressly approved of by this court in **Laurentiu –v- Minister for Justice**.

However, while the power to expel or deport non-nationals inheres in the State as a sovereign State, and not because it has been conferred on particular organs of the State by statute, it has, almost from the foundation of the State, been regulated by statute. In recent times, the relatively brief and draconian Aliens Act 1935 has been replaced by a new corpus of legislation which was a response by the Oireachtas to a number of new factors which had arisen: the greatly increased volume of immigration, the finding by the High Court, upheld on appeal by this Court, in **Laurentiu** that certain provisions in the Aliens Act 1935 had not survived the enactment of the Constitution and the necessity for the State to meet its obligations under international conventions dealing with the giving of asylum to refugees i.e., under the Geneva Convention and the Dublin Convention. There now exists an elaborate statutory framework under which non-nationals, such as the applicants, are entitled to have their claims for asylum status given fair consideration, which embodies an appeal procedure to an independent tribunal and which preserves the right of the applicants to have the relevant decisions judicially reviewed in the High Court, albeit subject to particular provisions designed to ensure the more expeditious processing of such applications.

It was suggested on behalf of the applicants in this case that, as there was no evidence in the High Court as to the numbers of illegal immigrants or the numbers of persons at present, or in recent years, claiming asylum as refugees, neither the High Court nor this court was entitled to have any regard to the factual context in which the relevant legislation was enacted and administrative decisions taken in the implementation of that legislation. However, Mr. Lohan, in an affidavit sworn by him in these proceedings said that applications for asylum in the State had increased from 424 in 1995 to 10,924 in 2000.

Even if that evidence were not available to the High Court and this court, I would have no hesitation in rejecting that argument. It cannot be right that this court should approach this case on the assumption, totally at variance with the facts known to us, that conditions in Ireland are as they were in the 1980's when there was a relatively high level of unemployment, many Irish people were emigrating to seek work abroad and there were relatively few immigrants or persons seeking asylum as refugees. I think it would be wrong for this court to approach the important issues which have arisen for resolution without having regard to the major changes in Ireland which have occurred over the past decade in this whole area and which have led, not merely to the enactment of the legislation to which I have referred, but to an ever increasing volume of litigation in the High Court solely concerned with the legal entitlements of illegal immigrants, many of whom, as they are entitled to do, pursue

applications through the statutory machinery to which I have referred claiming asylum as refugees.

The respective roles of the Oireachtas, the executive and the courts in this whole area must also be borne in mind. The manner in which States exercise their power to control immigration can range across the spectrum from an "open door" policy which would impose no restrictions whatever on the entry of non-nationals to a rigid policy of excluding wide ranges of non-nationals from entry, sometimes on an overtly racist basis. Ireland, in common with other member states of the European Union, has opted for neither of these extreme positions and the legislature and the executive have the difficult task of achieving a balance between the different interests and values which have to be taken into account. Many would wish to see the development in Ireland of a tolerant and pluralist society capable of accommodating immigrants from diverse ethnic and cultural backgrounds, because that is a desirable objective in itself, recognises the openness and generosity with which Irish emigrants in times past were received in other countries and, on a purely economic level, remedies serious shortages in the skilled and unskilled labour markets. At the same time, the legislature and executive cannot be expected to disregard the problems which an increased volume of immigration inevitably creates, because of the strains it places on the infrastructure of social services and, human nature being what it is, the difficulty of integrating people from very different ethnic and cultural

backgrounds into the fabric of Irish society. The resolution of these complex political, social and economic issues which, it need hardly be said, are not in any sense unique to Ireland, is entirely a matter for the Oireachtas and the executive. The function of the courts is to ensure that the constitutional and legal rights of all the persons affected by the legislation in question are protected and vindicated.

The effect of legislation regulating the exercise by the State of its power to expel non-nationals or refuse them entry on the constitutional rights of Irish citizens was considered in three important cases, all of which were decided at a time when the Aliens Act 1935 was the only legislation in force in this area.

The first of these cases is **Pok Sun Shun & Others –v- Ireland & Others**. The plaintiff in that case was a native of China who arrived in Ireland in 1978 and worked in a restaurant. As a result of what was described as a "serious incident" in 1979 he was informed by the Department of Justice that he would have to leave the country. Later that year he married the second named plaintiff: they had three children and, at the time of the hearing in the High Court, his wife was expecting a fourth child. No steps were taken by the authorities on foot of the earlier indication that he should leave the country and, on the contrary, he was given permits by the Department of Labour allowing him to continue to work. However, when, in 1981, he applied to the Minister

for a certificate of naturalisation and also made an application for permission to carry on business as a self employed person, both applications were refused. He was informed that he would have to leave the country, but a stay of a further three months was allowed to enable to let him wind up his affairs.

In the proceedings, a number of declarations were claimed on behalf of the plaintiffs, including declarations that the wife had a right under Article 41 to have her family unit protected and that the second named plaintiff, who was an Irish citizen, was entitled to have her family unit protected in its constitution and in particular to be allowed to cohabit with her husband and to reside within the State. A declaration was also sought that the first named plaintiff, as the lawful spouse of the second named plaintiff and father of the third and fourth named plaintiffs (the children), was entitled to the protection of the Constitution and in particular the provisions of Articles 9, 40, 41 and 42.

It was submitted on behalf of the plaintiffs that the statutory instruments purportedly made on foot of the Aliens Act 1935, as implemented by the Minister, could not validly trench upon the constitutional rights claimed on behalf of the parents and the children in that case. Costello J, as he then was, in holding that the plaintiffs were not entitled to the declarations sought, said:-

> "*I do not think that the rights given to the 'family' are absolute, in the sense that they are not subject to some restrictions by the State*

and, as [counsel for the State] has pointed out, restrictions are, in fact, permitted by law, when husbands are imprisoned and parents of families are imprisoned and, undoubtedly, whilst protected under the Constitution, these are restrictions permitted for the common good on the exercise of its rights".

In **Fajujonu**, Walsh J commented that

"*In **[Pok Sun Shun]** Costello J held that the rights given by the Constitution by the family are not absolute in the sense that they are subject to some restrictions by the State. He took as an example the fact that when a husband is imprisoned, or the parents of families are imprisoned, that these are restrictions permitted for the common good in the exercise of the State's rights, while admitting that the family still retains the protection of the Constitution. It does not appear to me that the comparison made by Costello J is a valid one. Imprisonment whether for a short or a long period of a parent or parents of families is in respect of crimes committed by the parent or parents as the case may be. The prosecution of and punishment for crime is indeed envisaged by the Constitution itself and it is applied irrespective of whether the offender is a citizen of Ireland or an alien and does not depend on whether the person resides in Ireland or not."*

I have considerable doubt as to whether Walsh J intended in that passage to convey that the constitutional rights of the family were absolute and could not under any circumstances be restricted by the State. That clearly is not the law and did not form part of the ratio of the decision in **Fajujonu**, since elsewhere in his judgment Walsh J makes it clear, as did Finlay CJ., that in that case a husband and wife could have been lawfully deported, giving rise to the possibility that the family unit would be broken up, if the Minister had given proper consideration to the factors referred to in the judgment. I do not read the reference by Costello J in **Pok Sun Shun** to imprisonment as being anything more than the citing of an instance in which the State are unarguably entitled to restrict the rights of the family by depriving the other members of the society of a parent, leading inevitably to the conclusion that the family rights in issue are indeed not absolute.

The second case is **Osheku & Others –v- Ireland**. The plaintiffs in that case were a husband and wife and their infant son. The husband was born in Nigeria and was not an Irish citizen. The wife and her infant son were. The husband arrived in Ireland in 1979 and informed an immigration officer at Dublin airport that he had come on holiday, that he would not stay in Ireland for more than a month and that he would not take up residence or undertake employment in Ireland. In the event, he remained in Ireland up to the time of

the hearing in the High Court in 1986, having married the second named plaintiff on the 26th June 1981. The infant was born on 4th June 1982. The husband had taken up employment in Dublin from time to time and attended night classes as a student.

The Gardaí appear to have become aware of the husband's presence in the State as an illegal immigrant in September 1981. In the course of correspondence which subsequently passed between the Department of Justice and the plaintiff's solicitor, it was stated on behalf of the plaintiffs that the husband was a night student in Bolton Street and that he was in receipt of unemployment assistance. In response, it was stated on behalf of the Minister that permission would not be given to the husband to remain unless he produced documentary proof of his ability to maintain himself and any dependants from his own resources. No such proof was, it would seem, furnished by the husband: the response to the Department's letter was the issuing of the proceedings in which a claim was made *inter alia* for a declaration that the Aliens Act 1935, the statutory instruments made thereunder and the Nationality and Citizenship Act 1956 were invalid having regard to the provisions of the Constitution. The plaintiffs also claimed an order restraining the Minister from deporting the husband from the State.

Gannon J rejected the claim for a declaration that the Aliens Act 1935 and the statutory instruments made thereunder were unconstitutional. It may be noted in passing that the submission subsequently successfully advanced in **Laurentiu** that the range of delegated legislation permitted to the Minister under the terms of the 1935 Act, was, in constitutional terms, impermissibly wide was not advanced in **Osheku.** However, as I have already noted, the statement of the law by Gannon J as to the inherent right of the State to control immigration into its territory was approved in **Laurentiu**. As to the claim made that, even assuming the validity of the legislation, the deportation of the husband from the State would violate the guarantees in the Constitution for the protection of marriage and the family, deriving in the case of the wife and infant from their Irish citizenship, the learned judge had this to say:-

> "*The constitutional guarantees for the protection of the marriage and the family are relied upon by all three plaintiffs, by the second and third named plaintiffs [the wife and son] by virtue of their citizenship, as the basis for their challenge to the authority conferred on the Minister for Justice by the legislature in his discretion to deport the first named plaintiff. The Constitution does not impose on the citizens a duty or obligation to remain resident within the State, nor does it impose on the State a duty to provide a place of residence within the State for every citizen."*

"*The essential basis for the declarations and orders sought in this action is the withdrawal by letter of 15th March 1983 of permission for Mr. Osheku's remaining in the State, thus rendering him liable at the discretion of the Minister for Justice to deportation. It is conceded that if and so long as Mr. Osheku remains resident in the State there is no interference with any of the constitutional rights asserted. It follows that if, in his discretion, the Minster should decide against deportation, (whether or not a prosecution for penalties should be taken) the question of whether the Aliens Act and orders are or are not consistent with the Constitution does not arise. Whether Mr. Osheku and his family will, if permitted lawfully so to do, remain in the State is so dependent upon many factors, including social and economic ones not yet fully considered, that their present declared intentions are not a sound basis for court proceedings and declarations."*

He went on to hold that

" An order made by the Minister for Justice deporting Mr Osheku, the first plaintiff, if made by him in the due exercise of the discretion vested in him by the Aliens Act, 1935, and the statutory orders made thereunder , would not infringe the constitutional rights of any of the plaintiffs,"

Gannon J, in the course of his judgment, also cited the passage I have already quoted from the judgment of Costello J in **Pok Sun Shun**.

Mr. Hogan SC in the present case submitted that the first passage I have quoted from the judgment of Gannon J in **Osheku** was disapproved of by Walsh J in **Fajujonu**. In **Fajujonu**, Walsh J, having also cited the same passage, went on:

> *"the conclusions of the learned Judge were to the effect that the parties would only enjoy the benefits of the protection and guarantees of the Constitution for so long as the Minister chose not to deport them, and if they were deported they would cease to have the benefit of the constitutional rights on the grounds that the Minister in making such an order would not be infringing their constitutional rights.*
>
> *It is not necessary for me in this case to offer any view on these expressions of opinion as to the constitutionality of the matters arising in* ***Osheku –v- Ireland*** *for the reason that the learned judge was of opinion that so many factors, including social and economic ones, were not as yet fully considered, that the present declared intentions of the parties were not a sound basis for court proceedings and the making of the declaration sought. It appears*

to me, however, that different considerations arise in the present case."

I do not think that Walsh J, in that passage, was disapproving, either expressly or by implication, of the passages I have cited from **Osheku**. In **Fajujonu**, in contrast to **Osheku**, the first named plaintiff had been offered employment and it was his prospective employer's application for a work permit in order to enable him to take up that offer which brought him to the attention of the Minster for Justice and led to the possibility of his being deported. Walsh J was clearly of the view that this was in contrast to the situation dealt with in **Osheku** where the husband was not employed and had declined to comply with a request from the Department of Justice for evidence as to his prospects of gaining employment.

There remains the decision in **Fajujonu**. The first plaintiff in that case was a citizen of Nigeria and was married to the second plaintiff, a Moroccan citizen. They came to live in Ireland at the end of March 1981 and it was accepted that they were at all stages illegal immigrants. In the High Court, Barrington J said that he was satisfied that, at all material times since he came to Ireland, the husband had been anxious and willing to work. The third named plaintiff was the first child of the marriage who, having been born in this country on 24th September 1983, was an Irish citizen.. In December 1983,

Dublin Corporation offered the husband and wife a house in Ballyfermot, Dublin where they were still residing at the date of the proceedings. They were popular members of the local community and the husband was offered employment with the Ballyfermot Sports and Leisure Complex. His prospective employers sought a permit for him to work as an alien from the Minister for Labour. At this stage the husband found himself in a situation, which, to use a well worn expression, could be described as Kafka like. The Minister for Labour, having consulted with the Department of Justice, informed the plaintiff that he could not be given a work permit, because he was an illegal immigrant. The Minister for Justice refused him permission to reside in the State, thereby confirming his status as an illegal immigrant, because he had been refused permission to work.

No deportation order had as yet been made, but, faced with this dilemma, the husband, wife and daughter instituted proceedings against the Minister for Justice, Ireland and the Attorney General in which they claimed orders restraining their deportation and declarations that they were entitled to reside in the State and that such of the provisions of the Aliens Act 1935 as purported to empower the Minister to deport them from the State were inconsistent with the Constitution.

In the High Court, Barrington J, having referred to the decision of Finlay P in **The State (M) –v- The Attorney General** went on:

> "*The present case appears to me to raise much more complex issues. I am prepared to accept that the child has, generally speaking, a right, as an Irish citizen, to be in the State. I am also prepared to accept as a general proposition that the child has the right to the society of its parents. But does it follow from this that the child has the right to the society of its parents in the State? If, for instance, the parents were to decide that they wish to emigrate to Australia could the child, as a general proposition, be heard to say that it did not wish to go to Australia and that, moreover it wished to have the society of its parents in Ireland".*

Having referred to the arguments advanced by counsel for the plaintiffs based on Article 41 of the Constitution, which were broadly similar to those advanced on behalf of the applicants in the present case, the learned judge went on

> "*In the present case the parents never had a right to live or to work in Ireland. The child clearly has a certain right to be in Ireland. She also has the right to the society of her parents. But it does not follow from this that she has a right to the society of her parents in Ireland. I do not think that the parents can by positing on their*

> *child a wish to remain in Ireland in their society confer upon themselves a right to remain in Ireland, such as could be invoked to override legislation passed by the Irish parliament to achieve its concept of what the common good of Irish citizens generally requires. I think this distinguishes the present case from* ***The State (M) –v- The Attorney General****. There the paramount issue was what the welfare of the child required. But the present case does not turn merely upon the rights of the child, it also raises the powers of the Oireachtas to control the immigration of aliens into the country."*

Barrington J then went on to point out that the arguments advanced by counsel for the plaintiffs in that case had been rejected by Costello J in **Pok Sun Shun** and Gannon J in **Osheku –v- Ireland** and declined an invitation from counsel to treat those authorities as wrongly decided. He accordingly held that the plaintiffs were not entitled to any of the reliefs claimed.

I should point out, parenthetically, that the proceedings in that case had been commenced by plenary summons in 1984 and were heard and determined by the High Court in November 1987.

An appeal was brought from the decision of the High Court and heard by this court on the 10th and 11th October 1989. It appears from the judgments in this court, which were delivered on 8th December 1989 that, since the institution of the proceedings in the High Court, two further children had been born in Ireland to the first and second named plaintiffs.

Judgments were delivered by Finlay CJ and Walsh J. Griffin J agreed with both judgments and Hederman and McCarthy JJ also expressed their agreement.

Finlay CJ, having set out the facts, said that it was clear from the pleadings in the High Court and the judgment of Barrington J that the plaintiff's case in the High Court was confined to a single issue, i.e., an assertion that the third plaintiff as a citizen of Ireland was entitled as an absolute right to remain resident within the State and have preserved for her the family of which she was a member as a unit of society within the State and to be parented by her parents within the State and that this was a right which could not be defeated by any order made by the Minister pursuant to the Aliens Act 1935. Having referred to the determination by Barrington J that the family and other constitutional rights of the third plaintiff were not absolute and could be restricted by the proper exercise by the Minister for Justice of the powers conferred on him under the Act of 1935, the learned Chief Justice went on:

> "*When the matter came before this court on appeal the case really made on behalf of the plaintiff…….. was not an assertion of the absolute right incapable of being affected by the provisions of the Act of 1935, but rather the assertion of a constitutional right of great importance which could only be restricted or infringed for very compelling reasons."*

Having said that the court had decided in the interests of justice to allow this case to be made, although not made in the court below, the learned Chief Justice summed up his conclusions as follows:

> "*I have come to the conclusion that where, as occurs in this case, an alien has in fact resided for an appreciable time in the State and has become a member of a family unit within the State containing children who are citizens, that there can be no question but that those children, as citizens, have got a constitutional right to the company, care and parentage of their parents within a family unit. I am also satisfied that prima facie and subject to the exigencies of the common good that that is a right which those citizens would be entitled to exercise within the State.*
>
> *"I am also satisfied that whereas the parents who are not citizens and who are aliens cannot, by reason of their having as members of their families children born in Ireland who are citizens, claim*

any constitutional right of a particular kind to remain in Ireland, they are entitled to assert a choice of residence on behalf of their infant children, in the interests of those infant children.

"Having reached these conclusions, the question then must arise as to whether the State acting through the Minister for Justice pursuant to the powers contained in the Aliens Act 1935, can under any circumstances force the family so constituted as I have described, that is the family concerned in this case, to leave the State. I am satisfied that he can, but only if, after due and proper consideration, he is satisfied that the interests of the common good and the protection of the State and its society justify an interference with what is clearly a constitutional right."

He went on to say that *"in the particular circumstances of a case such as this"* the Minister's power could only be exercised

"in the light of a full recognition of the fundamental nature of the constitutional rights of the family"

He was also of the view that the reason which would justify the removal of the family *"three of whom are citizens of Ireland"* from the State would have to be

> *"a grave and substantial reason associated with the common good."*

The learned Chief Justice then pointed out that there was no finding by the trial judge that the existence of *"important family rights in the children of this marriage"* had been ignored nor any finding that would support a careful consideration of those rights or

> "*a particular importance attached to them by reason of their constitutional origin."*

He added:

> "*In any event the position of the family itself, the exercise by it of its rights to remain as a family unit and the exigencies of the common good which may be affected by the continued residence in the State of the first and second plaintiffs, are all matters which must, of necessity, have been subject to at least the possibility, if not the probability, of very substantial change since this matter was investigated in 1984."*

The learned Chief Justice went on to say that, in those circumstances, he was satisfied that the protection of the constitutional rights which arose in the

case required fresh consideration by the Minister of the question as to whether the plaintiffs should be permitted to remain in the State. He added:

> *"I am, however, satisfied also that if, having due regard to those considerations and having conducted such inquiry as may be appropriate as to the facts and factors now affecting the whole situation in a fair and proper manner, the Minister is satisfied that for good and sufficient reason the common good requires that the residence of these parents within the State should be terminated, even though that has the necessary consequence that in order to remain as a family unit the three children must also leave the State, then that is an order he is entitled to make pursuant to the Act of 1935."*

The learned Chief Justice when on to say that he would dismiss the appeal but would give the plaintiff liberty to apply to the High Court in the action if they wished to challenge any further act or omission on behalf of the Minister with regard to the granting or refusing of a permit to them to remain in the country.

In his judgment, Walsh J, having said that it was abundantly clear that Irish citizens could not be deported said

> *"In my view, the first two plaintiffs and their three children constitute a family within the meaning of the Constitution and the three children are entitled to the care, protection and the society of their parents in this family group which is resident within the State. There is no doubt that the family has made its home and residence in Ireland."*

Having discussed the decisions in **Pok Sun Shun**, **Osheku** and **The State (Bouzagou) –v- Station Sergeant Fitzgibbon Street,** [1985] IR 426, Walsh J went on to refer to the particular facts of the instant case. Having observed that one of the reasons advanced for refusing the husband permission to stay in the country was that he was unable to support his family without assistance from the State, the learned judge went on:

> "*The reason he was unable to support his family was precisely because he was refused permission to work. Therefore in effect he was not being permitted to support his family within the State because he was not permitted to work. Such a position could not arise in respect of the support of his family if the parents were citizens and therefore to that extent the members of the family who were Irish citizens were suffering discrimination by reason of the fact that their parents were aliens. The question which arises therefore is, whether a family, the majority of whose members are*

> *Irish citizens, can effectively be put out of the country on the grounds of poverty. The dilemma posed for the parents by this attitude is that they must choose to withdraw their children, who are Irish citizens, from the benefits and protection of Irish law under the Constitution, or, alternatively, to effectively abandon them within this State, which would then be obliged to support them.*
>
> *"In view of the fact that these are children of tender age who require the society of their parents and when the parents have not been shown to have been in any way unfit or guilty of any matter which makes them unsuitable custodians to their children, to move to expel the parents in the particular circumstances of this case, would, in my view, be inconsistent with the provisions of Article 41 of the Constitution guaranting the integrity of the family."*

Having expressed his agreement with the opinion of the Chief Justice that the matter would have to be reconsidered by the Minister, bearing in mind the constitutional rights involved, he added

> "*In my view, he would have to be satisfied, for stated reasons, that the interests of the common good of the people of Ireland and of the protection of the State and its society are so predominant and so overwhelming in the circumstances of the case, that an action*

> *which can have the effect of breaking up this family is not so disproportionate to the aim sought to be achieved as to be unsustainable.*
>
> *"In the result, having regard to the considerations raised in the judgments delivered in this court, it is my opinion that no order need be made against the Minister and I would therefore dismiss this present appeal."*

Finally, I should refer to the provisions of the Dublin Convention which was implemented in Ireland by the Dublin Convention (Implementation) Order 2000 SI. No. 343/2000 made by the Minister for Foreign Affairs pursuant to the powers vested in him by S.22 of the Refugee Act 1996. The convention is described as a convention

> "*determining the State responsible for examining applications for asylum lodged in one of the member states of the European Communities."*

The preamble recites that the heads of State had regard to the objective of harmonising their asylum policies and that they had also considered the joint objective of an area without internal frontiers in which the free movement of persons should be ensured. The preamble recited that they were aware of the need, in pursuit of that objective,

> *"to take measures to avoid any situation arising with the result that applicants for asylum are left in doubt for too long as regards the likely outcome of their applications and [were] concerned to provide all applicants for asylum with a guarantee that their applications will be examined by one of the member states and to ensure that applicants for asylum are not referred successively from one member state to another without any of these States acknowledging itself to be competent to examine the application for asylum."*

Article 8 of the Convention provides that:

> "*Where no member State responsible for examining the application for asylum can be designated on the basis of the other criteria listed in this convention, the first member State with which the application for asylum is lodged shall be responsible for examining it."*

As already noted, it is not in dispute that Mr. Lobe and Mr. Osayande both applied to the United Kingdom for asylum before they travelled to Ireland and that the United Kingdom authorities have agreed to accept responsibility for Mr. and Mrs. Lobe and their children and Mr. and Mrs. Osayande and their children.

Conclusions

In effect, the case made on behalf of the applicants is that, where a married couple arrive in Ireland in circumstances which render them illegal immigrants and the wife gives birth to a child, the entire family are entitled to remain in Ireland at least until such time as the child reaches his or her majority, that this right derives from the Irish citizenship of the newly born child and the constitutional rights of such a child to the society and care of its parents and that it arises irrespective of the length of time which elapses between their arrival in the State and the birth of the child. It is claimed that the only qualification to which the exercise of those rights is subject is the liability of the non-national members of the family to be deported from the State where the Minister is of the opinion on reasonable grounds that they are engaged in activities inimical to the common good or are likely to be so engaged.

For the reasons I have already set out in the previous section of this judgment, I am satisfied that this submission rests on a misconception of the constitutional rights of the minor applicants and that I would not be prepared to accept it as being the law unless I was coerced by binding authority so to hold. It is strenuously contended, however, on behalf of the applicants that this is indeed the effect of the decision of this court in **Fajujonu**.

As Hardiman J observes in his judgment in this case, there is some difficulty in ascertaining the ratio of that decision. In his judgment, Finlay CJ undoubtedly laid emphasis on the constitutional rights of a family some of whose members were children and Irish citizens. He also, however, appears to have attached significance to the fact that the plaintiffs had resided for an appreciable time in Ireland. Walsh J, on the other hand, while clearly attaching importance to the fact that three of the children were Irish citizens treated the question for resolution as essentially being whether a family, the majority of whose members were Irish citizens, could be effectively expelled on the grounds of poverty.

It is also a notable feature of the judgments of Finlay CJ and Walsh J in **Fajujonu** that they contain no expression of disapproval of the statement of the law by Gannon J in **Osheku**: it is simply referred to in passing in the judgment of the learned Chief Justice and Walsh J confined himself to pointing out that different considerations arose in **Fajujonu** from those that arose in **Osheku**. As to **Pok Sun Shun –v- Ireland and Others,** it is again simply referred to in passing in the judgment of the learned Chief Justice. Walsh J, as I have already noted, questioned the validity of the use by Costello J in his reasoning of the imprisonment of a member of a family, but as I have already indicated, there must be considerable doubt as to whether he was suggesting that the view taken by Costello J – that the family rights relied on were not absolute – was wrong. Since that was clearly the basis on which

Costello J reached his conclusion in that case that the family rights in question could not override the constitutional right of the Minister to deport the applicant, I am satisfied that the judgments in **Fajujonu** cannot be read as questioning the correctness of the decision in **Pok Sun Shun**.

This is clearly of considerable importance since the statements of the law in those two cases are clearly irreconcilable with the legal proposition on which the applicants in this case have founded their argument, i.e., that the claimed right of the minor applicant to enjoy the society of their parents in Ireland cannot be infringed by the deportation of the other members of the families, unless there are specific reasons arising in their particular cases which would render the continued residence of the other members of the family in the State inimical to the common good. It is true that in **Pok Sun Shun**, there had been an incident in the past which might have provided a specific reason of that nature for the husband's deportation, but I do not infer from the judgment of Costello J that that played any part, let alone a decisive part, in the conclusions at which he arrived. In **Osheku**, Gannon J found that the conduct of the husband in relation to his continuing stay in Ireland had been deceitful in nature. Again, however, that does not appear to have been a decisive factor in the conclusions arrived at by the learned judge in that case and the judgments in **Fajujonu** also proceeded on the basis that the first and second named plaintiffs

had knowingly acted in breach of the regulations governing the arrival in the State of immigrants.

Even more striking, however, is the fact that not merely is there no disapproval in the judgments of Finlay CJ and Walsh J of the comprehensive statement of the law on the precise issues which have arisen in this case by Barrington J at first instance: the appeal from his judgment was unanimously dismissed.

In these circumstances, I am satisfied that **Fajujonu** is not an authority for the proposition advanced on behalf of the applicants in these cases. It is, however, an authority of this court for the proposition that, in the particular circumstances that arose in that case and which might, of course, similarly arise in other cases, the Minister was obliged to give consideration to whether, in the light of those circumstances, there were grave and substantial reasons associated with the common good which nonetheless required the deportation of the non-national members of the family, having as its inevitable consequence, either the departure of the entire family from the State or its break-up by the departure of the non-nationals alone with the consequent infringement of the constitutional rights of the Irish citizens who were members of the family. Since there was no evidence as to whether the Minister had taken those factors into consideration, the plaintiffs were given liberty to apply to the High Court in the event of his deciding to proceed with their deportation.

It can reasonably be inferred from the judgments that there were specific circumstances to which the court thought the Minister should have regard in **Fajujonu**, together with the constitutional rights of the family and any other matters relevant to their continued stay in the State which might come to the Minister's attention, i.e.

(1) the "appreciable time" (approximately eight years at the date of the hearing in this court) for which they had resided as a family in Ireland;

(2) the fact that the family had made its "home and residence" in Ireland;

(3) the fact that the first plaintiff had been offered employment, that the relevant authority was prepared to issue him a work permit and that the only ground on which a permit would not be issued was that the Minister in that case had refused to grant him permission to stay in Ireland.

Not one of those three factors is present in either of these cases. I am satisfied that, as found by the learned High Court judge, the decision in **Fajujonu** is, accordingly, entirely distinguishable and has no application to the facts of the present case.

I am, moreover, satisfied that, if the court in that case intended to lay down the proposition of law contended for by the applicants in these cases, it would have followed inevitably that, far from the appeal against the judgment of Barrington J being dismissed, the appeal would have been allowed and the Minister would have been restrained from deporting the non-nationals. As in this case, there was no indication in the judgments in either the High Court or this court that there were any specific grounds, peculiar to the plaintiffs, which could have led the Minister reasonably to form the opinion that their continued presence in the State would be inimical to the common good. No such evidence was adduced and no such argument to that effect was advanced on behalf of the Minister.

I am also satisfied that the decision in **Fajujonu** is distinguishable on another ground. As I have already noted, both the factual and statutory context in which the Minister is required to decide whether a deportation order should be made has altered radically since that case was decided. The executive are entitled to take the view, it being entirely a matter for them, that in the public interest immigrants seeking to make their home in this country should not be allowed to bring about a situation in which their applications are dealt with in priority to other applications (to the possible detriment of later applicants), by entering the State illegally and instituting what prove to be unfounded applications for refugee status. In particular, they are entitled to take the view

that the orderly system in place for dealing with immigration and asylum applications should not be undermined by persons seeking to take advantage of the period of time which necessarily elapses between their arrival in the State and the complete processing of their applications for asylum by relying on the birth of a child to one of them during that period as a reason for permitting them to reside in the State indefinitely. It must be emphasised that, whether the Minister is right in forming that view is not a matter for the courts: they do not exercise any appellate jurisdiction in respect of decisions by the Minister under the relevant statutory code. As in all applications by way of judicial review, the test for determining whether the Minister was entitled to make the orders of deportation in either or both of the present cases is whether the decision was so manifestly contrary to reason and common sense that it must be set aside by the High Court. I am satisfied in both cases that it was not.

I am reinforced in that view by some observations of Geoghegan J as a High Court judge in **Kweeder –v- The Minister for Justice, Ireland and The Attorney General** [1996] 1IR 381. In that case, the applicant was a Syrian national whose British wife had moved to this State and taken up employment. The applicant had been deported form the United Kingdom for having breached the conditions of his student visa by taking up part time employment. His application for an Irish entry visa having been refused, he applied to the High Court for an order quashing that refusal. One of the grounds relied on by the

respondents in resisting the application was that public policy required that the common travel area between the State and the United Kingdom should not be put in jeopardy. The applicant's wife admitted in her evidence that she and the applicant had a long term intention of returning to the United Kingdom.

In the course of his judgment, Geoghegan J said:

> *"I accept that the common travel area arrangements as between Ireland that the United Kingdom have been and are perceived by the general public to be of great advantage to this State. I therefore accept the submissions made on behalf of the Minister that this public policy is not merely legitimate but also fundamental…a single or individual instance of backdoor illegal immigration into the United Kingdom through initial entry into Ireland may not threaten the continuance of the common travel area, but an accumulation of such 'back door entries' would obviously threaten the continuance of the privilege. For that reason each individual instance of such backdoor illegal entry or probable backdoor illegal entry is a serious threat to the long-term continuance of the common travel area and it is a legitimate act of public policy to take the necessary steps to prevent each individual instance of it."*

I would respectfully agree with that approach. While the Minister must consider each case involving deportation on its individual merits, he is undoubtedly entitled to take into account the policy considerations which would arise from allowing a particular applicant to remain where that would inevitably lead to similar decisions in other cases, again undermining the orderly administration of the immigration and asylum system. Those considerations did not arise to anything like the same extent (if indeed they arose at all) at the time the **Fajujonu** case was decided and, so far as the report of the case goes, were not relied on in any way by the Minister.

I am also satisfied that the Minister was entitled to have regard to the provisions of the Dublin Convention which was not, of course, in existence at the time of the decision in **Fajujonu**, in reaching his decision that the applicants should be deported. While it was suggested that the convention does no more than enable a member state, in a case where an applicant for asylum has previously applied for asylum in another member state, to return the applicant to that other state so that his application for asylum may be considered by the State concerned, I am satisfied that this is an unduly reductive view of the convention. It is an important international instrument entered into by the contracting parties to ensure that a coherent system exists for the speedy processing of applications for asylum in the member states by specifying the particular states to which applications should be made in cases where an

applicant has applied for that status in more than one member state. The State were unquestionably entitled, in my view, to apply the provisions of the Convention so as to ensure that the applications for asylum were dealt with by the country whose responsibility it was to deal with those applications and which had accepted that responsibility . I should, however, add that even if the Dublin Convention had not arisen for consideration in this case – if, for example, the applicants had come directly from Nigeria or the Czech Republic to Ireland - my conclusion, for the reasons I have already given, would be the same.

There remains for consideration the dictum of Finlay CJ in **Fajujonu** to which I referred at an earlier stage. I had already indicated that, if it does bear the meaning attributed to it in the arguments on behalf of the plaintiffs, I would not be prepared to treat it as correctly stating the law unless it formed part of the ratio of the case... From the detailed summary which I have already given of the judgments in that case, it will be apparent that Walsh J – with whom Griffin J, McCarthy J and Hederman J agreed - did not rest his judgment on the proposition that the first and second named plaintiffs were entitled to assert a choice to reside in the State on behalf of their children. I am satisfied that the law on that matter was in that case correctly stated by Barrington J in his judgment at first instance and that the dictum of Finlay CJ, to the extent that it suggests a different view, did not form any part of the ratio of the decision in

this court. As I have already indicated, there must, in any event, for the reasons set out by Geoghegan J in his judgment, be some doubt as to whether that was what Finlay CJ intended to convey in that much debated passage.

I would dismiss the appeals in each case and affirm the order of the High Court.

THE SUPREME COURT

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

BETWEEN/ **No. 109/2002**

DAVID LOBE, JANA LOVEOVA, ALADAR LOBE
(A minor suing by his father and next friend, David Lobe)
LUKAS LOBE (A minor suing by his father and next friend, David Lobe)
and JANA LOBE (A minor suing by his father and next friend, David Lobe),
and KEVIN LOBE (A minor suing by his mother and best friend,
Jana Loveova)

Applicants/Appellants

and

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

Respondent

AND **No. 108/2002**

BETWEEN/

ANDREW OSAYANDE AND OSAZE JOSHUA OSAYANDE
(A minor suing by his mother and next friend, Flora Osayande)

Applicants/Appellants

and

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

Respondent

Judgment delivered on the 23rd day of January, 2003, by Denham J.

1. Migration

Over thousands of years waves of people have come ashore on the island of Ireland. However, the island found by those early migrants was very different from the Ireland of today. The differences included those of the landscape, society and governance. Tales of early refugees to Ireland are told in myth and legend. In pseudohistory they may be discovered also. Lebar Gabála[18] described the first invasion as by the relatives of Noah who had been refused entry to the ark before the flood. Today Ireland is not covered by great oak forests. Raths have been replaced by housing estates and apartment blocks. The Brehon law has been displaced by modern Irish law. The principles and law governing Irish society today come from the people and are to be found in the Constitution of Ireland, 1937, and the legislation of the Oireachtas. It is to that Constitution and law we must look to determine the issues of our times. The days when migrating people would sail long boats up an Irish river, pull the boat up the shingle, and set up home in Ireland, without recourse to a central government, are long gone. Today people who migrate to Ireland may arrive by many means but they must comply with the Constitution and the law.

2. Issue

The essence of the issue in these cases is as follows. Where a non-national married couple arrive in Ireland and a child is born to them, is the entire family entitled to remain in Ireland (or at least until the child reaches his majority) as a consequence of the Irish citizenship of the child and the constitutional right of the child to the care and company of his parents, no matter how long or short a time the parents and child have been in Ireland?

3. Two Appeals

The two appeals were taken together. Both cases require a decision on the facts balancing constitutional principles in circumstances where children are born in Ireland of parents who are non-nationals.

4. Points of law of exceptional public importance

[18] See The Irish National Origin-Legend: Synthetic Pseudohistory by John Carey, Quiggin Pamphlets, 1994.

On 12th April, 2002 the High Court (Smyth J.) refused the reliefs sought by the applicants in both cases. Pursuant to s. 5(3)(a) of the Illegal Immigrants (Trafficking) Act, 2000, the High Court certified that its decision involved points of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken to this court.

5. The Facts

The facts were not in dispute. Andrew Osayande is a Nigerian national who applied for refugee status in the State together with his wife and daughter in May, 2001. The Minister has determined that the claim of Andrew Osayande should be transferred to the United Kingdom pursuant to the Dublin Convention. That decision was made pursuant to the Dublin Convention (Implementation) Order, 2001. The respondent has served a deportation order on Andrew Osayande, but not on his wife who arrived in the State with him and claimed refugee status in the State.

Andrew Osayande's wife, with whom he resides, gave birth to Osaze Joshua Osayande, a son of the family, on the 4th October, 2001. By reason of his birth in Ireland Osaze Joshua Osayande is a citizen of the State. Andrew Osayande is thus the father of an Irish citizen and he wishes and intends to reside in the State. His wife has not been served with a deportation order and she wishes to reside in the State until she is compelled to leave. The respondent has expressed his intention to deport Andrew Osayande and had taken steps to do so prior to giving an undertaking not to do so pending the determination of these proceedings.

David Lobe, Jana Loveova, Aladar Lobe, Lukas Lobe, and Jana Lobe are Czech nationals who arrived in the State in March, 2001 and claimed refugee status. The Minister has determined that their claim should be transferred to the United Kingdom pursuant to the Dublin Convention. That decision was made pursuant to the Dublin Convention (Implementation) Order, 2001. The respondent has served deportation orders on the applicants. Jana Loveova, with whom David Lobe, Aladar Lobe, Lukas Lobe and Jana Lobe reside, gave birth to Kevin Lobe, a son of the family, on the 2nd November, 2001. Kevin Lobe, by reason of his birth in Ireland, is a citizen of the State. Thus David Lobe and Jana Loveova are the parents of an Irish citizen and they wish and intend to reside in the State. The respondent has expressed his intention to deport David Lobe, Jana Loveova, Aladar Lobe, Lukas Lobe and Jana Lobe and took steps to do so prior to giving an undertaking not to do so pending the determination of these proceedings.

The reasons given by the Minister for refusing the application not to deport David Lobe were:

(i) the length of time the family has been in the State (a matter of months);

(ii) the Lobe family can adapt to the family's return to the United Kingdom and the Czech Republic and their lives or well being would not be endangered.

(iii) the application of the Dublin Convention; and

(iv) the need to preserve respect for and the integrity of the asylum and immigration systems.

The reasons given in the case relating to the Andrew Osayande were similar except that the second ground was not given.

6. The Judgment of the High Court

Smyth J. held in Andrew Osayande & Osaze Joshua Osayande v. Minister for Justice, (Unreported, High Court, 8th April, 2002), that notwithstanding the very expansive range of reliefs sought in the elaborate grounds advanced in the documentation, that the case on presentation to the High Court reduced itself to two broad issues – constitutional and the Dublin Convention. He found that the rights invoked were:

(i) those of the citizen, the Irish-born child, (a) as an individual, and (b) as a member of a family unit; and

(ii) those of the family.

In his determination the learned High Court judge considered Fajujonu. He held, *inter alia*, that:

> "The Applicants' cases are clearly distinguishable from Fajujonu in the interval of time between the original determination and the consideration as to whether to insist on the matter of deportation. I am satisfied and find as a fact that the most up-to-date information was taken into account by the Minister and that the existence of the important constitutional rights of the Irish-born child and the family have not been ignored or brushed aside, and that there has been a careful consideration of those rights and a particular importance attached to them by reason of their constitutional origin; the memoranda clearly, by internal reference to Tab A, B and C, in particular (ie, the representations made on behalf of the Applicants dated 7th December 2001), and the consideration of the judgments in the cases of Osheku, Fajujonu, the referral of the Illegal Immigrants (Trafficking) Bill and the matter of PB & L."

The High Court refused the reliefs sought. However, pursuant to s. 5(3)(a) of the Illegal Immigrants (Trafficking) Act, 2000 the High Court certified that its decision involved points of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken to the Supreme Court.

7. The Appeal

Against the order and judgment of the High Court the applicants have appealed. Twenty six grounds of appeal were set out. However, these distilled down to the query as to whether the Minister may deport parents of an Irish citizen of tender years in the absence of overwhelming conditions. It was conceded that the parents had no right of residence absent the child.

8. Sovereignty

Ireland is a sovereign, independent state. It is sovereign in its land. An integral part of sovereignty is the government of all the people within its boundaries. The people within the State may have different status, capacity and social function. However, all persons are subject to the law. It is an important feature of sovereignty for a nation to control people who seek to enter and stay within the State. This is an aspect of government which is for the common good and for the protection of the nation. The nation is defended and vindicated by the organs of state. All powers of government derive from the people and are exercised by and on the authority of these organs of state, being the legislature, the executive and the judiciary. The necessity for the organs of State to control the entry of non-citizens to the State is well recognised in our law. In Osheku v Ireland [1986] I.R. 733 at p. 746 Gannon J. stated:

> "...
> That it is in the interests of the common good of a State that it should have control of the entry of aliens, their departure, and their activities and duration of stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter. The integrity of the State constituted as it is of the collective body of its citizens within the national territory must be defended and vindicated by the organs of the State and by the citizens so that there may be true social order within the territory and concord maintained with other nations in accordance with the objectives declared in the preamble to the Constitution."

This statement was endorsed by the Supreme Court in Laurentiu v. Minister for Justice, [1999] 2 I.R. 27 and in In Re Article 26 of the Constitution and the Illegal Immigrants (Trafficking) Bill, 1999 [2000] 2 I.R. 360.

The concept of sovereignty is evolving. Decisions have been made in many countries, including Ireland, to share sovereignty on certain issues. This may be illustrated in a number of ways. Policy decisions have been taken by the nation that sovereignty be shared on specific matters. Thus, human rights are recognised in transnational treaties and institutions. Further, Article 2 of the Constitution of Ireland, decided upon by the

people, is a consequence of the Belfast Agreement made between Ireland and the United Kingdom. Also, the Dublin Convention is a product of the European Union. The factual matrix as to immigration into Western Europe has resulted in States joining together and sharing sovereignty between their nations and the European Union on certain issues for mutual benefit. Thus the law and the Constitution reflect decisions on foreign policy and immigration made by the sovereign state for the nation itself and in some areas in conjunction with other sovereign states for transnational policy.

9. Constitution of Ireland

Under the Constitution of Ireland every person born on the island of Ireland is part of the Irish nation. Thus, a child born on the island of Ireland, its islands and seas, is entitled to Irish citizenship: Constitution of Ireland, Article 2. Other relevant rights under the Constitution are those protecting personal rights, family rights, and individual rights to the family. Specific relevant articles include:

Article 40.3.1.:

> "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."

Article 41:

> "1◦ The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
>
> 2◦ The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."

Article 42:

> "1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children."

10. Law - Statute

Section 6 of the Irish Nationality and Citizenship Act , 1956 provides:

> "(1) Every person born in Ireland is an Irish citizen from birth."

The law as to those who are not citizens has recently been modernised by the Oireachtas. Under Acts of the legislature a modern scheme has been established, an updated asylum and immigration system. It is a system

which provides to applicants rights of application, appeal and further consideration on humanitarian grounds. Applicants have entitlements under the system.

In essence the application in this case is an application to obtain the right to reside in Ireland irrespective of the scheme established. It is an application to by pass the scheme and to otherwise obtain rights. Thus the integrity of the system is in issue.

Over many decades the regulation and control of non-citizens was to be found in the Aliens Act, 1935. Today the modern legislative scheme provides a system for applications, hearings and appeals by non-citizens who wish to stay in Ireland. The scheme is provided, *inter alia*, in the Refugee Act, 1996, the Immigration Act, 1999, and the Irish Nationality and Citizenship Act, 2001.

The statutory law provides safeguards for applicants. Thus, for example, there are many factors which must be taken into account before a deportation order is made. The Immigration Act, 1999 provides that (subject to the prohibition of *refoulement*,
s. 5 Refugee Act, 1996 and the provisions of the Act), the Minister may, by a deportation order, require a non-national to leave the State. A deportation order may be made in respect of:

(a) a person who has served or is serving a term of imprisonment imposed on him or her by a court in the State,
(b) a person whose deportation has been recommended by a court in the State before which such person was indicted for or charged with any crime or offence,
(c) a person who has been required to leave the State under Regulation 14 of the European Communities (Aliens) Regulations, 1977 (S.I. No. 393 of 1977),
(d) a person to whom Regulation 19 of the European Communities (Right of Residence for Non-Economically Active Persons) Regulations, 1997 (S.I. No. 57 of 1997) applies,
(e) a person whose application for asylum has been transferred to a convention country for examination pursuant to section 22 of the Refugee Act, 1996,
(f) a person whose application for asylum has been refused by the Minister,
(g) a person to whom leave to land in the State has been refused,
(h) a person who, in the opinion of the Minister, has contravened a restriction or condition imposed on him or her in respect of landing in or entering into or leave to stay in the State,
(i) a person whose deportation would, in the opinion of the Minister, be conducive to the common good.

Where the Minister proposes to make a deportation order he or she must notify the person concerned of the proposal and the reasons for it. A person so notified may within fifteen working days make representations in writing to the Minister. The Minister shall, before deciding the matter, take into consideration any

representations made to him and notify the person of his or her decision. In determining whether to make a deportation order the Minister shall have regard to:-

(a) the age of the person;
(b) the duration of residence in the State of the person;
(c) the family and domestic circumstances of the person;
(d) the nature of the person's connection with the State, if any;
(e) the employment (including self-employment) record of the person;
(f) the employment (including self-employment) prospects of the person;
(g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions);
(h) humanitarian considerations;
(i) any representations duly made by or on behalf of the person;
(j) the common good; and
(k) considerations of national security and public policy, so far as they appear or are known to the Minister.

Thus the Oireachtas has provided for a modern and extensive system applicable to non-nationals who wish to stay in Ireland. It is this scheme, under the law and the Constitution, which is applicable to those who wish to apply to remain in Ireland today.

11. The Dublin Convention

The Dublin Convention is an illustration of an exercise of sovereignty by the State. It is an exercise clearly within the long established rights and duties of the State. It is an act of foreign policy by the State. It is also an illustration of an exercise of sovereignty which is becoming more frequent – a sharing of sovereignty amongst a group of nations for the benefit of the nations.

The Dublin Convention is an important factor for consideration by the Minister, when it is applicable. The Dublin Convention determines the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities. The objectives of the Convention include a common humanitarian tradition, the free movement of persons within the European Union, and the avoidance of delay in applications for asylum. The parties to the Convention agreed:

> ". . . in keeping with their common humanitarian tradition, to guarantee adequate protection to refugees in accordance with the terms of the Geneva-Convention of 28 July 1951, as amended by the New York Protocol of 31 January 1967 relating to the Status of Refugees, hereinafter referred to as the 'Geneva-Convention' and the 'New York Protocol' respectively;
>
> CONSIDERING the joint objective of an area without internal frontiers in which the free movement of persons shall, in particular, be ensured, in accordance with the provisions of the Treaty establishing the European Economic Community, as amended by the Single European Act;
> AWARE of the need, in pursuit of this objective, to take measures to avoid any situations arising, with the result that applicants for asylum are left in doubt for too long as regards the

> likely outcome of their applications and concerned to provide all applicants for asylum with a guarantee that their applications will be examined by one of the Member States and to ensure that applicants for asylum are not referred successively from one Member State to another without any of these States acknowledging itself to be competent to examine the application for asylum;
>
> DESIRING to continue the dialogue with the United Nations High Commissioner for Refugees in order to achieve the above objectives;
>
> DETERMINED to co-operate closely in the application of this Convention through various means, including exchanges of information,
>
> TO CONCLUDE THIS CONVENTION . . ."

Under the Dublin Convention the application of any non-citizen shall be examined by a Single Member State, determined in accordance with the criteria defined in the convention. There are a number of criteria set out. Article 7 provides that the responsibility for examining an application for asylum shall lie with the Member State responsible for controlling the entry of the non-citizen into the territory of the Member States. To this there are exceptions and qualifications but it is the primary provision. Under s. 22 of the Refugee Act, 1996 the Minister for Justice, Equality and Law Reform may make such orders as appear to him to be necessary or expedient for the purpose of giving effect to the Dublin Convention.

12. Case Law - Ireland

The issues of sovereignty, non-nationals and family rights under the Constitution have been addressed in previous cases. Those judgments are useful precedents. I have already referred to Osheku v Ireland [1987] I.L.R.M. 330 and the judgment of Gannon J. insofar as it considered the issue of national sovereignty and non-nationals. However, constitutional rights of the family were also in issue in that case. In Osheku the facts were that the plaintiff, a non-national, arrived in Ireland on the 11th June, 1979 and was permitted to land for one month provided he did not take up employment. In breach of the conditions he did remain in Ireland after the 11th July, 1979 and he did take up employment. On the 26th June, 1981 the plaintiff married and on the 4th June, 1982 a child was born. In August, 1982 the plaintiff ceased work and registered for social welfare unemployment assistance. On numerous occasions from January, 1980 the plaintiff was asked by the Minister to leave the country. A meeting was held between the parties in January 1982 when it was confirmed that the plaintiff by taking employment in the State was in breach of the condition of entry to the State. This was a ground for his proposed deportation. The plaintiff engaged a solicitor and there was a lengthy correspondence between his legal representative and the Minister. By letter dated the 15th March, 1983 the Minister informed the plaintiff that he could not remain in the State after the 30th April, 1983 unless he could produce evidence that

he could maintain himself and his dependents from his own resources. The plaintiff did not produce such evidence nor did he leave the country. The plaintiff then instituted proceedings claiming constitutional rights. The High Court (Gannon J.) at pp. 343/4 held of the plaintiff:

> "He cannot, in my opinion, by a marriage within the State recognised as lawful, acquire a status of citizenship nor immunity from the sanctions of the law in respect of his continued disobedience to the law. His marital status and the familial relations created by that lawful marriage can be recognised and protected by the State 'in its Constitution and authority' while applying to him sanctions for non-compliance with the law. In my opinion the prosecution of Mr. Osheku for offences committed contrary to the provisions of the Aliens Act 1935, or his deportation pursuant to the powers conferred on the Minister for Justice, if such be his determination in the exercise of his discretion, would not constitute an infringement of any of the constitutional provisions for the protection of marriage and the family.
> . . .
> The constitutional guarantees for the protection of the marriage and the family are relied upon by all three plaintiffs . . . as the basis for their challenge to the authority conferred on the Minister for Justice by the legislature in his discretion to deport the first named plaintiff. The Constitution does not impose on the citizens a duty or obligation to remain resident within the State, no does it impose on the State a duty to provide a place of residence within the State for every citizen. . . . It is conceded that if and so long as Mr,. Osheku remains resident in the State there is no interference with any of the constitutional rights asserted. It follows that if, in his discretion, the Minister should decide against deportation . . . the question of whether the Aliens Act and orders are or are not consistent with the Constitution does not arise. Whether Mr. Osheku and his family will, if permitted lawfully so to do, remain in the State is so dependent upon many factors, including social and economic ones not yet fully considered, that their present declared intentions are not a sound basis for court proceedings and declarations."

In Pok Sun Shun v. Ireland [1986] I.L.R.M. 593 the relationship between state sovereignty, and family rights was also addressed. Costello J. held at p. 596/7:

> In sub-paragraph (d), it is claimed that, 'the Aliens Order (SI No. 395 of 1946) and the Aliens (Amendment) Order (SI No. 128 of 1975) do not empower the Minister in view of Articles 40, 41 and 42 of the Constitution to control the duration of stay and/or engagement in business of the first-named plaintiff within the State and otherwise control or prohibit the movements within and/or departure from and re-entry into the State of the first-named plaintiff. There have been slightly different submissions made on this by counsel for the plaintiffs, and I think I should deal with them separately. Mr. Gaffney SC submitted on behalf of the plaintiffs that because of the very entrenched provisions of the family rights in the Constitution, these could not be trenched upon, in any way, by the State and, in particular, by the Aliens Order. He went so far as to answer a question I put, to say that if an alien landed in the State on one day and married the next day to an Irish citizen in the State, the State was required, by the Constitution, to safeguard the rights which were given to the family, and these could not be taken away by the Aliens Act 1935. In other words, the order made under the Aliens Act 1935 was unconstitutional. I cannot accept that view. I do not think that the rights given to the 'family' are absolute, in the sense that they are not subject to some restrictions by the State and, as Mrs. Robinson SC has pointed out, restrictions are, in fact, permitted by law, when husbands are imprisoned and parents of families are imprisoned and, undoubtedly, whilst protected under the Constitution, these are restrictions permitted for the common good on the exercise of its rights. It seems to me that the Minister's decisions and the Act, and orders made under it are permissible restrictions and I cannot hold that they are unconstitutional."

I am satisfied that this is a correct statement of the law. The rights given to the family are not absolute. There may be restrictions permitted for the common good.

In the submissions made in this case great reliance was placed by the parties on Fajujonu v. The Minister for Justice [1990] 2 I.R. 151. All parties referred in detail to Fajujonu. It was at the core of the High Court's decision. In summary, the facts of that case were that the first and second plaintiffs were Nigerian and Moroccan citizens respectively who were married in London in 1981. Shortly thereafter they moved to Ireland. The third plaintiff of the case was born in Ireland in September, 1983 and acquired Irish citizenship. The first two named plaintiffs did not inform the Minister that they were in Ireland. In December, 1983 Dublin Corporation allocated the first two plaintiffs a three bedroomed house. Two further children were born in Ireland and thus acquired Irish citizenship. The first plaintiff came to the notice of the Minister for Justice when seeking a work permit for employment in Ballyfermot. The Minister for Labour refused to grant him a permit because of his status as an unauthorised alien. The Minister for Justice requested the first two plaintiffs to make arrangements to leave the country and stated that one of the reasons they were being refused permission to stay was because the first plaintiff was unable to support the family without assistance from the State. The plaintiffs commenced proceedings seeking orders restraining their deportation and declarations that they were entitled to reside in the State. The High Court (Barrington J.) refused the reliefs sought. Barrington J. stated at pp. 156/7 *inter alia*, that:

> "The present case appears to me to raise much more complex issues. I am prepared to accept that the child has, generally speaking, a right, as an Irish citizen, to be in the State. I am also prepared to accept as a general proposition that the child has the right to the society of its parents. But does it follow from this that the child has the right to the society of its parents in the State? If, for instance, the parents were to decide that they wished to emigrate to Australia could the child, as a general proposition, be heard to say that it did not wish to go to Australia and that moreover it wished to have the society of its parents in Ireland.
> . . .
>
> It is clear from this that the Constitution does not contemplate the family as existing in isolation but regards it as living in a larger community or society in which the State has a role to play as the guardian of the common good. Moreover, Article 40 of the Constitution clearly contemplates that a citizen may under certain circumstances be deprived of his personal liberty, or even of his life, notwithstanding the fact that this may have tragic repercussions or innocent members of his family who may be deprived of his society and his support. In interpreting the Constitution it appears to me to be important to preserve the balance which the Constitution itself contemplates. Whatever the 'inalienable and imprescriptible' rights of the family may be, they hardly comprise the right to dictate the foreign policy of the State. It appears to me that the control of the circumstances under which aliens may live or work in Ireland and the making of arrangements for rights of free travel between this and other countries are peculiarly matters within the competence of the Oireachtas and the Government and that they are matters into which these courts should be slow to enter.

> In the present case the parents never had a right to live or to work in Ireland. The child clearly has a certain right to be in Ireland. She also has a right to the society of her parents. But it does not follow from this that she has a right to the society of her parents in Ireland. I do not think that the parents can be positing on their child a wish to remain in Ireland in their society confer upon themselves a right to remain in Ireland such as could be invoked to override legislation passed by the Irish parliament to achieve its concept of what the common good of Irish citizens generally requires.
> . . .
>
> In the circumstances it appears to me that the plaintiffs are not entitled to any of the reliefs claimed."

The plaintiffs appealed. The Supreme Court dismissed the appeal with no order as to costs, and the plaintiffs were given liberty to apply to the High Court in the proceedings (to include any appropriate amendment of proceedings) if they wished to challenge any further act or omission on the part of the Minister for Justice with regard to the granting or refusing of a permit to remain in the country. The Supreme Court, in two judgments, analysed the issues of the case. In effect the case went back to the Minister for Justice for reconsideration. It is clear that the court considered the facts in the Fajujonu case to be of critical importance. The length of time the applicants were in the State, the birth of the children in Ireland, the granting of a house to the applicants, were just three of the important factors in their favour. However, even given those facts, and the constitutional principles involved, the court refused the application and indicated that it was for the Minister to consider all the relevant facts.

Finlay C.J., at p. 163 concluded his judgment with the words:

> "In these circumstances, I am satisfied that the protection of the constitutional rights which arise in this case require a fresh consideration now by the Minister for Justice, having due regard to the important constitutional rights which are involved, as far as the three children are concerned, to the question as to whether the plaintiffs should, pursuant to the Act of 1935, be permitted to remain in the State. I am, however, satisfied also that if, having had due regard to those considerations and having conducted such inquiry as may be appropriate as to the facts and factors now affecting the whole situation in a fair and proper manner, the Minister is satisfied that for good and sufficient reason the common good requires that the residence of these parents within the State should be terminated, even though that has the necessary consequence that in order to remain as a family unit the three children must also leave the State, then that is an order he is entitled to make pursuant to the Act of 1935. The fact that he is so entitled does not, in my view, render the Act of 1935 inconsistent with the Constitution. There are no grounds, in my view, on the facts proved in this case nor arising from the attitude taken on behalf of the Minister in this case which would warrant this court in concluding that the Minister and his officers would carry out the functions which now remain to be carried out by them pursuant to the Act of 1935 otherwise than in accordance with fair procedures and having regard to the rights which have been identified in the judgments of this court."

Griffin J. stated that he agreed with the judgments of Finlay C.J. and Walsh J., Hederman J. and McCarthy J. agreed.

I am satisfied that the kernel of the Fajujonu decision is the test set out in the above quoted paragraph of the Chief Justice. There must be an appropriate inquiry as to the facts and factors affecting the family in a fair and proper manner. To deport the plaintiffs the Minister should be satisfied that for good and sufficient reason the common good requires that the residence of the parents within the State should be terminated, even though it has the necessary consequence that in order to remain as a family unit the children must also leave the State.

Important factors relevant to the judgments of the Supreme Court in Fajujonu were as follows: (a) The Supreme Court did not hold that the learned trial judge had been in error in his judgment. Finlay C.J. referred to it as 'the very careful judgment of Barrington J.' (b) The appeal proceeded on grounds different to those argued in the High Court. Finlay C.J. explained the situation at p. 161-162:

> "The decision of Barrington J. was that whilst he clearly recognised and accepted the existence of constitutional rights in the third plaintiff, arising from her citizenship of the State, that on the authorities which he reviewed and in particular, having regard to the decisions in the High Court of Gannon J. in *Osheku v. Ireland* [1986] I.R. 733 and by Costello J. in *Pok Sun Shun v. Ireland* [1986] I.L.R.M. 593 and his own decision in *The State (Bouzagou) v. Station Sergeant, Fitzgibbon St.* [1985 I.R. 426, that the family and other constitutional rights of the third plaintiff were not absolute and could be restricted by the proper exercise by the Minister for Justice of the powers conferred on him under the Act of 1935. It was on that basis that the learned trial judge dismissed the plaintiffs' claim.
>
> When the matter came before this Court on appeal the case really made on behalf of the plaintiff by Mr. McDowell was not an assertion of the absolute right incapable of being affected by the provisions of the Act of 1935, but rather the assertion of a constitutional right of great importance which could only be restricted or infringed for very compelling reasons. Notwithstanding the fact that this was not the case which had been made in the court below, and notwithstanding the fact that it is difficult to fit it comfortably within any of the grounds of appeal which were contained in the notice of appeal, in the interests of justice this Court considered this submission and argument and the reply of the respondents to it."

(c) The appeal was dismissed by the Supreme Court, albeit with a view to the Minister reconsidering the facts. (d) The decision was facts based. (e) The facts of Fajujonu were considered very significant, these included: (i) the fact that applicants had been in the State for many years, (ii) three children of the family had been born in Ireland, (iii) the applicants had made a home in Ireland, (iv) the husband had an offer of a job. (f) Further, Fajujonu was decided under the Aliens Act, 1935, that is prior to the modern legislative scheme which gives more extensive procedures and protection to an applicant. (g) Finally, the Dublin Convention came into existence subsequent to Fajujonu and this had no relevance to Fajujonu but is applicable to the cases now before the court.

Fajujonu was a facts based complex judgment. It may be that on occasion a wrong view has been taken of the *ratio decidendi* of that case. It may be that on an erroneous view it was considered to be a route to take as a short cut through the system, that it was used to undermine the integrity of the system.

I am satisfied that the learned trial judge in this case was correct to distinguish Fajujonu. I would affirm his decision. Fajujonu was a decision on the facts of the case. It did not alter the law as previously outlined in common law in Ireland.

13. Case Law - elsewhere

This balance to be achieved between family rights and immigration controls is a matter which has been subject to litigation throughout the States of the European Union, the Court of Justice of the European Communities, the European Court of Human Rights, and other courts. For example, in the United Kingdom in The Queen ota Mahmood v. SSHD [2001] UKHRR 307 the issues were considered. Lord Phillips held, at p. 329:

> "(55) From these decisions I have drawn the following conclusions as to the approach of the Commission and the European Court of Human Rights to the potential conflict between the respect for family life and the enforcement of immigration controls:
>
> (1) The State has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.
> (2) Article 8 does not impose on a State any general obligation to respect the choice of residence of a married couple.
> (3) Removal or exclusion of one family member from a State where other members of the family are lawfully resident will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family.
> (4) Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a State if the circumstances are such that it is not reasonable to expect the other members of the family to follow the member expelled.
>
> . . .
>
> (5) Whether interference with family rights is justified in the interests of controlling immigration will depend on:
>
> (i) the facts of the particular case and
> (ii) the circumstances prevailing in the State whose action is impugned."

While our constitutional framework is different, this is a useful analysis of the law in a neighbouring jurisdiction and indicates a balancing of rights between State and family. That family rights are not absolute according to the European Convention for the Protection of Human Rights and Fundamental Freedoms was made clear in Poku v. United Kingdom, 22 E.H.R.R. CD 94. At CD 97 the Commission recalls:

> ". . . according to its established case law that, while Article 8 of the Convention does not in itself guarantee a right to enter or remain in a particular country, issues may arise where a person is excluded, or removed from a country where his close relatives reside or have the right to reside . . .
> However, the Commission notes that the State's obligation to admit to its territory aliens who are relatives of persons resident there will vary according to the circumstances of the case. The Court has held that Article 8 does not impose a general obligation on States to respect the choice of residence of a married couple or to accept the non-national spouse for settlement in that country (ABDULAZIZ, CABALES AND BALKANDALI judgment (1985) 7 E.H.R.R. 471, para. 68). The Commission considers that this applies to situations where members of a family, other than spouses, are non-nationals. Whether removal or exclusion of a family member from a Contracting States *(sic)* is incompatible with the requirements of Article 8 will depend on a number of factors; the extent to which family life is effectively ruptured, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e.g. history of breaches of immigration law) or considerations of public order (e.g. serious or persistent offences) weighing in favour of exclusion (see, e.g. Nos. 9285/81. Dec. 6.7.82., D.R. 29 p. 205 and 11970/86, Dec. 13.7.87. unpublished)."

14. <u>Decision.</u>

The kernel of these cases requires a decision balancing rights of the Nation, of individuals and of the family unit. Counsel for the applicants queried whether the Minister for Justice, Equality and Law Reform may deport parents of an Irish citizen of tender years in the absence of overwhelming conditions. Do the children have a constitutional right to have the company and care of their parents in Ireland given their age?

(1) <u>Personal Rights</u>

The children in these cases have personal rights. However, they are not absolute rights. They are rights which have to be weighed to achieve a proportionate decision. In <u>Osheku v. Ireland</u> [1986] I.R. 733, at p. 746, Gannon J. held:

> "It seems to me to follow that personal rights guaranteed under the Constitution are not so absolute as to be capable of being considered entirely independently of the overall provisions of the Constitution. The personal liberty of the citizen is probably the greatest of the fundamental freedoms. It must be in the interests of social order and the common good from time to time in individual cases to restrict the freedom of movement of a citizen within the State, as for instance by imprisonment or hospitalisation. This necessity may prevail over the related constitutional rights of members of the family of the individual concerned notwithstanding the recognition in the Constitution of the family as:
>
> > '. . . the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law . . .'
>
> and
>
> > '. . . as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.'
>
> (See Article 41.1.1◦ and 2◦.)"

I would affirm and apply such an approach. Personal rights guaranteed under the Constitution are not absolute, social order and the common good may require restriction of such rights.

(ii) Citizens

The Irish citizenship of the children is not contested. The right arises both under legislation, the Irish Nationality and Citizenship Act, 1956 s. 6, and the Constitution of Ireland, Article 2. The children are Irish citizens and this is a benefit, a property, they have and may utilise during their lives. However, the fact of citizenship does not of itself resolve the issues for determination.

(iii) Right of Residency

I am satisfied that the children born in Ireland have a right of residence in Ireland. As the children in these cases are of very tender years this right may be asserted by their parents. However, the fact that they may reside in Ireland does not resolve the cases. The decision as to where the children reside may not be made by the children – they are of very tender years. Such a decision, of family residency, is usually taken by the parents of children. The parents' decision is determinative in relation to the children. While decisions in relation to the child are made by the parents, parental decisions are subject to the law of the land. Thus, the parents in these cases, who are not Irish citizens and have no right of residency in Ireland, cannot themselves decide to be Irish citizens or decide to reside in Ireland. Such decisions are for the appropriate governmental authorities to make in accordance with law.

(iv) Right to care and company of parents

The children have a right under the Constitution to the society, the care and company of their parents. The rights of the child as a member of a family were described in

Re J.H. (inf.) [1985] I.R. 375. Finlay C.J. held, at page 394, that an infant had the following rights as a member of a family:-

> "(a) to belong to a unit group possessing inalienable and imprescriptible rights antecedent and superior to all positive law (Article 41, s.1);
> (b) to protection by the State of the family to which it belongs (Article 41, s.2) *(sic)*; and
> (c) to be educated by the family and to be provided by its parents with religious, moral, intellectual, physical and social education (Article 42, s. 1).

It is presumed that the welfare of a child is best met in the family. This is a presumption which is rebuttable, but it is a presumption based on fundamental principles laid down in the Constitution. This right of the child to the society, and care and company of parents, may be protected by residence elsewhere. The parents may decide to reside outside Ireland and bring their children with them. Thus the right of the child to the care and society of parents may be protected outside this jurisdiction.

(v) Rights to the Family

The family is the fundamental unit group of our society. It has a special place recognised and enhanced by the Constitution. The family benefits from the rights and guarantees established in Articles 41 and 42 of the Constitution. The decisions in families with young children are made by parents. In North Western Health Board v. HW and CW [2001] 3 I.R. 622 at p. 722 I stated:

> "The Constitution clearly places the family as the fundamental unit of the State. The family is the decision maker for family matters – both for the unit and for the individuals in the family. Responsibility rests fundamentally with the family. The people have chosen to live in a society where parents make decisions concerning the welfare of their children and the State intervenes only in exceptional circumstances."

However, the rights of the family are not absolute. They have to be determined in balance with other conflicting rights and principles, in accordance with constitutional principles. Thus a citizen may be imprisoned by a court under the law and separated from his family. The family, the convicted person, and all members of the family, suffer as a consequence of the separation. But the separation is constitutionally valid. In other words for good legal reasons decisions may be made by courts which result in separating families.

The family is the fundamental unit group of the State but the State governs, not the family. The rights of the family are not absolute. The State by its laws, made for the common good, may so order society as to restrict family life in Ireland. The family is the primary unit group – but it is a unit of the State. The State may make appropriate laws which may impinge upon the family for the common good.

The Constitution of Ireland contemplates a balance of rights, of persons and of organs of the State. Thus the State determines the foreign policy of the nation, and this may include agreed European Union policy. Historically and constitutionally foreign policy is a matter for the executive and the legislature. The courts

protect and vindicate constitutional rights. However, such rights are not absolute. They are subject to the law and the Constitution, to matters such as public order, the common good and proportionality.

In these cases the two minor children are citizens of Ireland. I am satisfied that as a consequence they are entitled to reside in Ireland. They also have the right to the society, the care and company of their parents. However, the rights of the children are not absolute. They are protected in a proportionate fashion. It does not follow from the rights of citizenship and residency of a minor child that he has a right to the society, the care and company of his parents in Ireland. Nor does it follow that the family of such a child as a unit has, or the parents or siblings have, a right to reside in Ireland.

The applicants laid great emphasis on the judgments in Fajujonu. It is clear from that case that the court regarded the facts of that case as critical. Even then the court refused the declarations sought. However, it is clear that in any Ministerial decision in that case the issues such as the length of time the plaintiffs were in Ireland, the fact that the three children had been born in Ireland, the fact that the plaintiffs had been offered a house by Dublin Corporation, amongst others, were all weighty factors for the Minister to consider.

These cases are very different. First, the facts and circumstances are very different. Secondly, these cases fall for analysis at a different time, they are to be analysed under a different legislative scheme; a legislative scheme under which the applicants may apply and appeal, a scheme giving to the applicants more rights than existed previously. Thirdly, the State is now a party to the Dublin Convention.

The citizenship of the child is recognised and protected. However, it is not a factor which overrides all else. The family of the child is still a unit. But the rights given to the family are not absolute. There are restrictions permitted for the common good. Other factors, such as the fact that the members of the family are non-nationals, their history, social and economic factors, and their status in the immigration process, and foreign policy, are all relevant.

The family unit is the fundamental unit group of society. It may make decisions for its benefit. The parents make decisions for the benefit of the unit and the children. However, the unit itself is subject to the Constitution

and the law and to restrictions established in law and the Constitution for the common good. The Constitution underpins a balanced society in which decisions should be determined with proportionality.

15. Standard of Review on Judicial Review

The standard of review on the judicial review in the High Court was pursuant to State (Keegan) v. The Stardust Victims Compensation Tribunal [1986] I.R. 642 and O'Keefe v. An Bord Pleanala [1993] 1 I.R. 39 at 76. No question was raised before this court as to the applicability of such a test. Consequently the standard of judicial review was not an issue on this appeal. In recent years the applicability of this test to cases such as this has been queried. In Z v. Minister for Justice and Ors. (Unreported, Supreme Court, 1st March, 2002), in concurring with the judgment of McGuinness J., I agreed that further consideration must await a fuller argument on the issue of the test to be applied in judicial review of cases of this type. The degree of review in cases where a decision of a public authority may interfere with a fundamental right of a person was not before this court in these appeals and I await a full argument on the issue.

16. Conclusion

I am satisfied that the learned trial judge correctly distinguished Fajujonu and refused the relief sought. I would affirm the order and judgment of the High Court.

The Minister is obliged to consider the facts of each case by an appropriate inquiry in a fair and proper manner as to the facts and factors affecting the family. If the Minister is satisfied for good and sufficient reason that the common good requires that the residence of the parents within the State should be terminated, even though that has the necessary consequence that in order to remain a family unit the child who is an Irish citizen must also leave the State, then that is an order he is entitled to make. The child has rights of citizenship and as a consequence he or she also has rights of residence in Ireland. He or she also has the right to the society, care and company of his or her parents. However, it does not flow from the rights of the child that the family or parents and siblings of Irish children have the right to reside in Ireland. It is for the Minister to weigh the factors in a fair and just manner in each case in accordance with the law and the Constitution. The Minister may deport parents if he is satisfied that for good and sufficient reason the common good requires that the residence of the parents within the State should be terminated, even though that has the necessary consequence that in order to remain a family unit the child who is an Irish citizen must also leave the State. It is appropriate in balancing all

the factors of a case to place weight on the time factor, the integrity of the immigration system and the Dublin Convention.

Even if the children do not reside in Ireland they retain their rights as citizens of Ireland. They retain this property, this right, and may benefit from it, for example at a later date by residing in Ireland, by obtaining an Irish passport, by voting, etc. The fact that they are Irish citizens may benefit not only themselves but their descendants.

In conclusion, the Irish citizenship of a minor child does not give rise to an absolute right to have his or her family, parents or siblings, reside in Ireland. Reasons by the Minister for refusing not to deport the family of an Irish citizen of tender years will depend upon the circumstances of each case but may include: (a) the length of time the family has been in the State; (b) the application of the Dublin Convention; and (c) the overriding need to preserve respect for and the integrity of the asylum and immigration system.

For the reasons given in this judgment I am satisfied that the appeals should be dismissed and the orders of the High Court affirmed.

THE SUPREME COURT

Record No. 109/02 108/02

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

BETWEEN

DAVID LOBE, JANA LOBE, ALADAR LOBE (A MINOR SUING BY THIS HIS FATHER AND NEXT FRIEND, DAVID LOBE) JANA LOBE (A MINOR SUING BY HIS FATHER AND NEXT FRIEND, DAVID LOBE) AND KEVIN LOBE (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, JANA LOVEOVA

APPLICANTS/APPELLANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

BETWEEN

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

APPLICANTS/APPELLANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment delivered the 23rd day of January, 2003 by Murray, J.

The State may, for reasons associated with the interests of the common good, deport non-nationals who are the parents of a child who is a citizen of Ireland even if that means, *defacto*, that the child is compelled to leave and reside outside the State with its parents.

That statement regarding the law is common to the arguments all the parties in these proceedings. It is one which emerges clearly from the judgments of this Court in **Fajujonu -v- Minister for Justice [1990] 2IR 151** upon which the parties have based their primary arguments.

The issues in this appeal focus on the ambit of the power of the State to deport parents in such circumstances and in particular the criteria which may be applied by it when seeking to exercise such a power of deportation in the interests of the common good. It was not argued that non-national parents of infant citizens have an absolute right to remain in the State. The Appellants argue that the Fajujonu case should be applied to their circumstances without distinction but in accordance with the interpretation of the judgments in that case advanced on their behalf which included an assertion that the Minister may not take into account "*ordinary immigration reasons"* as a ground for deporting the parent Appellants. The Minister on the other hand submits that the Fajujonu case is distinguishable having regard to do the particular facts and circumstances which prevailed in that case and certain principles referred to in the judgments have only limited application to the circumstances of the present case. Neither side asked the Court to overrule Fajujonu.

Background Facts:

The appeal concerns two cases which were heard and determined together in the High Court. The first case is concerned with the position of the Lobe family and the second with that of the Osayande family.

Mr and Mrs Lobe, Czech citizens, arrived in Ireland with their three children on March 31st, 2001. Shortly afterwards they applied for asylum within the State and it transpired that they had previously applied for asylum in the United Kingdom. In these circumstances the Refugee Applications Commissioner, on July 24, 2002, ruled that the application for asylum made by the Lobe family should not be examined by the State but should be examined and determined in the United Kingdom pursuant to Article 8 of the Dublin Convention, the Inter-Governmental Convention determining the state responsible for examining applications for asylum lodged in one of the Member States of the European Communities.

An appeal was lodged by the Lobe family to the Refugee Appeals Tribunal on the grounds, *inter alia*, that Mrs Lobe was pregnant and was experiencing serious medical complications with the pregnancy. The tribunal refused the appeal on the 29th August, 2001.

Deportation orders were made in respect of the Lobe family on the 26th September, 2001. Subsequently these proceedings were initiated and the Minister agreed not to give effect to those orders pending the outcome of these proceedings. On the 2nd November, 2001, Mrs Lobe gave birth to a child, Kevin Lobe, one the Plaintiffs in these proceedings. Subsequent to the birth of the child the Minister invited the Lobe family to make further representations having regard to the birth of the child. Following upon these representations a report was prepared was made by Mr John Lohan, Principle Officer, Immigrant Division. Having regard to this report the Minister confirmed the original deportation orders and the Applicants have sought to set aside this further decision in these proceedings.

As regards the second case, Mr and Mrs Osayandes arrived in the State on 6th May, 2001 along with their three year old daughter. They are Nigerian nationals. They also applied for asylum and their case followed a similar course to that of the Lobe family. Mr Osayande had previously made an application for asylum in the United Kingdom and the Refugee Applications Commissioner refused the Application on the grounds that any application for asylum fell to be examined and determined in the United Kingdom pursuant to Article 8 of the Dublin Convention. The relevant decisions were appealed to the Refugee Appeals Tribunal on grounds, *inter alia*, that Mrs Osayande was pregnant and bedridden. The appeal was rejected on 29th August, 2001 and in due course a deportation order was made by the Minister in respect of Mr Osayande. It would appear that no decision has yet been made in respect of Mrs Osayande or her daughter but nothing turns on this.

On 4th October, 2001 Mrs Osayande gave birth to a son, Osaze. Subsequently the case followed the same course as in the Lobe case with the Minister confirming the deportation order having regard to the memorandum prepared by Mr Lohan.

The Lohan Memorandums:

In the Lobe case the Memorandum of Mr Lohan acknowledged that "*the deportation of the Lobe family could result in the removal of Kevin,, an Irish citizen from the state in circumstances which could be interpreted as a constructive deportation,*" and went on to propose that "*The Minister should weigh up the rights of that Irish citizenship against the needs of the common good.*" At paragraph 9 it was stated "*It is accepted that Kevin is an Irish citizen and may have rights to reside in the State. It would also appear that he would have protection of the Constitution in terms of guaranteeing him the right to the company, care and parentage of his family/parents. However, against these factors are the need for the Minister to preserve the integrity of and the respect for the State's asylum and immigration laws. TheLobe family have not been in the State for a lengthy period – they arrived in March, 2001, a period of nine months. They applied for asylum in the State even though Mr Lobe, Ms Lobeova and three dependent children had already applied for asylum in the U.K. …"*

At paragraph 11 it states "*On balance, the interests of the common good and of the protection of the State through seeking to preserve the respect for and the integrity of the asylum and immigrations systems are seen in this case as outweighing the countervailing claims which the Irish born child and consequently his family have made to the Minister."*

The memorandum then went on to make a recommendation on the following terms at paragraph 13 "*I believe that it is in the common good that the Deportation Order made in respect of this family should be affirmed. The interests of maintaining the common good outweigh any claims made on behalf of the Lobe family. The common good would be ensured through the Minister having as his priority the protection of the asylum and immigrations systems in the absence of sufficiently strong features to ignore that priority."* In the ensuing paragraph it was stated "*On the basis of the family protection claimed by the Applicants, it should be presumed that the Applicants would preserve the family unit on enforcement of the orders by taking Kevin with them, thereby preserving his right to the care and protection of his family as per Article 41 of the Constitution.*"

A similar approach was adopted in Mr Lohan's memorandum in the Osayande case and in each case the memorandum went onto set out the concluding reasons for the recommendation to the Minister, and which were adopted by him, namely: -

- The length of time the family has been in the State;
- The Application of the Dublin Convention;
- The overriding need to preserve respect for and the integrity of the asylum and immigrations systems.

There was one additional reason given in the Lobe case, "*the Lobe family and Kevin Lobe can adapt to the family's return to the United Kingdom and the Czech Republic and that their lives or wellbeing would not be endangered*."

Arguments of the Parties:

Counsel for the Appellants contended that the issue at the heart of the joint appeals is the question whether the Minister may deport the parents of Irish children of tender years "*In the absence of special and overwhelming circumstances".* It follows from the judgments of Finlay, C.J., Walsh, J. in the Fajujonu case that such special and overwhelming circumstances associated with the common good must exist before the Minister can exercise his power to deport in such cases. The reasons relied upon the Minister and set out in the Lohan Memorandums can best be described as standard and orthodox immigration reasons and do not constitute the special or particular reasons envisaged by the aforementioned judgments.

The Fajujonu case falls to be applied without distinction to the position of the Appellants in this case and the learned High Court Judge erred in distinguishing the Fajujonu case from this case.

Infant citizens, it was submitted, have an unqualified right to reside in the State. That is protected by Article 2, Article, 9, Article 40.1 and Article 40.3 of the Constitution. It is a fundamental, absolute and imprescriptible right of citizenship, Walsh J., having found in Fajujonu, that citizens of the State may not be deported.

Allied to the foregoing right, an infant citizen has the right to have the care and company of its parents in the State. It is only with such care and company that an infant citizen can effectively exercise or enjoy his or her right to reside in the State. Furthermore, to deny a citizen the care and company of his or her parents and family would be an attack on the integrity of the family and the rights of an infant as a member of that family as identified by Finlay, C.J. in **Re: J.H. (an infant) [1985] I.R. 375** and in **North Western Health Board –v- H.W. and C.W. [2001] 3.I.R. 622**. It is a fundamental principle of Article 41 that the family has a right to remain together and that any State measure which has the effect, direct or indirect, of breaking up the family constitutes an attach on the integrity of the family and a breach, *prima facia*, of Article 41. Similarly the removal of the family from the State must amount to a breach of the State's obligation under Article 42.

It was further submitted that while the exceptional circumstances associated with the common good which might justify the deportation of the non-national parents of infants who are citizens were not

expressly set out in Fajujonu, it is clear that a general desire to maintain the integrity of the immigration or asylum systems would not constitute such a reason. The learned High Court Judge erred in holding that the integrity of the immigration could constitute such a reason. It is clear from the judgment of both Finlay, C.J. and Walsh, J. in Fajujonu that any routine immigration reason would not in itself suffice to justify deportation orders in such circumstances. Walsh, J. appears to have envisaged that the deportation of the parents might be justified where they pose a threat to security or had engaged serious criminal wrongdoing but not otherwise. The application of the Dublin Convention could not be considered as a "*grave and substantial reason*" within the meaning of the Fajujonu case. The Convention does not oblige the State to transfer an individual to another convention country for the purpose of having his application for asylum examined. Although the State maybe obliged under the Convention to accept the transfer of an individual from another convention country, it has a discretion whether or not to transfer an Applicant for asylum to another convention state. In any event the Dublin Convention must be operated subject to rights protected by the Constitution.

On behalf of the Minister it was acknowledged that the respective infant children in question were Irish citizens but the issue was whether such citizenship necessarily confers an automatic right of residence on the parents and siblings of such a child. The State had an inherent and constitutional right to control the entry of non-nationals and their departure from the State in the interest of the common good. This was recognised in a number of cases including **Osheku –v- Ireland [1968] I.R. 733**, **Poke Sun Shun –v- Ireland [1986] I.L.R.M. 593, Laurentiu –v- Minister for Justice [1999] 4.I.R. 27** and In Re Article 26 of the Constitution and the Illegal Immigrants (Trafficking) Bill 1999 (2000) 2 I.R.360. In that case-law the courts have acknowledged that the provisions of the Aliens Act 1935 prevail over the rights of the family members of a citizen notwithstanding the provisions of Article 41 of the Constitution. The case-law relied upon by the Appellants is not authority for the proposition that family members of citizens may not be deported. The judgments of this court in Fajujonu must be read in the context of its particular facts which were specifically referred to and relied upon by Finlay C.J. and Walsh, J. in their judgments in that case. It is clear from those judgments that the court did not hold that an infant citizen had an automatic constitutional right to the company, care and parentage of his or her parents. The approach adopted in the Fajujonu case was dependant on the fact that the non-nationals in that case had resided for an appreciable period of time in the State (8 years) and the family had made its home and residence in Ireland. It was submitted that the Appellants, in their submissions, were asking the Court to go further than the decision in

Fajujonu case and to conclude that all infant citizens have the right to reside within the State and to the company and care of their parents as a family unit without regard to the particular factual matrix which arose in that case.

It is well established that the maintenance and integrity of the asylum and immigrations systems is a legitimate aspect of public policy and the common good and was so held in P, L and B. case. There is nothing in the judgments in Fajujonu which would preclude the Minister having full and proper regard to such matters in coming to a decision in cases of this nature. As regards the Dublin Convention, to which the State is a party and to which effect has been given by the Oireachtas by way of Section 22 of the 1996 Act, it establishes an inter-governmental system designed to provide an orderly system of examining applications for asylum in countries which are parties to the Convention. It was entirely reasonable that the Minister would take into account the operation of the Convention, to which Ireland is a party, when making his decision in these cases.

The Fajujonu Case:

It is a notable feature of this case that both parties took the judgments in the Fajujonu case as their starting point and indeed the very basis of their nonetheless divergent arguments concerning the powers of the Minister to make a deportation order and the criteria to be applied by him before deciding to do so. Both parties subjected the judgments of Finlay C.J. and Walsh, J. in that case to detailed analysis. For the purpose of this judgment I propose to examine the two judgments in that case in detail. Undoubtedly there is a parallel between the issues in Fajujonu and the issues which arise in this case but any consideration of Fajujonu must first of all be done in the context of its facts and circumstances in order to determine the essential ratio of the judgments and the manner and extent to which they may be applicable to the issues as they arise in this particular case.

Fajujonu – Facts:

First of all as regards the facts of the Fajujonu case, Mr and Mrs Fajujonu were married in March, 1981 and at the end of that month came to Ireland. They had the status of the illegal immigrants and as such were always subject to the risk that a deportation order might be made against them pursuant to the provisions of Section 5 of the Aliens Act 1935. Their first child was born in Ireland on the 24th September, 1983 and was thus an Irish citizen. Mr Fajujonu was a Nigerian citizen and Mrs Fajujonu a Moroccan citizen. Subsequently they had two further children. Mr Fajujonu although willing to obtain employment was unable to do so because he

did not have a work permit. In December, 1983, Dublin Corporation provided the family with a house in which they were still residing at the time of their proceedings before the courts. The family established themselves among the local community and indeed it was the decision of the committee of their local tenants association to employ Mr Fajujonu at the local sports and leisure complex which brought his presence in the country formally to the attention of the Department of Justice. When an application was made for a work permit for that purpose this lead to an investigation of his immigrant status by the Department. He was then requested by the Minister for Justice to make arrangements for his departure from the State. No deportation order had been made by the Minister but it was the fear that a deportation order would in due course follow which gave rise to the proceedings which they brought before the High Court and ultimately the Supreme Court. It is not clear when precisely the Minister requested Mr Fajujonu to prepare for the departure of himself and his family but certainly it was made prior to mid-November, 1984. In those proceedings the Plaintiffs, Mr and Mrs Fajujonu and their first born daughter Miriam, sought,

inter alia, an order restraining the Minister from prohibiting them to reside within the State and a declaration that they were entitled to so reside. As Finlay C.J. was to note in his judgment, the Plaintiff's case in the High Court was confined to an assertion that the third Plaintiff, the daughter of Mr and Mrs Fajujonu, as a citizen of Ireland was entitled by virtue of her citizenship, to remain resident within the State and to have the right to do so with other members of her family. In the High Court this was asserted as an absolute right which could not be infringed by any order made by the Minister pursuant to Aliens Act, 1935. That submission was rejected by Barrington, J and the Plaintiffs' application dismissed. The assertion of an absolute right in this regard was not pursued on appeal in the High Court but abandoned. In the Supreme Court what was argued was not an absolute but rather the assertion of a constitutional right of great importance which could only be restricted or infringed for very compelling reasons.

The High Court proceedings were disposed of by the judgement of Barrington, J. delivered on the 11th November, 1987. The Supreme Court proceedings, which dismissed the appeal, were disposed of on the 8th December, 1989 in the judgments of Finlay, C.J. and Walsh, J., other members of the court agreeing with both judgments.

I think it is relevant to note at this point, because specific reference was made to it in the judgment of Finlay, C.J., that when the Supreme Court delivered its decision in the Fajujonu case a considerable time had elapsed since the Minister for Justice and his officials had made an assessment on their case in 1984 and by that time the Fajujonu family had lived in Ireland for a period of approximately eight years without any deportation

order actually having been made. In the meantime, since 1984, two further children had been born to the family in Ireland.

Judgement of Finlay C.J.

I now turn to the judgment of Finlay C.J. At page 162 he set out his first conclusion in the following terms *"... where, as occurs in this case, an alien has in fact resided for an appreciable time in the State and has become a member of the family unit within the State containing children who are citizens, that there can be no question but that those children, as citizens, have a constitutional right to the company, care and parentage of their parents within a family unit. I am also satisfied that prima facie and subject to the exigencies of the common good that that is a right which these citizens should be entitled to exercise within the State*".

He then went on to express the view that non-national parents were entitled to assert a choice of residence on behalf of their infant children, and I will come back to this particular point later. In the next paragraph Finlay C.J. stated "*Having reached these conclusions, the question then must arise as to whether the State, acting through the Minister for Justice is pursuant to the powers contained in the Aliens Act, 1935, can under any circumstances force the family so constituted as I have described, that is the family concerned in this case, to leave the State. I am satisfied that he can, but only if, after due and proper consideration, he is satisfied that the interests of the common good and the protection of the State and its society justifies an interference as to what is clearly a constitutional right.*

The discretion, it seems to me, which in the particular circumstances of a case such as this is vested in the Minister for Justice to consider as to whether to permit the entire of this family to continue to reside in the State, on the one hand, or to prevent them from continuing to reside in the State on the other hand, is a discretion which can only be carried out after and in the light of a full recognition of the fundamental nature of a constitutional rights of the family. The reason, therefore, which would justify the removal of this family as it now stands, consisting of five persons three of whom are citizens of Ireland against the apparent will of the entire family, outside the State has to be grave and substantial reason associated with the common good."

At this point I would note first of all that it is quite evident that the then Chief Justice did not hold that the Fajujonu family had an automatic right let alone an absolute one to remain within the State. There could be circumstances justifying their removal from the State. Secondly, he premised his first conclusion pointedly on the fact that they had resided in the State for an appreciable time and in ensuing paragraphs referred to the

"*family concerned in this case*" and the "*particular circumstances of a case such as this*" and the justification for the removal "*of this family as it now stands*".

The learned Chief Justice was clearly addressing the issues in the context of the circumstances of the Fajujonu family and in doing so he identified competing considerations or rights, none of which were absolute, namely rights flowing from the fact that three of the children concerned were Irish citizens and the right of the State, in the interest of the common good, to deport non-nationals even if this had the consequence that infant citizens would necessarily have to leave the State with their parents. This was a matter to be decided by the Minister in the exercise of his discretionary power.

It seems to me that the facts and circumstances in which the balance could be struck between these competing considerations or rights may vary greatly. In principle the constitutional rights of infants who are citizens must be taken into account in every case but the degree to which a deportation order may constitute an injury to those rights may, in a qualitative sense, vary according to the circumstances of the case. In the Fajujonu case the family, at the time of the Supreme Court decision, had been in the country for eight years.

They had, as Walsh J expressly stated, made their home and residence in Ireland.

That Finlay C.J. considered the facts and circumstances of the case as influencing the manner in which the Minister should strike balance between the competing considerations or rights seems to me to be conclusively demonstrated by the next ensuing paragraphs of his judgment. He first of all pointed out that while there was no finding of fact to suggest that the rights of the children had been ignored or brushed aside by the Minister in the investigations carried out on his behalf, neither was there a finding or any evidence of a careful consideration of those rights. He then went on to support his conclusion in the case with the following statement:

"*In any event the position of the family itself, the exercise by it of its rights to remain as a family unit and the exigencies of the common good which may be affected by the continued residence in the State of the first and second Plaintiffs, are all matters which must, of necessity, have been subject to at least the possibility, if the not the probability of very substantial change since this matter was investigated in 1984."*

In short, it seems to me that Finlay C.J. relied on a probable change in the factual circumstances relating to the competing rights and considerations since 1984 as capable of having an important bearing on how the Minister exercised his discretion as to whether or not he should make a deportation Order. He then went on to state:

"*In these circumstances, I am satisfied that the protection of the constitutional rights which arise in this case, require a fresh consideration now by the Minister for Justice, having due regard to the important constitutional rights which are involved, as far as these three children are concerned, to the question as to whether the Plaintiffs should, pursuant to the Act of 1935 be permitted to remain in the State."*

Finlay C.J. then went onto what I regard as the definitive part of his judgment where he stated:

"*I am, however, satisfied also that if, having had due regard to those considerations and having conducted such inquiry as maybe appropriate as to the facts and factors now affecting the whole situation in a fair and proper manner, the Minister is satisfied that for good and sufficient reason the common good requires that the residence of these parents within the State should be terminated, even though that has the necessary consequence that in order to remain as a family unit the three children must also leave the State, then that is an order he is entitled to make pursuant to the Act of 1935."*

I regard this concluding passage of Finlay C.J. as containing the definitive statement of principle which he sought to apply in that case because it sets out the duties of the Minister in a more abstract fashion namely, that he must have due regard to the constitutional rights of infant citizens who maybe affected, even if indirectly, by a deportation order concerning their parents as well as any facts or factors affecting their situation and those rights maybe circumscribed by deportation orders in respect of the parents if the Minister is satisfied that for good and sufficient reason the common good requires that such orders be made.

Finlay C.J.'s earlier statement that there should be grave and substantial reason associated with the common good is entirely dependent on his reference in the same sentence to the removal of the family "*as it now stands consisting of five persons three of whom are citizens of Ireland".* Depending on the circumstances of the case particularly where there are special factors such as "*continued residence in the State", "for an appreciable time"* and the circumstances under which that residence has continued, may give rise in a particular case to the need for "*a grave and substantial reason associated with the common good."*

It was submitted on behalf of the Applicants that the constitutional rights of the infant citizens and the extent to which they are entitled to rely on them should not in principle be affected by the length of time which the children, or the family of which they are part, are in the State. In short a constitutional right is a constitutional right and cannot be affected by such factual considerations. In making that submission, Counsel for the Applicants did not seek to put in issue the correctness of the judgments in Fajujonu but submitted that it was the basis on which they should be interpreted.

Counsel submitted that Finlay C.J. did not hold that *only* citizens whose parents had resided in the State for an appreciable time had the constitutional right to reside. If he had intended to limit the rights recognised in Fajujonu to such a category of citizens, he could have done so expressly.

In my view to adopt such an approach would be to misinterpret the judgment of Finlay, C.J. First of all, as I have already pointed out, Finlay C.J. expressly relied on the passage of time between 1984 and the proceedings in the Supreme Court as giving rise to a probability that the factual circumstances of the Fajujonu family had changed and this could lead the Minister to taking a different view than he had in 1984. Neither do I think that Finlay C.J. was suggesting that only those who had been in the country for an appreciable period of time enjoyed such rights. In every case there are the prima facia rights of the infant citizens on the one hand and the possible existence of good and sufficient reasons associated with the common good suggesting that the non-national parents be deported. The Minister has to ascertain the weight to be attached to all of the relevant and competing considerations and make a decision which is rational and proportionate. Justice requires that this be done according to the circumstances of the case. It should be self-evident that the deportation of such a family which has been allowed to remain the State for, say, fourteen or fifteen years, would be likely to give rise to qualitively different considerations than a similar family to which an Irish citizen was born during the relatively short period while the parents were waiting the outcome of an application for asylum. It is not simply that a family here for an appreciable period of time has integrated well in discrete ways such as doing well at school or being popular in the local community. It is more that after such a period Ireland has become their home and residence as Walsh, J. put it. They may have in a very substantial way established their home in the State. When the question of making a deportation in such circumstances arises, the Minister is not dealing with the fact that an infant was born in Ireland as an abstract notion. Clearly what was envisaged by this Court in its decision in Fajujonu was that the Minister should have regard to all the relevant facts of the particular circumstances not because some had rights and others did not. If such a family has made its home and residence in the State for an appreciable period of time, the amplitude of the rights of the infant citizens would be affected and a deportation order of their parents may have a more intrusive or injurious effect on those rights than in the case of infant citizens whose parents had been in the country for some weeks or months. Similarly, whether reasons associated with the common good, which the Minister might consider as a basis for a deportation order, may or may not be of sufficient weight to justify such an order depends on a range of circumstances. In the case of integrity of the immigration and asylum system, it must be self-evident that different considerations may arise

according to whether the total number of applicants for asylum per annum falls well under one hundred or runs into many thousands.

That the infant citizens are members of a family and the length of time which that family has resided in the State are relevant factors which the Minister must take into account.

I conclude from the judgment of Finlay C.J. that the Minister may make an Order deporting the parents of infant citizens if, having taken into account their constitutional rights as citizens, and members of a family, he is satisfied that for good and sufficient reason the common good requires it.

Judgment of Walsh J.

I now turn to the judgement of Walsh J. in Fajujonu. First of all some general observations. Walsh J. also held that the Applicants' claim for relief preventing the Minister from deporting them from the State should be dismissed even if this had the consequence that their infants, who were citizens, would also have to leave the State or even if they were in effect compulsorily separated from their parents. In short, he also concluded that the non-national members of the Fajujonu family had neither an absolute nor automatic right to be excepted from deportation by reason only of the fact that children in the family were Irish citizens. In doing so he also agreed with the judgment of Finlay C.J. when he concluded that having regard to the considerations raised in "*the judgments"* of the Court he would dismiss the present appeal.

It is also evident that the approach of Walsh J. was very much premised on the particular facts and circumstances of the case and in particular the fact that they had lived in Ireland for a considerable period of time during which they had established themselves as part of their local community. This is illustrated by his statement that "*There is no doubt that the family has made its home and residence in Ireland."* It was in this context that Walsh J. stated *"In my view, the first two Plaintiffs and their three children constitute a family within the meaning of the Constitution and the three children are entitled to the care, protection and the society of their parents in this family group which is resident within the State."* In my view, Walsh J. is here stating simply that the Fajujonu family, as a family resident in the State, and while resident in the State, enjoys as a family the protection of the Constitution. I will address this question further in the context of family rights but it is clear that Walsh J. did not consider such rights as a bar to an appropriate deportation order since as I have already pointed out, in dismissing the Applicant's appeal he held that the Minister may, in certain circumstances, for stated reasons associated with the common good, make such a deportation order.

He also stated in the same context that "*It is abundantly clear that citizens of the State may not be deported"* but this again was not a bar to deportation of the non-national members of the family even it has the implication that infants, who are citizens, would have to leave the State with their parents. Perhaps I should say a brief word on the notion of deportation. It has long been a principle of international law that a State may not deport its own citizens. This is in part because it would be inimical to international order and risk creating what would in effect be a large body of stateless persons making it difficult and sometimes impossible for States to refuse entry or deport undesirable aliens. There would be no State to which they could be returned and which would accept them. Much more relevant as Walsh J. stated, the Constitution protects citizens from such deportation. Of course a citizen may be removed and sent out of the State under our extradition laws. Although this may in one sense be viewed as a form of *de facto* deportation it is of course not deportation in its true or legal sense since the citizen extradited has a right to return to the State if and when the purposes for which he or she has been extradited have expired such as when a term of imprisonment served in another country is completed. Deportation in its true and legal sense is the removal of a non-national from a State on the grounds that he or she has no right to be within the State and has no right to return to the State (except by Executive discretion or special change of circumstances). The terms '*constructive deportation*' or '*de facto deportation*' have occasionally been used in these proceedings to refer to the consequences which a deportation order of parents has for their infant citizens. These are no more than euphemisms for the practical effects which the deportation of non-national parents may have on their infant citizens, namely, that they will almost inevitably have to leave the State with them. Those infant citizens of course retain the right to return to the State at anytime once they have reached an age of discretion enabling them to decide to do so. However it is described, this is not deportation in its true and legal sense and was patently not considered as such by this Court in the Fajujonu case.

Subsequent to the foregoing considerations, Walsh, J. dealt with a number of discrete points. The first of these was the reference by Costello J. in **Pok Sun Shun –v- Ireland [1986] I.L.R.M. 593** to the imprisonment of a parent as an example that the rights given by the Constitution to the family are not absolute in the sense that they are not subject to some restrictions by the State. Walsh, J. made the point that this did not appear to him to be a valid comparison since the right to prosecute and punish for crime is derived from the Constitution itself and is applied irrespective of whether or not the offender is a citizen of Ireland. Walsh, J. did not in any sense seek to call in question the general premise that the constitutional rights of the family under the Constitution are not absolute in the sense that they are subject to

some restriction by the State. That is a general premise which has been recognised in the case law of this Court (see for example **North Western Health Board –v- H.W. and C.W. [2001] 3 I.R. 622** and the cases cited in the judgments of the Court). I consider Walsh, J. observations in this regard to be entirely obiter.

Walsh, J. next makes reference to the judgment of Gannon J. in **Osheku –v- Ireland [1986] I.R. 733** and some conclusions which can be drawn from it. Walsh, J. stated that because different considerations arose in the Fajujonu case that it was not necessary for him to offer any view on Gannon J's expression of views as to the constitutionality of certain matters arising in Osheku, that is to say the Aliens Act and Orders. It seems to me that nothing turns on the distinctions which Walsh, J. made between the considerations which arose in those two cases.

It was submitted on behalf of the Applicants in this case that Walsh, J. in effect expressed a disapproval of the reasoning of Gannon J. in the passage which he quoted from the judgment in Osheku. I do not think there is any basis whatsoever for interpreting Walsh, J's judgment as in any sense expressing disapproval of that passage or indeed the principles expressed by Costello J. in **Pok Sun Shun**.

The next discrete question which Walsh J addressed was a reason advanced by the Minister for refusing Mr Fajujonu permission to stay in the country "*that he was unable to support his family without assistance from the State."* It is a somewhat curious feature of the Fajujonu case that neither in the High Court nor the Supreme Court were the reasons relied upon by the Minister for refusing the Fajujonus permission to stay in the country set out. Inability to support his family was cited by Walsh, J. as *one* of the reasons, but we do not know what the others were. Consequently, there is no examination of any ground based on the integrity of the immigrations system such as in the present case, which is something to be borne in mind. Walsh, J. commenced his examination of that particular reason by noting that there was no suggestion that the first two plaintiffs in Fajujonu, the parents, were in anyway unfit to maintain the guardianship and custody of their children or that there was any other ground upon which they could be lawfully separated from their children either temporarily or permanently. This was done for the purpose of distinguishing Fajujonu from the State (Bouzagou) –v- Station Sergeant, Fitzgibbon Street [1985] I.R. 426 which was a case where the parents had become estranged and the father, a non-national, had been the subject of a barring order. I do not think it is necessary to go into any further detail concerning the later case. Walsh, J. was simply making the point that there was nothing in the Fajujonu case which rendered the parents unfit to act as parents of the children in question. Walsh, J. then moved on to the substance of the issue arising from the Minister's ground that the

father was unable to support his family without assistance from the State and posed the relevant question in the following terms: -

"*The question which arises, therefore, is whether a family, the majority of whose members are Irish citizen, can effectively be put out of the country on grounds of poverty".* The dilemma for Mr Fajujonu was that he was unable to support his family because the State refused him permission to work. The situation in which Mr Fajujonu found himself was a vicious circle and Walsh, J. rightly pointed out that this left the parents with a dilemma. To expel the parents for that reason in those particular circumstances, when they had not "*been shown to have been in anyway unfit or guilty of any matter which make them unsuitable custodians to their children*" would

"*be inconsistent with the provision of Article 41 of the Constitution guaranteeing the integrity of the family*." He went onto conclude "*it would be ultra vires the act to exercise the powers which had been sought to be exercised by the Minister to disrupt this family <u>for no other reason than poverty</u>, particularly when that poverty has been effectively induced by the State itself*."

In rejecting poverty or the inability of Mr Fajujonu to support his family as a valid ground in the circumstances of the case upon which the Minister could rely, Walsh, J. was deciding a discrete issue which as nothing whatsoever to do with the present case before the court. Inability to support the families concerned in this case is not a ground upon which the Minister relies for the making of a deportation Order.

In his penultimate paragraph Walsh, J. had this to say: "*I agree with the opinion expressed by the Chief Justice that there is nothing to suggest that the Minister had applied his mind to any of these considerations, and the matter will have to be reconsidered by the Minister, bearing in mind the constitutional rights involved. In my view, he would have to be satisfied, for stated reasons, that the interests of the common good of the people of Ireland and of the protection of the State and its society are so predominant and so overwhelming <u>in the circumstances of the case</u>, that an action which can have the effect of breaking up this family is not so disproportionate to the aims sought to be achieved as to be unsustainable."* He then concluded by dismissing the appeal of the Fajujonu family having regard to the considerations of his judgment and that of Finlay, C.J. It was only in the latter cited passage that Walsh, J. addressed the considerations by reference to which the Minister could proceed to deport the family if he was satisfied, for stated reasons, that the interests of the common good and the protection of the State required it.

One cannot elide from the judgment of Walsh, J. (no more than one can from that of Finlay, C.J.) his specific references to the circumstances of the case with which he is dealing including, in the last cited passage,

his reference to the particular circumstances of the case and the risk of the breaking up of "*this family"*. When Walsh J, used the words "*predominant and so overwhelming*" it was very much in the context of the facts and circumstances of the Fajujonu case just as the words "*grave and substantial*" of Finlay C.J. were, for reasons already explained. As I have already alluded to, Walsh J. expressly agreed with the considerations in the judgment of Finlay C.J. among the grounds for dismissing the appeal in that case. Although he initially approached the issues from a different perspective and dealt with some discrete issues which Finlay C.J. did not address, his final conclusion is very much in accord with what Finaly C.J. felt the Minister should have regard to when addressing anew the particular situation of the Fajujonu family as it then stood. There is nothing in his judgment inconsistent with what I have described as the more definitive and abstract principle laid down in the judgment of Finlay C.J. whereby generally speaking the Minister in considering whether to deport non-national parents of children who are citizens must have regard to the constitutional rights arising but may make a deportation Order if there is "*good and sufficient reason"* associated with the common good.

I think it can be said that Walsh J did add a nuance to the considerations in the judgment of Finlay C.J. which he adopted in his ultimate paragraph. In his penultimate paragraph he was expressing the view that the effect which a deportation order might have on the Fajujonu family should not be "*so disproportionate to the aims sought to be achieved [by recourse to the* interests *of the common good] as to be unsustainable*". In essence he was here introducing a proportionality test which I consider inherent in Finlay C.J.'s reference to "good and sufficient reason". He obviously concluded on the particular facts of the Fajujonu case the considerations which could lead to their deportation should be predominant and overwhelming. That was his application of the test to that particular case and of course the facts in the present case before the court are very much different. However, I would accept that it follows from the judgment of Walsh J. and consistent with the approach adopted by Finlay C.J., that in a judicial review of a decision of the Minister to deport the principle of proportionality may be applied in order to ascertain whether its effect was so disproportionate to the aim sought to be achieved as to be unsustainable. This principle, for reasons which I have outlined above, must be applied having regard to the circumstances of the particular case.

While the facts and circumstances of the Fajujonu case differ materially from those in the present case, in my view the judgments do, as I have just indicated, express principles of more general application which I sum up later in concluding.

I would also like to add in passing that although Walsh J. expressed the view that the Minister could deport non-national parents in appropriate circumstances in the interests of the common good even if it should

result in the separation of members of the family, the case made before this Court was not premised on a proposition that such would be the result in any of these cases. There is no evidence whatsoever in this case that there is any reality in the prospect that the parent appellants would abandon their infant children if deported. It was suggested at one point, in a letter to the Minister written by the solicitor for one of the parties, that he should not presume that, if deported, the parents concerned would necessarily bring the infant with them. That, he said, was a matter on which they would take a decision if and when a deportation order was enforced. The matter was put no further than that. In my view the Minister was perfectly entitled to presume, in the absence of concrete material to the contrary, that the parents would act in a natural, responsible, and humane fashion so that if, like other non-national parents, they should be deported they would continue to give care and parentage to their child as part of their family.

'Reasons associated with the common good'

I now come to another argument advanced on behalf of the Appellants according to which it was submitted that the reasons or "*exceptional circumstances"* associated with the common good upon which Finlay C.J. and Walsh J. held a Minister could rely could not be any routine immigration reason – such as illegal immigrant status of the Applicants or that they were not entitled to asylum or refugee status.
It was submitted that any reason relied upon by the Minister in such circumstances must be reasons which are personal to the non-nationals such as where they posed a threat to national security or had engaged in serious criminal wrong doing. This is clear, it was submitted, from both judgments in the Fajujonu case.

This argument is a crucial part of the Appellant's case. It sought to exclude from consideration by the Minister any consideration of illegal immigrant status, or other reason associated with the immigration and asylum system when considering whether he should make a deportation order in respect of non-nationals who are also the parents of an infant born in this country. Even if the "grave and substantial" criteria argued for by the Applicants were to apply to this case, the Minister would still be left with a reasonable discretion to make a deportation order in respect of the parents if those considerations could be taken into account. Thus in making this argument the Applicants seek to exclude altogether any consideration by the Minister of the integrity of the immigration and asylum systems as a matter associated with the interests of the common good. This would grant such parents an automatic right to remain within the country unless there was some specific reasons such as national security or criminal wrongdoing personal to them, or one of them.

In my view, the argument advanced on behalf of the Appellants is unfounded. It was acknowledged that the circumstances or reasons upon which the Minister could rely were not fully spelled out in Fajujonu. The court was addressing the facts in that particular case. There was no suggestion in the judgments in the Fajujonu case that there was any basis for considering non-immigrant reason, such as criminal wrong-doing or something which might be a threat to the State, on the part of Mr and Mrs Fajujonu, yet their application was dismissed. What the Court said was that the Minister should consider their situation afresh, first of all to have regard to the fact that three members of the family were citizens, their constitutional rights, and that they had made their home and residence in Ireland having being in the country for an appreciable period of time and secondly that the situation had evolved since the Minister had first examined their case in 1984. The fundamental basis of the Minister's position was that Mr and Mrs Fajujonu had entered the State illegally and, more important, as non-nationals had no authority or right to remain within the State. Patently, if the court had wished to exclude immigration considerations from the ambit of the Ministers discretion they would have expressly done so. I do not consider that there is anything in either of the judgments of the Court which in any sense could be said to expressly or implicitly exclude immigration reasons from the Ministers consideration.

Citizenship

Reference was made at the hearing to the nineteenth amendment to the Constitution which amended Article 2 of the Constitution so that it reads as follows:

"*It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish Nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage."*

Prior to the adoption of the amendment, citizenship was acquired by law, the relevant provision being Sections 6 of the Nationality and Citizenship Act, 1956. I will confine myself to quoting sub-section 1 which provides "*Every person born in Ireland is an Irish citizen from birth*."

During the course of the hearing a question arose as to whether Article 2 had the effect of enhancing the rights of citizens and thus the infant citizens concerned with this case. My understanding of the submissions made on behalf of the Appellants is that it was accepted that the amended Article 2 of the Constitution was no more than declaratory of the existing right to citizenship of a person born in Ireland as provided for by law. In any case I find it difficult to accept in the context of issues in this case, that the constitutional rights of a citizen

born prior to the adoption of the amendment to the Constitution in 1998 were less, or were afforded less protection, than the constitutional rights or protection which they now enjoy. So far as the rights of citizens in issue in this case are concerned I do not find any basis in Article 2 as amended, for concluding that they have either been enhanced or diminished. In the context of this case I am satisfied that those articles in the Constitution which either acknowledge or protect the rights of citizens apply to the citizens who are such by virtue of Article 2 in the same way as they previously applied to citizens by virtue of Section 6 of the 1956 Act.

Family Rights:

In support of his submissions on the interpretation and application of Fajujonu Counsel for the Appellants relied on the special and express protection afforded by the Constitution to the family as a fundamental unit in society. It was submitted that the family comprising an Irish citizen is a family under Irish law and enjoys the protection of the Constitution, in particular Articles 41 and 42. Reference was made to the judgments of this court in **North West Health Board –v- H.W. and C.W.** (cited above) where the fundamental status of the family in society and the nature of its rights under the Constitution were acknowledged. Counsel also referred to the decision of the former Chief Justice, Finlay C.J. in **Re J.H. (an infant) [1986] I.R. 375** where an infant had the following rights as a member of the family:

> *"(a) to belong to a unit group possessing inalienable and imprescriptible rights antecedent and superior to all positive law (Article 41, s.1);*
>
> *(b) to protection by the State of the family to which it belongs (Article 41, 3.2); and*
>
> *(c) to be educated by the family and to be provided by its parents with religious, moral, intellectual, physical and social education. (Article 42, s.1)."*

It was submitted that it flowed from Article 41 that the family has a right to remain together and that any State measure which has the affect, direct or indirect, of breaking up the family must be an attack on the integrity of the family and must, therefore, be *prima facie* in breach of Article 41. Similarly, it was submitted, that the removal of the family from the State must amount to a breach of the States obligations under Article 42. It was submitted that in the Fajujonu case this Court recognised the right of the citizen to reside in the State and the right of infant citizens in that case to the company, care and parentage of her parents within the family unit within the State.

Article 41.1 recognises "… *the Family as the natural, primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all*

positive law". Article 41.1 then goes on to state "*The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State*."

Article 42.1 provides "*The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious, moral, intellectual, physical and social education of their children*."

I would first of all observe that in my view the protection afforded by the Constitution to the family is not dependent entirely on whether it counts among one of its members a citizen of the State.

In the North Western Health Board case the judgment of this Court once again pointed out that the constitution recognises the family as a moral institution independent of the State but in respect of which the State has a duty to protect its constitution and authority. I do not believe that the decision of the Court in South Western Health Board (which upheld the right of the parents to refuse to submit their infant to a health screening test notwithstanding the opposite view of the Health Board) would have been any different if all members of the family were non-nationals. When a family of non-nationals is within the State it has all the attributes which the Constitution recognises as a "*moral institution*". I do not think that there can be any question but that the non-national children of such a family have a constitutional right to the company, care and parentage of their parents within a family unit while in the State and that one or both parents could not be removed from that role on grounds any different from those which the Constitution permits as the basis for removing children from the custody of their parents who are citizens.

In the present context it is only when the deportation of a family arises that a distinction is made between families, as was in the Fajujonu case, and that distinction is the fact of citizenship of one or more of the children of the family. It is a distinction based on citizenship and not on family rights.

It is self-evident that a family (of citizens) may choose to leave the State voluntarily and live elsewhere and that does not impinge on its authority or constitution as a family unit or the rights of the parents as natural educators of the child as envisaged in Article 42.1. Patently that is a different matter to deportation. It has never been suggested, and I do not think it could be seriously contended, that the deportation of a non-national family, on otherwise lawful grounds, could be said to put in peril the status of a family as such or undermine its constitution and authority.

I return to the important and self-evident distinction between an entirely non-national family and one in which one or more of the children are citizens. A proposed deportation of the latter gives rise to different

considerations because of the Irish citizenship of one or more children of the non-national parents. The children have a general right of residence in the State and *prima facie* a right to the company and parentage of their parents within the family unit while within the State. But that right is qualified and the infant citizen does not have a right to the company and parentage of their parents in all circumstances to such an extent that the parents themselves acquire a right to reside in the State in all circumstances. Any rights of the parents are qualified because they themselves have no right to remain within the State and any right of the infants to their company and parentage is subject to the exigencies of the common good.

This is what I understand Finlay C.J. to have meant in Fajujonu when, having referred to the position of children who are citizens and their right to the company of their parents went onto say "*I am also satisfied that prima facie and subject to the exigencies of the common good that that is a right which these citizens would be entitled to exercise within the State."* The rights in question are not absolute they are qualified. They are subject to the exigencies of the common good. I think it is also worth repeating that both Finlay C.J. and Walsh J took full account of the rights of the family within the State but went onto conclude that these were no bar to deportation as such and that the Minister may for good and sufficient reasons associated with the common good nonetheless deport the non-national parents with all the consequences that that would have for the infant citizens. Walsh J. went so far as to say that this was so even if it should result in the separation of members of the family although this has not been established as a fact in this case. The point being, that unlike a family of non-nationals who can be deported simply because they are non-nationals, having no personal right whatsoever to be within the State (where rights arising under the Immigration and asylum systems have been excluded) the Minister *must* take into account in a case such as the present one, the *prima facie* constitutional rights deriving from the citizenship of the infants in question and consider whether notwithstanding those rights there are, in the circumstances of the case, good and sufficient reason associated with the common good for the deportation of their parents with the inevitable consequences for their child.

I wish to turn briefly to the statement, mentioned earlier, by Finlay C.J. that the non-national parents are "*entitled to assert a choice of residence on behalf of their infant children in the interest of those infant children."* I empathise with the analysis of this statement made in the judgments of both Keane C.J. and Hardiman J. However, I do not consider that Finlay C.J. was saying here that the parents were *making* a choice of residence for the children *as if* it were the choice of the children themselves. That would be absurd and inconsistent with the rest of his judgment. Once citizens have reached the age of discretion they may decide to reside in the State and may do so without qualification of their constitutional right to do so. Finlay C.J. was not

treating any assertion of the rights referred to as equivalent to that situation. Any assertion of a choice of residence by parents of infant children is at most their assertion of where they would wish the family to reside. The choice maybe motivated by the interest of one or more of their children or their own wishes as to where they would like to reside. Whatever be the case it is patently not the decision of the infants themselves. It seems to me that in referring to the assertion of a choice of residence on behalf of the children, Finlay C.J. was doing no more than referring to a situation in which such parents in effect seek to require the Minister, before the making of a deportation order, to take into account, in the decision he has to make, the constitutional considerations concerning residence, and related factual elements, which arise from the fact that one or more of their children is an Irish citizen. In any event having so stated that the parents may assert such a choice he concluded, and in my view properly so, that any rights arising did not prevent the Minister from exercising his discretion to deport the non-national parents if there was good and sufficient reason associated with the common good.

Immigration and the interest of the common good:

Although the primary thrust of the submissions of the Appellants in this regard was to exclude immigration considerations from the ambit of reasons which the Minister may take into account in deciding whether or not to deport the parents of a family which includes an infant Irish citizen, and one which I have held must fail, I think it appropriate to consider, before concluding, the public interest element of the control of immigration. In the case as recent as the Illegal Immigrants (Trafficking) Bill 1999 this Court cited with approval statements of law on this subject by Costello, J. and by Gannon J.

Costello J. in **Pok Sun Shun –v- Ireland** stated *"[The] State .... must have very wide powers in the interests of the common good to control aliens, their entry into the State, their departure and their activities within the State*."

In **Osheku –v- Ireland** the passage of Gannon, J approved was as follows:

"*The control of aliens which is the purpose of the Aliens Act, 1935, is an aspect of the common good related to the definition, recognition, and the protection of the boundaries of the State. That is in the interests of the common good of a State that it should have control of the entry of aliens, their departure, and their activities and duration of stay within this State is and has been recognised universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter. The integrity of the State*

constituted as it is of the collective body of its citizens within the national territory must be defended and vindicated by the organs of the State and by the citizens so that there maybe true social order within the territory and concorde maintained with other nations in accordance with the objectives declared in the preamble to the Constitution."

It is an inherent and fundamental right of the State to control and regulate immigration. Its right, and even its duty to do so arises in the interests of the common good which includes the maintaining of true social order within its territory and concordance in its relations with other nations. These principles must, in my view, be considered well established in the light of the foregoing case law and in particular having regard to the decision of this court in the Immigration Bill case. That the control and regulation of immigration by the Government, through powers conferred on the Minister for Justice, is in the interest of the common good of the nation cannot in my view be gainsaid and it is universally so accepted in sovereign democratic states.

No doubt it can be said that immigration of policy adopted by our State, with our history, should be as generous as possible but the evaluation of its generosity is not a matter for the Courts. On the other hand few, if any, countries can afford to adopt an open door policy. There must be some regulation and control of numbers. The Courts are concerned as to whether the control and regulation of immigration and in particular the application of those controls in individual cases are in accordance with the law and the Constitution. Where the Minister is required, as in a case such as this, to take into account the relevant circumstances of parents of children who are citizens and who maybe affected by a deportation order, it is clear that he must also be entitled to take into account the integrity, including functioning, of the immigration and asylum systems in order to determine whether there exists interests of the common good which require the making of such a deportation order.

It was suggested that this Court should not have regard to the manner in which the number of applications for asylum or refugee status have evolved over the years particularly since the 1980's when the Fajujonu case was decided, because there is no statistical evidence put before the Court on this matter. I do not think it would be necessary to rely on such statistical evidence, if such were available (although some general figures were made available). The Court has judicial knowledge of the fact that the number of applicants for asylum has grown enormously in recent years. In any event it is sufficient to say that there is manifestly a distinction to be drawn between a situation where the number of persons seeking to enter the State in any one year is very low, for example 30 or 40, and the situation where many thousands seek to do so. In the latter situation the importance and priority to be attached to the necessity of maintaining the integrity of such a system

in the interests of the common good is far greater than in the former case. The weight to be attached to those interests is not frozen at some point in time. It evolves as the situation evolves. The Minister in my view is entitled to take current circumstances concerning the level of immigration and the complexities involved in maintaining the integrity of the asylum and immigration systems in the interests of the common good.

It was argued on behalf of the Minister that if non-national parents who came to this country for the purpose of seeking asylum or refugee status could claim an automatic right to remain in the State independent of the outcome of their application for asylum by reason of the "*fortuity"* that a child was born to them while awaiting a final decision on their application, the Immigration and Asylum System would be distorted. It also self-evident that in such a situation a substantial number of non- nationals could come to this State for the ostensible reason of seeking asylum with the intent of circumventing the controls which the State has imposed on immigration in the interests of the common good. This certainly seems to me to be at least a possibility against which the State is entitled to protect itself.

It is also seems to me evident that the immigration system and the powers of the State to regulate it includes the right of the State to permit the entry of economic migrants in accordance with policies adopted in the interests of good government and the common good. This means that the State may choose to permit the entry of skilled workers, by reason of the need for such skills in particular economic sectors, subject to such conditions as to limited period of time and that they remain in regular employment. It is also the case that in this country, as in most other countries, that other categories of non-nationals maybe permitted to enter subject to conditions, for specialised purposes such as the establishment of new industry or the pursuit of post graduate or other academic studies. It seems to me that the proper regulation of immigration in all its aspects requires the State to be in a position to impose lawful and reasonable conditions on the entry of such persons into the State and the circumstances under which they are permitted to remain. If such non-nationals could acquire an automatic right to remain in the State (subject only to deportation if they commit a serious criminal offence or otherwise a threat to the security of the State) by reason *only* of the fact that they had an infant born to them, it would obviously undermine the ability of the State to exercise its inherent and sovereign powers to control and regulate immigration. The Constitution has to be read as a whole and competing rights reconciled. In my view the general principles which emerge from the judgments of this Court in Fajujonu permit the State to exercise control and regulation in this sphere.

In his judgment in this case Fennelly J makes reference to the apparent significant number of non-nationals who have been or appear to have been permitted to remain in the State by reason of the fact that they

were the parents of at least one Irish born child. No reference was made to State practice or policy in this regard in the course of the proceedings and was not relied upon by the Applicants as a ground for impugning the decision of the Minister to deport the parent Appellants in this case. How the State regulates immigration is in first place a matter of policy for the government acting through the relevant Minister. It is for the government to determine that policy from time to time having regard, among other matters, to the exigencies of the common good. Such policy may evolve or change according as factors affecting the exigencies of the common good evolve or change. There is always likely to be a point in time when a particular policy must be changed and this may be done for reasons associated with the common good. Since the practice of the State in recent years on this matter did not arise during the course of the proceedings neither party had an opportunity to address any underlying policies involved in such practice and in particular the State did not have an opportunity to do so. In these circumstances I do not consider appropriate to treat any State practice in this regard, whatever it may be or have been, as material to the issues in this particular case.

The Dublin Convention

The Dublin convention is an inter-governmental agreement between states who have shared objectives and shared interests in the orderly and fair regulation of applications for asylum from persons outside those states who are contracting parties to the agreement.

The preamble to the agreement includes the following recitals:

"*CONSIDERING the joint objective of an area without internal frontiers in which the free movement of persons shall, in particular, be ensured, in accordance with the provisions of the Treaty establishing the European Economic Community, as amended by the Single European Act;*

AWARE of the need, in pursuit of this objective, to take measures to avoid any situations arising, with the result that applicants for asylum are left in no doubt for too long as regards the likely outcome of their applications and concerned to provide all applicants for asylum with a guarantee that their applications will be examined by one of the Member States and to ensure that applicants for asylum are not referred successively from one Member State to another without any of these states acknowledging itself to be competent to examine the application for asylum;

…

DETERMINED to co-operate closely in the application of this Convention through various means …"

One of the objectives of the convention is to facilitate the effective achievement of an area without internal frontiers in which the free movement of person can be effectively ensured. This is an objective common to the states concerned and it is an objective which Ireland is bound to pursue in common with other states, pursuant to the provisions of the Treaty referred to as amended by the Single European Act. A further objective of the Convention, mutually undertaken by the states, is to ensure the orderly treatment of applications for asylum so that applicants are guaranteed that their applications would be examined by one of the member states and that they are not referred successively from one member state to another. The states have a duty to co-operate in the application of the convention.

To these ends the Minister has power to make such orders as are necessary or expedient to give effect to the convention.

Exercising its constitutional powers the State became a party to the Dublin Convention and the Oireachtas conferred powers on the Minister by virtue of the Refugee Act 1966 to give effect to the Convention. It is clearly in the interests of the common good that the State fulfil its obligations to ensure that the convention is applied with a view to achieving its objectives. That is a task and duty which falls upon the Minister. Even where he has a discretion to permit an application for asylum to be examined in this country where the Convention otherwise envisages that it be examined in another state party to the Convention, he still has the task and duty of exercising that discretion in the light of the objectives of the convention and so as to ensure its effective application. That is a decision for him to make in the interests of the common good in order to ensure that the State fulfils its obligations.

Case Law of the United States and the E.C.H.R.

Certain case-law of the courts of the United States were cited in the course of the oral argument. I do not propose to cite them but simply to recall that the substantial effect of them was that those courts viewed the deportation of non citizens with the consequential effect of citizen children having to leave the United States with them as not constituting a denial of the exercise of the right of citizenship but merely a postponement In this particular case I do not think there is a sufficient parallel between our constitutional provisions which are relevant to the issues being tried and the constitutional considerations applying in the United States so as to make that case- law relevant. It is perhaps significant that no case law has been cited from any country which recognises the acquisition of citizenship on the grounds of *jus soli* which would support the thesis being

advanced on behalf of the Appellants. I do not think that the case law of the European Court of Human Rights was relied upon to a significant extent by the Appellants. Apart from the fact that the European Convention on Human Rights is not part of domestic law, I consider that the issues and circumstances which arose in the cases of the E.C.H.R. which were cited are so removed from the facts and issues in this case that they can have no meaningful bearing on them. The issues in this case fall to be resolved within the ambit of the constitutional provisions relied upon by the Appellants.

Conclusion

Matters material to the Minister's decision

In my view the arguments advanced on behalf of the Appellants in essence amount to a false syllogism. It was submitted that infants who are citizens have a constitutional right of residence. Such infants have a constitutional right to the care, company and parentage of their parents within the State. Therefore, the parents have a right to remain in the State. For the reasons outlined in this judgment this conclusion is not validated by the preceding premises. Barrington J. also addressed this in his judgment in the High Court in the Fajujonu case when he said "*I am prepared to accept that the child has, generally speaking, a right, as an Irish citizen, to be in the State. I am also prepared to accept as a general proposition that the child has the right to the society of its parents. But does it follow from this that the child has the right to decide the society of its parents in the State?"* Barrington J's answer to this question included the following:

"*In interpreting the Constitution it appears to me to be important to preserve the balance which the Constitution itself contemplates … In the present case the parents never had a right to live or work in Ireland. The child clearly has a certain right to be in Ireland. She also has a right to the society of her parents. But it does not follow from this that she has the right to the society of her parents in Ireland. I do not think that the parents can be positing on their child a wish to remain in Ireland in their society confer upon themselves a right to remain in Ireland such as could be invoked to override legislation passed by the Irish Parliament to achieve its concept of what the common good of Irish citizens generally requires."*

I agree with those statements and it is notable that they were not in any sense criticised in the appeal by either Finlay C.J. or Walsh J. and in my view there is nothing in their judgments inconsistent with them.

I have already expressed the view that while much of what was said in the judgments in the Fajujonu case relate to the particular facts and circumstances of that case there are nonetheless general principles, on a proper interpretation of those judgments, which can be applied generally when a decision to deport is being considered in a case such as we have here.

A child or infant of non-national parents has, *prima facie*, a right to remain in the State. While in the State such a child has the right to the company and parentage of its parents. These rights are not absolute but are qualified. The rights do not confer on the non-national parents any constitutional or other right to remain in the State. The rights referred to are qualified in the sense that the Minister having had due regard to those rights and taking account of all relevant factual circumstances, may decide, for good and sufficient reason, associated with the common good, that the non-national parents be deported even if this necessarily has the effect that the child who is a citizen leaves the State with its parents. In deciding whether there is such good and sufficient reason in the interests of the common good for deporting the non-national parents the Minister should ensure that his decision to deport, in the circumstances of the case, is not disproportionate to the ends sought to be achieved.

The decision of the Minister

It is evident from the memorandum of Mr Lohan, which I cited at the outset, that when making his decision in this case the Minister had before him all the material facts and circumstances relating to the situation of the Appellants in this case. It is also clear that the relevant constitutional considerations to which I have adverted to in my judgment were taken into account. In deciding to make the deportation order the Minister made specific reference to the period of time for which the applicants for asylum had been in the State. He had regard to two matters which are material to promoting the interests of the common good namely the application of the Dublin Convention and the protection of integrity of the immigration and asylum systems. Each of the families who comprise the Appellants in this case were in this State for a relatively short period before the deportation order was made. The grounds upon which they seek to challenge the Minister's deportation order stem from the birth of a child in this State some months after their arrival. It seems to me entirely reasonable to conclude that the circumstances relating to the Applicants are not unique but on the contrary that it is a situation that could apply or would apply to a substantial proportion of applicants for asylum. In these circumstances it seems to me entirely reasonable that the Minister would consider whether a refusal to make a deportation in such circumstances could call in question the integrity of the immigration and asylum systems including their effective functioning. That is a matter for him. It has not been contested that the circumstances of each of the families are such that the Minister may require that their applications for asylum be examined in another state pursuant to the Dublin Convention.

No issue was raised concerning the principles to be applied in scrutinising the lawfulness of the Minister's decision and the established principles as to rationality fall to be applied.

In the circumstances of the case I am satisfied that the Minister's decision has been shown to be reasonable and rational in determining that there existed good and sufficient reasons associated with the common good for the making of the deportation order. Non-national immigrants are permitted to remain in the State while their applications for asylum or refugee status are examined and determined. It has been shown that the Minister decided to deport the non-national parents in this case because, *inter alia*, of concerns that this process could be circumvented by reason only of the fact that during the relatively short period during which that process takes place applicants may become the parents of a child born in the State. The Minister had a stark choice to make, either to deport or not to deport. There is no halfway house. No circumstances have been disclosed or shown to exist upon which one could consider the Ministers decision to be disproportionate. In my view it has not been established that the Minister's decision to deport in these cases was unlawful or unconstitutional. Cases may arise which are so wholly exceptional and unique in their circumstances which might require further evidence of the manner in which the integrity of the immigration and asylum systems could be called in question if no deportation order was made but this is clearly not such a case.

For the reasons set out in my judgment I would also dismiss this appeal.

THE SUPREME COURT

Keane C.J.
Denham J.
Murray J.
McGuinness J.
Hardiman J.
Geoghegan J.
Fennelly J.
109/02 & 108/02

BETWEEN

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

APPLICANTS/APPELLANTS

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

RESPONDENT/RESPONDENT

BETWEEN

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

APPLICANTS/APPELLANTS

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

RESPONDENT/RESPONDENT

Judgment of Mrs Justice McGuinness delivered the 23rd day of January 2003

I have had the advantage of reading the judgment about to be delivered by Fennelly J. and I agree with both his reasoning and his conclusions. I propose here to add some comments and considerations of my own.

The facts of the two cases in question have been fully and helpfully set out in the judgments both of the Chief Justice and of Fennelly J. and there is no need to repeat them here.

This is an appeal from the judgment of Smyth J. in the High Court delivered on the 12th April 2002 and his order made on the 12th April 2002 whereby he refused the relief sought by the Applicants in both cases in their judicial review proceedings. In essence the non-national Applicants sought to prevent their deportation as illegal immigrants.

In his judgment Smyth J. provided an admirably clear and succinct analysis of the submissions made by the parties and the matters which were, and which were not, in issue between them. It is, I consider, useful to set out that analysis here (from page 39 of the judgment onward):-

"The Legal Issues

Notwithstanding the very extensive range of reliefs sought or the elaborate grounds advanced in the documentation, the case on presentation to the Court reduced itself to two broad issues:-

(a) Constitutional, and

(b) Dublin Convention.

The Constitutional Issue

1. For ease of reference under this heading, Kevin Lobe and Osaze J. Osayande will be referred to as 'the Irish-born child'; the Lobe family and Osayande family will for convenience be referred to as 'the family'.

2. The rights invoked in these proceedings by the Applicants are:-

(i) those of the citizen, the Irish-born child as (a) an individual and (b) member of a family unit; and

(ii) those of the family.

3. The constitutional provisions relied upon were:-

(A) Article 2, which provides:-

> *"It is the entitlement and birthright of every person born on the island of Ireland, which includes its island and seas, to be part of the Irish nation. This is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage."*

The contention on behalf of the Irish-born child is that to be part of the Irish nation must involve an entitlement to live to be reared and to be educated in Ireland.

(B) Article 40.3.1, which provides:-

> *"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."*

The contention on behalf of the Irish-born child is that amongst the personal rights of the citizen is the right to reside in Ireland. That, where the citizen is a minor and unable because of that fact to make the decision to so reside, it is the parents of that child who are entitled, prima facie, to make that decision and to exercise that right for and on behalf of the child.

In respect of both (A) and (B), the Respondent accepts that:-

(i) the Irish-born child is a citizen;

(ii) it is not possible to make a Deportation Order against an Irish citizen;

(iii) there is a prima facie entitlement of the parents to make a decision on behalf of the Irish-born child to reside within the State.

(C) Article 41.1.1 which provides:-

> *"The State recognises the Family as the natural primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptible rights antecedent and superior to all positive law."*

Article 41.2:-

"The State, therefore, guarantees to protect the Family in its Constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."

The contention on behalf of the family is that it is a constitutionally recognised family and that it has rights as a family by virtue of the fact that comprised in the family unit there is an Irish-born child, who is a citizen. The Irish-born child was referred to by Mr Shipsey as 'the anchor' which connects and keeps connected to Ireland or the State the families of non-nationals.

The Respondent did not dissent from the submission made on behalf of the family that:-

(a) *it is not legally permissible to ignore the constitutional rights which derive under Article 41 in respect of a family that has one member who is an Irish citizen;*

(b) *every Irish citizen has a right to membership of a family;*

(c) *every Irish citizen has a right to have that family respected under Article 41 of the Constitution; and*

(d) *the family and family rights have a very special position under the Constitution.*

(D) *Article 42, which provides:-*

'1. The State acknowledges that the primary natural educator of the child is the family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

2. *Parents shall be free to provide this education in their homes or in private schools or in schools recognised and established by the State.*

3. *– 1^0 The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools*

established by the State, or to any particular type of school designated by the State.

- 2^0 The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.

4. The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.

5. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State, as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard to the natural and imprescriptible rights of the child."

The contention on behalf of the family is that:-

(i) it is the family not the parents that is regarded as the primary and natural educator of the child, it is a right which attaches to the family not to the parents;

(ii) the family comprises the parents and the children within the family;

(iii) the guarantee would be meaningless if the State could deport the parents of Irish children and thus effectively abdicate all responsibility which the State could exercise over those parents in respect of the education and welfare outside of the State;

(iv) the mandatory obligation of the State under Article 42.3.2, as guardian of the common good, cannot be fulfilled by deporting the parent(s).

The Respondent did not dissent from submissions (i) and (ii) aforesaid, bit did not agree that (iii) and (iv) were a consequence of giving effect to Deportation Orders made by the Respondent.

*Both parties agreed with the law as expressed by Finlay CJ in **Re J.H.** [1985] IR 375 (as referred to in the Supreme Court decision of the **Northwestern Health Board v HW and CW** unreported 8th November 2001, per Keane CJ, at p.40 of his judgment, and at p.30 of the judgment of Hardiman J), that an infant had, in addition to the rights of every child, rights under the Constitution as a member of the family, which he defined as follows:-*

> *"(a) to belong to a unit group possessing inalienable and imprescriptible rights antecedent and superior to all positive law (Article 41.1);*
>
> *(b) to protection by the State of the family to which it belongs (Article 41.2); and*
>
> *(c) to be educated by the family and to be provided by its parents with religious, moral, intellectual, physical and social education (Article 42.1)"*

The argument in the High Court, as in this Court, turned in the main on the interpretation and analysis in the case of ***Fajujonu v Minister for Justice*** [1990] 2 IR 151, to which I shall refer in detail later. The learned trial judge held that the reasons given by the Respondent Minister for refusing permission for the non-national members of the Lobe family and for Mr Osayande to continue to reside in this country met the requirements set by this Court in the ***Fajujonu*** case and that the Minister was entitled to make the relevant deportation orders.

The Rights in Issue

The two children, Kevin Lobe and Osaze J. Osayande, are citizens of Ireland both in accordance with Statute and in accordance with Article 2 of the Constitution. The children and their parents also have rights as families; these rights arise under Articles 41 and 42 of the Constitution. The children's rights arising from their citizenship, which are protected under Article 40.3 of the Constitution, are not necessarily absolute rights but their right to be citizens is an absolute right and the Respondent accepts that they cannot, as persons, be deported. The rights of the family under Articles 41 and 42 are important and powerful rights but are not absolute; this is clear both from Article 42.5 itself and from a number of previous decisions of this Court (including ***Fajujonu*** itself) to which I will refer later.

While the right of the State to control the entry and residence of non-nationals is not explicitly expressed in the Constitution, it has been accepted by this Court that this is a sovereign right – see, for example,

the much quoted passage from the judgment of Gannon J. in ***Osheku v Ireland*** [1986] IR 733, as approved by this Court in ***Laurentiu v Minister for Justice Equality and Law Reform*** [1999] 4 IR 27, and in ***In Re Article 26 of the Constitution and the Illegal Immigrants (Trafficking) Bill, 1999*** [2000] 2 IR 360. This too, is an important right and must be seen in the context of the common good.

In the ***Fajujonu*** case the Court considered the rights of the particular family in the context of the immigration system then prevailing – the Aliens Act 1935. The Court dismissed the appeal and returned the matter to the Respondent Minister for consideration in the light of the requirements set out by the Court. In the words of Finlay CJ (at page 162):

> *"The reason, therefore, which would justify the removal of this family as it now stands, consisting of five persons three of whom are citizens of Ireland, against the apparent will of the entire family, outside the State has to be a grave and substantial reason associated with the common good."*

In the words of Walsh J. (at page 166) the Respondent Minister:-

> *"Would have to be satisfied, for stated reasons, that the interest of the common good of the people of Ireland and of the protection of the State in its society are so predominant and so overwhelming in the circumstances of the case that an action which can have the effect of breaking up this family is not so disproportionate to the aim sought to be achieved as to be unsustainable."*

The Respondent Minister in the instant cases put forward a number of reasons why he had decided to refuse the applications of the parents to remain in this country. These are mot clearly expressed in the memorandum provided to the Minister for consideration of the cases by Mr John Lohan (the *"Lohan Memorandum"*) as follows:-

> *"The reasons for this recommendation are:-*
>
> *The length of time the family has been in the State – only seven months at this stage but less than four months at the time of making the deportation order,*
>
> *The application of the Dublin Convention to which Ireland is a party,*
>
> *The overriding need to preserve respect for and the integrity of the asylum and immigration systems."*

In the Lobe case, a further reason was given relating to the adaptability of the family to life in the Czech Republic.

The learned High Court judge accepted that these reasons met the standards set in the ***Fajujonu*** case. The Applicants have appealed. In their notice of appeal a series of grounds of appeal are set out, but in essence the Applicants assert that the learned High Court judge erred in holding that the reasons put forward by the Minister met the requirements set out by this Court in the ***Fajujonu*** case.

As in the High Court, therefore, the argument before this Court turned in the main on the analysis and interpretation of this Court's decision in ***Fajujonu*** and whether the instant cases could properly be distinguished from that case. It should be noted that the Respondent did not mount a direct challenge to the decision in ***Fajujonu,*** nor did he bring evidence, statistically or otherwise, to try to demonstrate that in the context of the common good and in the context of present immigration patterns the considerations set out by the Court in ***Fajujonu*** should no longer apply.

It is therefore necessary for this Court to consider the nature, importance and weight of the rights of the child citizens, of their families, and of the State, in the context of the ***Fajujonu*** judgment.

The Children's Citizenship

Kevin Lobe and Osaze J.Osayande were born in Ireland. They are therefore citizens of Ireland in accordance with the provisions of the Irish Nationality and Citizenship Act 1956 which provided, *inter alia*, at section 6(1)(a):

"Every person born in Ireland is an Irish citizen from birth."

Article 2 of the Constitution which was passed by Referendum of the people following the British-Irish Agreement of Good Friday 1998, provides as follows:-

> *"It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage."*

The terms of the Article are strong and emotive; it is the birthright of every person born in Ireland to be part of the Irish nation. Do the terms of Article 2 in any way affect the rights of the two children in question as citizens? They do not add any specific rights to those acquired by Statute, nor, presumably to these rights which may arise through the operation of Article 40 of the Constitution. Historically, however, the enactment of Article 2 by the people was accepted as being of great importance.

The statutory position, as has been pointed out by others, arose from the old rule of *ius soli*, and doubtless, even without the constitutional protection of Article 2, it would not be possible retrospectively to remove the right of citizenship from those who were already qualified, including these two children. However, the *ius soli* rule has been altered and diminished by legislation elsewhere, in particular in the United Kingdom. Given the changes in the pattern of immigration to this country it is not impossible that, in the absence of constitutional protection, the statutory position in this jurisdiction might also have been changed, possibly in the case of those who, to use the Respondent's phrase, were born *"fortuitously"* in Ireland. In the light of Article 2 such a statutory change cannot now occur.

I would also concur with Fennelly J. in his analysis of the wording of Article 2. Some import and meaning must be given to the concept of the birthright of the Irish born person and to the declaration that such a person is part of the Irish nation; it is not a mere shibboleth. It seems to me that the enactment of Article 2, while not altering the statutory position in regard to citizenship, alters the context and perhaps also the quality of the citizenship which is the right of the Irish-born. Can the declared birthright and entitlement contained in Article 2 be met by a reassurance that Kevin Lobe and Osaze J.Osayande, having been in reality constructively deported in infancy, may return to claim their citizenship at the age of 18? This question also, in my view, must be included in the Court's consideration of the tests set out in the judgments in ***Fajujonu***.

Articles 41 and 42

The first section of Article 41 of the Constitution provides as follows:

"41.1.1 The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

1.2 The State, therefore, guarantees to protect the Family in its Constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."

Article 42 which is headed *"Education"* provides as follows:

"42.1 The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

2.1. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.

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

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

4.2 The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.

5. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means, shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."

The meaning and effect of these Articles have been considered by the High Court and by this Court in a considerable number of cases. The rights of the family and of children are central to the organisation of our society, and understandably there has been much analysis and commentary on these decisions, for example in Kelly; The Irish Constitution (3rd edition), pages 989 to 1060 and in Shatter: Family Law (4th edition) chapter 1 and seriatim.

While in Article 41 the rights of the family are declared to be inalienable and imprescriptible, they are not fully defined. This question was addressed by Kenny J. in ***Ryan v The Attorney General*** [1965] IR 294 where he said:-

> *"Not one of the Counsel in this case has attempted to state what the inalienable and imprescriptible rights of the family are and, as the Constitution gives little help on this, I am in some difficulty in dealing with this argument.* 'Inalienable' *means that which cannot be transferred or given away while* 'imprescriptible' *means that which cannot be lost by the passage of time or abandoned by non-exercise. The right of the family to educate the children of that family is, I think, one of the rights which any moral philosophy would recognise but this right cannot, in my opinion, be one of the rights referred to in Article 41 for there is a separate Article (Article 42) dealing with education and it is highly unlikely that the Constitution gives the family two separate rights to educate….Some clue to the ambit of the rights of the family referred to in article 41 is to be found in sub-section 2 of section 1 where there is a reference to a guarantee by the State to protect the family in its Constitution and authority. It seems, therefore, that the rights referred to in section 1.1 of Article 41 relate to the Constitution and authority of the family."*

These fundamental rights and their origin were notably described by Walsh J. in ***McGee v Attorney General*** [1974] 284 (at 310):-

> *"Articles 40, 41, 42 and 44 of the Constitution all fall within that section of the Constitution which is titled 'fundamental rights.' Articles 41, 42 and 43 emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection. The individual has natural and human rights over which the State has no authority; and the family, as the natural, primary and fundamental unit group of society, has rights as such which the State cannot control. However, at the same time it is true, as the Constitution acknowledges and claims, that the State is the guardian of the common good and that the individual, as a member of society, and the family, as a unit of society, have duties and obligations to consider and respect the common good of that society."*

Walsh J. reiterated these views in ***G v An Bord Uchtala*** [1980] IR 32 (at page 69) where he said:-

"In my judgment in the same case ***(McGee v AG)****I referred to Articles 41, 42 and 43 of the Constitution and expressed the view, which I still hold, that these Articles 'acknowledged that natural rights or human rights are not created by law but that the Constitution confirms their existence and gives them protection. The individual has natural and human rights over which the State has no authority…"*

Later, at page 317 of the report, I stated:-

"The natural or human rights to which I have referred earlier in this judgment are part of what is generally called the natural law."

The leading case on the rights of the constitutional family (the family based on marriage, as a unit) is ***In Re J.H*** [1985] IR 375 a case which the Respondent accepts as binding on him. The facts of that case were that the infant girl who was the subject of the proceedings was placed in foster care by her unmarried natural mother one week after her birth on 25th September 1982. The mother took this course because at the time she was worried about the effect on the child of being brought up by an unmarried mother. Although the mother knew the infant's father, a widower with grown up children, she did not wish to marry him solely because of her pregnancy. The infant was placed for adoption within three months of birth. The adoptive parents, both in their twenties, already had one adopted child. The natural mother later married the father of the infant and they then applied pursuant to the provisions of the Illegitimacy Act 1931 for the infant's birth to be re-registered. The natural mother, in correspondence with the Adoption Society, refused to give her consent to an order for the infant's adoption. The adopting parents issued proceedings claiming that the natural mother's consent to adoption should be dispensed with pursuant to the provisions of the Adoption Act 1974. The natural parents issued further proceedings pursuant to the provisions of the Guardianship of Infants Act 1964 in which they sought custody of the infant. The High Court granted an order pending determination of the proceedings restraining re-registration of the infant's birth since such re-registration would, under the Adoption Acts, have effectively prevented any adoption. The natural parents did not challenge the suitability of the adopting parents to provide a secure and stable home for the infant and it was established in evidence that the infant and the adopting parents' other child had formed a close relationship. The adopting parents presented medical evidence relating to the natural parents indicating that the father suffered from blood pressure and a partially detached retina, while the mother suffered from over-strain which was occasioned by her care for her own ageing mother

whom she had nursed up to her death. Psychiatric evidence at the trial indicated that there was a risk of long term psychological harm to the infant if custody was transferred from the adopting parents to the natural parents. At the date of the hearings in the High Court the natural mother was expecting another child.

In the High Court Lynch J. granted custody of the infant to the adopting parents having regard to the test of the primacy of the welfare of the child as stated in section 3 of the Guardianship of Infants Act 1964, but refused to dispense with the natural parents consent to adoption.

The natural parents appealed to this Court on the custody issue. This Court remitted the custody issue to the High Court, holding that the test as to the welfare of the child stated in section 3 of the Guardianship of Infants act 1964 must be given a meaning consistent with the infant's rights as stated in Articles 41 and 42 of the Constitution as a member of a family, in view of the marriage of her parents. Notwithstanding the presumption of validity attaching to the provisions of section 3 of the Act of 1964, it was held that the Court cannot supplant the right to education by the family and parents conferred on the infant by Article 42 section 1 unless there is established to the satisfaction of the Court the exceptional circumstances referred to in Article 42 section 5 and in the circumstances section 3 of the 1964 Act ought to be construed as involving a constitutional presumption that the welfare of the child as defined in section 2 of the Act is to be found within the family unless there are compelling reasons why this cannot be achieved, or the evidence establishes an exceptional case as envisaged by Article 42 section 5 and in this light the matter should be reconsidered on the basis of this test.

In the event the High Court having heard further evidence and applying the test as adumbrated by this Court awarded custody of the child to the natural parents.

In his judgment Finlay C.J. spoke of the family rights under Articles 41 and 42 of the Constitution. He surveyed a number of cases which dealt with these rights and went on to say (at page 394):-

> *"Having considered these decisions and the relevant provisions of the Constitution I have come to the conclusion that the principles of law applicable to this case are as follows:*
>
> *1. The infant, being the child of married parents, now legitimised, has in addition to the rights of every child, which are provided for in the Constitution and were identified by O'Higgins C.J. in* ***G v An Bord Uchtala*** *[1980] IR 32 at page 56, rights under the Constitution as a member of a family, which are:*

(a) to belong to a unit group possessing inalienable and imprescriptible rights antecedent and superior to all positive law (Article 41 section 1);

(b) to protection by the State of the family to which it belongs (Article 41 section 2); and

(c) to be educated by the family and to be provided by its parents with religious, moral, intellectual, physical and social education (Article 42, section 1)…."

Later in his judgment Finlay C.J. continued:-

"A child of over two years of age, as this infant is, in the dominant or general custody of persons other than its parents and continuing in such custody against the wishes of its parents, cannot be said to enjoy the right of education by its family and parents granted by Article 42 section 1 of the Constitution. And no additional arrangements, as were indeed put in train in this case by the orders of the High Court for access by its parents to the child or participation by them in a decision-making process concerning its education, could alter that situation. Furthermore, notwithstanding the presumption of validity which attaches to the Act of 1964 and the absence of a challenge in these proceedings to that validity, the Court, cannot, it seems to me, as an organ of the State, supplant the right to education by the family and parents which is conferred on the child by the Constitution unless there is established to the satisfaction of the Court a failure on the part of the parents as defined in Article 42 section 5 and 'exceptional circumstances'.

I would, therefore, accept the contention that in this case section 3 of the Act of 1964 must be construed as involving a constitutional presumption that the welfare of the child, which is defined in section 2 of the Act in terms identical to those contained in Article 42 section 1, is to be found within the family, unless the Court is satisfied on the evidence that there are compelling reasons why this cannot be achieved, or unless the Court is satisfied that the evidence establishes an exceptional case where the parents have failed to provide education for the child and to continue to fail to provide education for the child for moral or physical reasons."

The other members of the Court – Griffin J., Hederman J., McCarthy J., and O'Hanlon J. agreed with the Chief Justice. In a brief judgment McCarthy J. emphasised the need for *"compelling reasons"*. At page 397 he said:-

> *"The key issue is whether the Court is satisfied on the evidence that there are compelling reasons why the welfare of the child, as defined, cannot be achieved within the family, in other words that there are compelling reasons why the child should be in custody other than that of her parents. It may seem inappropriate in a case so inevitably distressing as this to speak of a burden of proof; I would merely wish to emphasise that the 'compelling reason or reasons' must, in my view, be clearly established."*

This judgment, which firmly established the constitutional rights of the family as a unit, had considerable impact at the time. Its reasoning and conclusions are reflected in the terms of the Child Care Act 1991 which, in earlier Bill form, was before the Oireachtas at the time that this Court gave judgment. Section 3 of the 1991 Act, for example, provides:-

> *"3(1) It shall be a function of every Health Board to promote the welfare of children in its area who are not receiving adequate care and protection.*
>
> *(2) In the performance of this function, a Health Board shall -*
>
> *(a) take such steps as it considers requisite to identify children who are not receiving adequate care and protection and co-ordinate information from all relevant sources relating to children in its area;*
>
> *(b) having regard to the rights and duties of parents, whether under the Constitution or otherwise –*
>
> *(I) regard the welfare of the child as the first and paramount consideration, and*
>
> *(II) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child; and*
>
> *(c) Have regard to the general principle that it is generally in the best interests of a child to be brought up in his own family."*

The next judgment in which the strength of the rights of the constitutional of family was considered was ***In the Matter of Article 26 of the Constitution*** and ***In the Matter of the Adoption (No. 2) Bill 1987 [1989] IR 656.*** Prior to 1987 there was no provision in the Adoption Acts for the adoption of a child of married parents. The Adoption Bill 1987 provided for such adoptions in extremely limited circumstances. The Bill, which was enacted as the Adoption Act 1988, reflects virtually word for word the terms of Article 42.5 of the Constitution and adds the additional requirement that the child in question must be *"abandoned"* by the married parents. In delivering the judgment of the Court Finaly C.J. stressed the necessity for strict interpretation of the terms of the Act, which arose from the importance of the rights of the family under Articles 41 and 42 of the Constitution. Only where the circumstances set out in Article 42.5 applied could there be any possibility of removing the child from its constitutional family. At page 663-4 the learned Chief Justice, having set out the provisions of the Constitution and of the Bill, said:-

> *"In section 3 the provisions of sub-clause I (A) to II (B) inclusive provide a series of matters which seriatim must be established to the satisfaction of the Court. They are not merely matters to be taken into consideration by the Court in exercising a general discretion but are framed in a much more stringent form of being absolutely essential proofs requiring separately to be established. Failure in any one of these proofs absolutely prohibits the making of an authorising order, no matter how strong might be the evidence available of its desirability from the point of view of the interests of the child."*

Thus the importance of the rights of the family are held to be such that the strictest standards must be applied in any interference with them.

In ***M.F. v Superintendent Ballymun Garda Station*** [1990] ILRM 767 O'Flaherty J. in this Court returned to the subject of the constitutional rights of the child and of the family (at page 773):-

> *"Dealing with the constitutional rights in the first instance, what they are and the importance that the Court attaches to them, was fully explored in Re Article 26 of the Constitution and In the Matter of the Adoption (No. 2) Bill 1987. It will be recalled that the legislation (as it now is) was concerned with the entitlement of the child of the marriage to be adopted. In the course of its judgment the Court examined all the relevant constitutional provisions and highlighted the necessity always to have regard to the 'natural and imprescriptible' rights of the child.*

The Court accepted (page 272):-

> *'…that the right and duty of the State to intervene upon the failure of parents to discharge their duty to a child can be considered both under Article 42.5 and under Article 40.3. By the express provisions of Article 42.5 the State in endeavouring to supply the place of the parents is obliged to have due regard for the natural and imprescriptible rights of the child. Any action by the State pursuant to article 40.3 endeavouring to vindicate the personal rights of the child, would, the Court is satisfied, be subject to a similar limitation.'*

This is the constitutional requirement."

It is also clear from the case law that the family rights contained in article 41 and article 42 are not confined to families composed of Irish citizens. They can extend to non-nationals. In ***Northampton County Council v ABF and MBF*** [1982] ILRM 164 Hamilton J. (as he then was) held that non-citizenship had no effect on the interpretation of Article 41 or the entitlement to the protection afforded by it. In that case an English Juvenile Court had placed the infant child of English citizens who were married in and domiciled in England and which infant was born in England in the care of the applicant County Council. The father of the infant unlawfully removed the infant from the jurisdiction of the English Court to Ireland and placed her in the care of the Defendants. The County Council's claim was for the return of the infant so that she might be legally adopted in spite of the opposition of the father. The infant's mother consented to the proposed adoption. At the time such an adoption was not permissible under Irish law and was assumed to be repugnant to Article 41 of the Constitution.

Hamilton J. in his judgment referred to the passages from the judgment of Walsh J. in ***McGee v Attorney General*** which I have already quoted above and also to the judgment of Walsh J. in ***G v An Bord Uchtala***. He went on to say:

> *"The Supreme Court in the* ***State (Nicolaou) v An Bord Uchtala*** *[1996] IR 567 expressly reserved for another and more appropriate case consideration of the effect of non-citizenship upon the determination of the Articles in question. It seems to me, however, that non-citizenship can have no effect on the interpretation of Article 41 or the entitlement to the protection afforded by it.*

What Article 41 does is to recognise the family as the natural, primary and fundamental unit group of society and as a moral institution possessing inalienable and imprescriptible rights antecedent and superior to all positive law, which rights the State cannot control. In the words of Walsh J. already quoted, 'these rights are part of what is generally called the natural law' and as such are antecedent and superior to all positive law.

The natural law is of universal application and applies to all human persons, be they citizens of this State or not, and in my opinion it would be inconceivable that the father of the infant child would not be entitled to rely on the recognition of the family contained in Article 41 for the purpose of enforcing his rights as the lawful father of the infant the subject matter of the proceeding herein or that he should lose such entitlement merely because he removed the child to this jurisdiction for the purpose of enforcing his said rights.

These rights are recognised by Bunreacht na h-Eireann and the Courts created under it as antecedent and superior to all positive law: they are not so recognised by the law of the Courts of the jurisdiction to which it is sought to have the infant returned."

In the ***State (Bouzaqou) v Station Sergeant, Fitzgibbon Street Garda Station*** [1985] IR 426 Barrington J. in the High Court stated at (page 103) that he was prepared to accept that the rights recognised by articles 41 and 42 of the Constitution were not confined to citizens and that, in a proper case, the prosecutor would be entitled to rely upon these Articles, and he referred in this context to the ***Northampton County Council*** case.

In ***T.M. and A.M. v An Bord Uchtala*** [1993] ILRM 577 this Court was asked to consider whether the provisions of the Adoption Acts 1952 to 1988 applied to a child of alien parents. The prospective adopters in that case wished to adopt an Indian child of unknown parents. Evidence was given that the child had been a foundling but there was no evidence to indicate that the child's parents were unmarried. The Court held that the Adoption Act 1988 applied to any child within the jurisdiction who would otherwise qualify for adoption irrespective of the child's nationality. O'Flaherty J. in his judgment adverted to the constitutional point and said (at page 589):-

"The reference to 'parents' and 'children' in Article 42.5 is not confined to citizens of the State. Indeed it would be remarkable if this section could not be invoked to protect any child in the State who is left, in effect, parentless."

The most recent statement by this Court of the importance of the rights of the family and in particular of the rights of the family vis-à-vis the State is contained in the judgments in ***Northwestern Health Board v H.W. and C.W.*** [2001] 3 IR 622. In that case the Plaintiff Health Board applied for an order permitting it to carry out a particular screening test on the infant child of the Defendants notwithstanding the fact that the Defendants had refused to give their consent and for an order restraining the Defendants from impeding the Plaintiff from carrying out the test. In the High Court McCracken J. refused the relief sought holding *inter alia* that Article 41 of the Constitution placed the family in a special position as the natural, primary and fundamental unit group of society which possessed rights antecedent and superior to all positive law and that the State had a constitutional duty to vindicate the rights of children in exceptional cases, where there had been a failure by the parents in their duty, for physical or moral reasons. However, the State was not entitled to intervene in every case where parental opinion differed from a professional opinion or the State considered that the parents were wrong in a decision. In setting out his conclusions McCracken J. (at p.633) stated:

"Article 41.1 places the family in a very special position as being the natural primary and fundamental unit group of society. It also provides that the family possess rights which are antecedent and superior to all positive law. It is indeed probably the provision in the Constitution which comes nearest to accepting that there is a natural law in the theological sense. There have been a number of cases which have spoken of a hierarchy of rights under the Constitution, but the wording of Article 41.1 certainly would appear to place the rights of the family and therefore, presumably, the rights of parents in relation to their children, very high up in this hierarchy."

On appeal the decision of the learned High Court judge was upheld by this court. In his judgment the Chief Justice discussed at some length the provisions of Article 41. He pointed out (at Pg. 686) that:-

"While Article 12 of the European Convention of Human Rights and Fundamental Freedoms acknowledges the right of everyone to respect for his family life, neither the Canadian Charter of Rights and Freedoms nor the Commonwealth of Australia Constitution Act - to mention two jurisdictions' precedents from which were cited in the submissions - contain any articles equivalent to those contained in our Constitution."

Later in his judgment (at Pg. 687) he goes on to say:

"Again, the Article speaks, not of the authority of parents, but of the authority of the family. While the family, because it derives from the natural order and is not the creation of civil society, does not, either under the Constitution or positive law, take the form of a juristic entity, it is endowed with an authority which the Constitution recognises as being superior even to the authority of the State itself. While there may inevitably be tensions between laws enacted by the State for the common good of society as a whole and the unique status of the family within that society, the Constitution firmly outlaws any attempt by the State in its laws or its executive actions to usurp the exclusive and privileged role of the family in the social order."

Denham J. in her judgment at p.718 stated:

"Under the Constitution, the State recognises the family as the natural primary and fundamental unit group of society: Article 41.1.1. Further, the State guarantees to protect the family in its constitution and authority as the necessary basis of social order and as indispensable to the welfare of the nation and the State: Article 41.1.2. Thus, the family is the basic unit in our society and in accordance with the Constitution the State will protect it. The family in the context of Article 41 of the Constitution is the family founded on the institution of marriage.

The fact that the family is the fundamental unit group of society is a constitutional principle. Whatever historical origin or origins may be given for this principle it is a principle of the Constitution. In this case the family is one recognised and protected by the Constitution. The responsibility and authority of the family is exercised by the defendants. The child is a member of the family and has the benefit of being part of that unit. The child is the responsibility of the parents. The rights of the parents in exercising their responsibility are not absolute; the child has personal constitutional rights. The child has rights both as part of the unit of the family and as an individual."

At p.719 Denham J. added

"However, the legislation and the rights of the child have to be construed in accordance with Article 41 which place the family at the centre of the child's life and as the core unit of society. The language of Article 41 (set out previously) is clear and strong. The family is the fundamental unit group of society and the State (which includes the courts) guarantees to protect the family in its constitution and authority."

The origin, importance and weight of the rights of the family are all stressed in this powerful line of decisions both of the High Court and of this court. They are not absolute rights, but they are not readily displaced and compelling reasons are required to displace them.

It is in the context of these statements of the law that the case of ***Fajujonu v. The Minister for Justice*** [1990] 2 IR 151 came to be decided and it cannot be doubted that Articles 41 and 42 are the foundation and inspiration of this court's decision in that case.

The Respondent's Reasons.

In his submissions to this court senior Counsel for the respondent minister, Mr.Gallagher, relied on a number of cases dealing with the sovereign right of the State to maintain social order by controlling the entry of non-nationals into the State and their movement when within the State. In ***Osheku v. Ireland*** [1986] IR 733 Gannon J. put the position as:

> *"The control of aliens which is the purpose of the Aliens Act, 1935 is an aspect of the common good related to the definition, recognition and the protection of the boundaries of the State. That it is in the interests of the common good of the State that it should have control of the entry of aliens, their departure, and their activities and duration of stay within the State is and has been recognised universally and from earliest time. There are fundamental rights of the State itself as well as fundamental rights of the individual citizens and the protection of the former may involve restrictions in circumstances of necessity on the latter."*

Similarly in ***Pok Sun Shun v. Ireland*** [1986] ILRM 593, Costello J. held that the rights given to the family under the Constitution were not absolute and that the provisions of the Aliens Act, 1935 and the orders made under it were permissible restrictions. This line of authority was endorsed by this court in ***Laurentiu v. Minister for Justice*** [1999] 4 IR 27 and more recently ***In Re Article 26 of the Constitution and the Illegal Immigrants (Trafficking) Bill, 1999*** [2000] 2 IR 360. The respondent argues that these cases establish that the provisions of the Aliens Act, 1935 and of the present system of immigration control prevail over the constitutional rights of the family members of a citizen and that the family members of a citizen may be deported.

The minister puts forward a number of reasons why the deportation orders made in respect of the members of the Lobe family and in respect of Mr Andrew Osayande should not be revoked. These reasons are most clearly set out in the memoranda which were drawn up for the minister's consideration by Mr John Lohan, principal officer in the Department of Justice, Equality and Law Reform in both cases (the Lohan memoranda). These memoranda are very similar in both cases and they set out the situation of the families in a clear and fair manner. The full text of the memoranda have already been set out in other judgments and I will confine myself to referring to the final passage headed "*Recommendation*". This passage reads as follows:

> *"13. I believe that it is in the common good that the deportation orders made in respect of this family should be affirmed. The interests of maintaining the common good outweigh any claims made on behalf of the Osayande family. The common good would be ensured through the minister having as his priority the protection of the asylum and immigration systems in the absence of sufficiently strong features to ignore that priority.*

14. *Having considered all the material in this case, I recommend that the minister should not revoke the deportation order made in respect of Mr Andrew Osayande. The effect of the enforcement of this order will be a temporary separation of Mr Osayande from his wife and two children, one of whom is an Irish citizen. On the basis of the family protection claimed by the applicant it is presumed that Mrs Osayande and dependants will decide as to whether they wish to accompany Mr Osayande in the completion of his asylum claim in the UK and thus preserve the family. This matter will be addressed in due course by the Refugee Applications Commissioner.*

15. *The reasons for this recommendation are:-*

The length of time the family has been in the State - only seven months at this stage but less than four months at the time of making the deportation order,

the application of the Dublin Convention to which Ireland is a party,

the overriding need to preserve respect for and the integrity of the asylum and immigration systems."

The written submissions to this court on behalf of the respondent conclude by giving a similar list of reasons as follows

"The respondent was entitled to conclude that the deportation order made in respect of the Lobe family and Mr Osayande should not be revoked and that their application for residency in the State should be refused on the basis of (a) the length of time the Lobe family and Mr Osayande had been in the State; (b) the adaptability of Kevin Lobe and Osaze J.Osayande; (c) the fact that the lives of Kevin Lobe and Osaze J. Osayande would not be endangered if they were returned to the United Kingdom, (d)

the State's interest in applying the Dublin Convention (e) the overriding need to preserve respect for the integrity of the asylum and immigration system."

The first of these reasons is related to the ***Fajujonu*** decision and will be discussed under that heading. The second reason relies, as far as I understand it, on a pure assertion of belief that young children are adaptable. There is no detailed or evidential consideration as to whether these particular children are adaptable. The third and fourth reasons are related to the operation of the Dublin Convention to which I will refer later in this judgment. The final reason is indeed, as stated, the overriding reason - the need to preserve respect for the asylum and immigration system.

There is no doubt that the preservation of the integrity of the asylum and immigration system is an important factor and has been accepted by this court as being necessary for the common good. It is clearly undesirable that the proper administration of this system should be distorted and that certain immigrants or asylum seekers should gain undue priority if that is unjustified. These are serious matters which must be given due weight.

The Fajujonu Decision

Since this decision played such an important part in the arguments of both sides before this court it is necessary to consider it in some detail. The plaintiffs in the case were a husband and wife together with their Irish born daughter. The husband was a Nigerian citizen and the wife a Moroccan citizen. They were married in London in 1981 and shortly thereafter moved to Ireland and remained in this country without notifying the authorities. Their daughter was born in Ireland in September, 1983 and was therefore an Irish citizen. In

December, 1983 Dublin Corporation allocated them a three bedroom house. Two further children were born, also Irish citizens. The husband came to the notice of the authorities when he sought a work permit for employment in Ballyfermot. The Minister for Labour refused to grant him a work permit because he was an illegal alien. The Minister for Justice requested the husband and wife to make arrangements to leave the country and stated that one of the reasons they were being refused permission to stay was because the husband was unable to support his family without assistance from the State. Although no deportation order had yet been made the plaintiffs instituted proceedings in the High Court seeking orders restraining their deportation together with other reliefs. In the High Court Barrington J. refused the reliefs sought, stating that since the rights of the family were guaranteed by the Constitution in the context of the welfare of the nation and the State and having regard to the common good, the laws enacted by the Oireachtas for the control of the movements of aliens were permissible limitations upon the family and personal rights of the plaintiffs. In his judgment Barrington J. referred in particular to the judgment of the then President of the High Court (Finlay P.) in ***The State (M) v. The Attorney General*** [1979] IR 73. At p.156 of the report the learned judge stated, quoting that case:

> *"The former President then continues in a passage which Mr McDowell, on behalf of the plaintiffs, relies on very heavily. The passage reads as follows:-*
>
> > *'In the instant case where I am dealing with a child who is under the age of one year and is therefore under the age of reason, such a personal right must be construed, in my view, in the same way as the courts have consistently construed the right of liberty of such a child, that is to say as being a right which can be exercised not by its own choice (which it is incapable of making) but by the*

choice of its parent, parents or legal guardian, subject always to the right of the Courts by appropriate proceedings to deny that choice in the dominant interest of the welfare of the child. So construed, the right of travel constitutionally arising for this particular child on the existing legal provisions for its welfare consist, in my view, of the right to travel with the approval or consent of its mother provided that such travelling, and the purpose of it, do not appear to conflict with the welfare of the child.'

The learned President was dealing in the case referred to with a comparatively straightforward clash between the rights of the child on the one hand and the rights of the State on the other. He is adding that, in the case of a child of tender years, a parent may make the child's choice for him subject to the court being satisfied that the dominant interest of the welfare of the child is being achieved.

The present case appears to me to raise much more complex issues. I am prepared to accept that the child has, generally speaking, a right as an Irish citizen, to be in the State. I am also prepared to accept as a general proposition that the child has the right to the society of its parents. But does it follow from this that the child has the right of the society of its parents in the State?"

Later in his judgment Barrington J. refers to the family's rights under Articles 41 and 42:

"The rights of the family are declared to be 'inalienable' which means that they cannot be surrendered or given away. They are also declared to be 'imprescriptible' which means that they cannot be lost or forfeited through the wrongful act of a third

party over a period of time. One is therefore driven to the conclusion that the Constitution reserves to the family a certain sphere of authority and that within this sphere it has inalienable and imprescriptible rights. But this does not mean that the sphere of authority is unlimited or the rights absolute. There are certain matters which are outside and beyond the competence of the family, for example, issues such as peace or war or the foreign policy of the State."

The Plaintiffs appealed to this Court. Judgments were delivered by Finlay C.J. and Walsh J. Griffin J. expressed agreement with both judgments. Hederman J. and McCarthy J. expressed agreement simpliciter. The issue before the court was clear; Finlay C.J. stated (at p.161):

"It is quite clear from the terms of the pleadings in the High Court and from the terms of the very careful judgment of Barrington J. that the plaintiffs' case in the High Court was simply confined to a single net and complete issue, and that was an assertion that the third plaintiff as a citizen of Ireland was entitled to the protection of the constitutional rights to which she was entitled pursuant to Articles 40, 41 and 42 of the Constitution, and that amongst those rights was a right to remain resident within the State and have preserved for her the family of which she was a member as a unit of society within the State and to be parented by her parents within the State. That was asserted as an absolute right which could not be defeated or infringed by any order made by the Minister pursuant to the Aliens Act, 1935. As an alternative to that it was asserted that if the Act of 1935 purported to vest in the Minister a power to abolish or infringe the constitutional rights of the third plaintiff, which I have shortly outlined, that that provision of the Act of 1935 was inconsistent with the Constitution

and could not have been carried forward pursuant to Article 50 of the Constitution. The decision of Barrington J. was that whilst he clearly recognised and accepted the existence of constitutional rights in the third plaintiff, arising from her citizenship of the State, that on the authorities which he reviewed and in particular having regard to the decisions in the High Court of Gannon J. in ***Osheku v. Ireland*** *[1986] IR 733 and by Costello J. in* ***Pok Sun Shun v. Ireland*** *[1986] ILRM 593 and his own decision in* ***The State (Bouzagou) v. Station Sergeant, Fitzgibbon Street*** *[1985] IR 426, that the family and other constitutional rights of the third plaintiff were not absolute and could be restricted by the proper exercise by the Minister for Justice of the powers conferred on him under the Act of 1935. It was on that basis that the learned trial judge dismissed the plaintiffs' claim.*

When the matter came on before this court on appeal the case really made on behalf of the plaintiff by Mr McDowell was not an assertion of the absolute right incapable of being effected by the provisions of the Act of 1935, but rather the assertion of a constitutional right of great importance which could only be restricted or infringed for very compelling reasons. Notwithstanding the fact that this was not the case which had been made in the court below, and notwithstanding the fact that it is difficult to fit it comfortably within any of the grounds for appeal which were contained in the notice of appeal, in the interests of justice this court considered this submission and argument and the reply of the respondents to it."

Finlay C.J., in the central core passage of his judgment, went on to say:

"I have now come to the conclusion that where, as occurs in this case, an alien has in fact resided for an appreciable time in the State and has become a member of a family unit within the State containing children who are citizens, that there can be no question but that those children, as citizens, have got a constitutional right to the company, care and parentage of their parents within a family unit. I am also satisfied that prima facie and subject to the exigencies of the common good that that is a right which these citizens would be entitled to exercise within the State.

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

Having reached these conclusions, the question then must arise as to whether the State, acting through the Minister for Justice pursuant to the powers contained in the Aliens Act, 1935 can under any circumstances force the family so constituted as I have described, that is the family concerned in this case, to leave the State. I am satisfied that he can, but only if, after due and proper consideration, he is satisfied that the interests of the common good and the protection of the State and its society justifies an interference with what is clearly a constitutional right.

The discretion, it seems to me, which in the particular circumstances in a case such as this is vested in the Minister for Justice to consider as to whether to permit the entire of this family to continue to reside in the State, on the one hand, or to prevent

them from continuing to reside in the State, on the other hand, is a discretion which can only be carried out after and in the light of a full recognition of the fundamental nature of the constitutional rights of the family. The reason, therefore, which would justify the removal of this family as it now stands, consisting of five persons three of whom are citizens of Ireland, against the apparent will of the entire family, outside the State has to be a grave and substantial reason associated with the common good.

On the findings of fact which have been made by the learned trial judge there is not any finding that the existence of important family rights in the children of this marriage have been ignored or brushed aside in the investigations carried out on behalf of the minister. Neither, however, is there a finding nor any evidence, it would appear to me, to support a finding of a careful consideration of those rights and the particular importance attached to them by reason of their constitutional origin. In any event the position of the family itself, the exercise by it of its rights to remain as a family unit and the exigencies of the common good which may be affected by the continued residence in the State of the first and second plaintiffs, are all matters which must of necessity have been subject to at least the possibility if not the probability of very substantial change since this matter was investigated in 1984.

In these circumstances I am satisfied that the protection of the constitutional rights which arise in this case require fresh consideration now by the Minister for Justice, having due regard to the important constitutional rights which are involved, as far as the three children are concerned, to the question as to whether the plaintiffs should pursuant to the Act of 1935 be permitted to remain in the State."

Walsh J. in his judgment referred to the Aliens Act 1935 as conferring extensive powers on the Minister for Justice to make orders concerning aliens either in general or of a particular nationality or other class. These included the power to restrict or prohibit entering the State or leaving the State and provided for the exclusion or deportation of such persons from within the State. The learned judge went on to say:-

> *"It is abundantly clear that citizens of this State may not be deported. The third Plaintiff is one of three children of the first two Plaintiffs, all of which children are citizens of Ireland. If the first two Plaintiffs, being the parents of the infant children, are deported, the effect must be that their children who are Irish citizens are faced with the choice of remaining within this State as they are entitled so to do and therefore being in effect compulsorily separated from their parents, or having to leave the State with their parents and thus ceasing to have the benefit of all the protection afforded by the laws and the Constitutions of this State. In my view, the first two Plaintiffs and their three children constitute a family within the meaning of the Constitution and the three children are entitled to the care, protection and the society of their parents in this family group which is resident within the State. There is no doubt that the family has made it its home and residence in Ireland."*

The learned judge then went on to refer to the decisions in ***Pok Sun Shun v Ireland*** and ***Osheku v Ireland*** (mentioned above) and also to the ***State (Bouzagou) v Sergeant Fitzgibbon Street***. He pointed out that Mr and Mrs Fajujonu had entered the country illegally and that it was admitted that they knew that they were resident in Ireland illegally. Walsh J. continued

> *"The father openly applied through his prospective employer for a permit to work as an alien from the Minister for Labour. He was refused that permit on the grounds that he was an unauthorised alien and one of the reasons advanced for refusing him permission to stay in the country was that he was unable to support his family without assistance from the State. The reason he was unable to support his family was precisely because he was refused permission to work. Therefore in effect he was not being permitted to support his family within the State because he was not permitted to work. Such a position could not arise in respect of the support of his family if the parents were citizens and therefore to that extent the members of the family who were Irish citizens were suffering discrimination by reason of the fact that their parents were aliens. The question which arises therefore is whether a family, the majority of whose members are Irish citizens, can effectively be put out of the country on the grounds of poverty. The dilemma posed for the parents by this attitude is that they must choose to withdraw*

their children, who are Irish citizens, from the benefits and protection of Irish law under the Constitution or, alternatively, to effectively abandon them within this State, which would then be obliged to support them.

In view of the fact that these are children of tender age, who require the society of their parents and when the parents have not been shown to have been in any way unfit or guilty of any matter which make them unsuitable custodians to their children, to move to expel parents in the particular circumstances of this case would, in my view, be inconsistent with the provisions of Article 41 of the Constitution guaranteeing the integrity of the family.

The Act of 1935 did not in any way contemplate a situation in which infant citizens of this State could in effect be deprived of the benefit and protection of the laws and Constitution of this State. In my view, therefore, the Act is not inconsistent with the Constitution but it will be ultra vires the Act to exercise the powers which had been sought to be exercised by the Minister to disrupt this family for no reason other than poverty, particularly when that poverty has been effectively induced by the State itself.

I agree with the opinion expressed by the Chief Justice that there is nothing to suggest that the Minister had applied his mind to any of these considerations, and the matter will have to be re-considered by the Minister, bearing in mind the constitutional rights involved. In my view, he would have to be satisfied, for stated reasons, that the interests of the common good of the people of Ireland and of the protection of the State and its society are so predominant and so overwhelming in the circumstances of the case, that an action which can have the effect of breaking up this family is not so disproportionate to the aim sought to be achieved as to be unsustainable."

The appeal of the ***Fajujonu*** Plaintiffs was therefore dismissed, but rigorous standards were set in both judgments in regard to reasons which might justify the Minister in deporting the family in that case. In the case of the Chief Justice the requirement is expressed as *"a grave and substantial reason associated with the common good".* In the case of Walsh J. the requirement was that the reasons had to be so predominant and so overwhelming in the circumstances of the case that an action which can have the effect of breaking up this family is not so disproportionate to the aim sought to be achieved as to be unsustainable.

It is abundantly clear, however, that neither Finlay C.J. nor Walsh J. suggested that the personal rights of the child, or the rights of the family, were absolute. For proper and proportionate reasons these rights must yield to the requirements of the common good. This was clearly accepted, through their Counsel, by the Applicants in the present cases. The fact that these rights are not absolute is not in issue.

Reference was made in argument in the present cases to the fact that a family may be broken up by the conviction and imprisonment of one of its members. Such a division of the family would be constitutionally valid. In ***Pok Sun Shun v Ireland*** [1986] ILRM 593 at page 597 Costello J. (as he then was) stated:-

> *"I do not think that the rights given to the 'family' are absolute, in the sense that they are not subject to some restrictions by the State and, as Mrs Robinson S.C. has pointed out, restrictions are, in fact, permitted by law, when husbands are imprisoned and parents of families are imprisoned and, undoubtedly, whilst protected under the Constitution, these are restrictions permitted for the common good on the exercise of its rights."*

Walsh J. in his judgment in ***Fajujonu*** (at page 164) in fact rejected the comparison made by Costello J. in the ***Pok Sun Shun*** case. However, in the context of the present cases, it seems to me that the comparison with imprisonment of a member of a family is unnecessary rather than incorrect. The Applicants accept that the rights in question are not absolute. They accept that a member of a family may be deported where sufficiently grave reasons exist. In particular Senior Counsel for the Applicants agreed that an example of such a reason would be criminal behaviour on the part of the immigrant concerned. The Immigration Act 1999 reflects this in providing at section 3(2) that a deportation order may be made in respect of *"a person who has served or is serving a term of imprisonment imposed on him or her by a Court in the State."* No suggestion has been made that this provision conflicts with constitutional rights. The right of the State to deport immigrants, who have committed crimes, even if this results in the breaking up of their families, was not put in issue by the Applicants.

Following the decision of this Court, the ***Fajujonu*** proceedings do not appear to have come before the Courts again and one assumes that the family was permitted to remain in the country. It seems that it has been the normal practice of the Minister since the ***Fajujonu*** case to permit the parents of the Irish-born children of immigrants to remain in this country.

In his judgment, as quoted above, the learned Chief Justice held that the ***Fajujonu*** parents were *"entitled to assert a choice of residence on behalf of their infant children, in the interests of those infant children."* In the course of oral argument before this Court in the Lobe and Osayande cases a question was

raised as to whether this dictum formed part of the *ratio decidendi* of the Court's decision. This question does not appear to have arisen in the High Court; in Smyth J's analysis of the issues he states that the Respondent accepted that *"there is a prima facie entitlement of the parents to make a decision on behalf of the Irish-born child to reside within the State."* The issue is not raised in the Respondent's written submissions. Nor does the Respondent challenge the finding of the High Court by a notice to vary or otherwise.

With all respect to those who think otherwise, I find it difficult to see how the Chief Justice's dictum can be other than part of the ratio of his (and indeed Walsh J's) decision. Finlay C.J. makes it clear in the immediately preceding sentence that the parents cannot claim any constitutional right of their own to remain in Ireland. Any right of the parents to remain must therefore in the terms of the judgment arise from the right of the children to remain. While, as citizens, the children may not be deported, it is not suggested that they are compelled to remain here because they are citizens. As citizens they may choose to remain here or to leave; as infants they are incapable of making that choice for themselves. It therefore, as seen by Finlay C.J., falls to their parents to assert their choice for them.

It is only as a *result* of that choice that the parents may assert as part of the rights of a family under Articles 41 and 42 that they, too, have a right, albeit not an absolute right, to reside with the children in this country. The issue of the parents' right to remain and the findings of the Court in that respect are built on the assertion of the child's choice, which must therefore in my view be an inherent part of the ratio of the decision. In the absence of any direct challenge to the ***Fajujonu*** decision, therefore, it must be assumed to be binding on this Court.

The first of the list of reasons given by Mr Lohan in his memorandum to the Minister was the length of time the Lobe and Osayande families had been in the State. Counsel for the Minister relied strongly both in written and oral submissions on the argument that the present cases should be distinguished from the ***Fajujono*** case on the time factor and on the number of Irish citizens involved. In the ***Fajujono*** case by the time the matter came for hearing before this Court the family had been resident in Ireland for some eight years and also there were three Irish-born children in the family, two of whom had been born since the initiation of the proceedings. Senior Counsel for the Respondent, Mr Gallagher, drew attention to the passages in the judgments of Finlay C.J. and Walsh J in which reference was made to these facts. Finlay C.J. noted that that the aliens concerned had *"in fact resided for an appreciable time in this State"* and referred to *"this family, as it now stands, consisting of five persons three of whom are citizens of Ireland"*. (page 162).

Walsh J. (at page 164) stated:

"There is no doubt that this family has made its home and residence in Ireland."

and referred to the family as *"a family, the majority of whose members are Irish citizens"*. Counsel argued that these factual circumstances were no doubt an important, if not crucial influence on the decision of this Court and that the instant cases should be distinguished from ***Fajujonu*** on these factual grounds.

The families in the present cases had been in Ireland for a very much shorter time. The Lobe family arrived in Ireland on 31st March 2001 and the Osayande family shortly thereafter on 6th May 2001. Each family has only one Irish-born child. Their circumstances were quite different from the ***Fajujonu*** family and, Mr Gallagher submitted, their cases were clearly distinguishable from that of the ***Fajujonu's***.

Senior Counsel for the Applicants, Mr Hogan, stressed that despite their long residence in Ireland Mr and Mrs Fajujonu were at all times illegal immigrants; their status was the same as that of the Lobe and Mr Osayande. While no deportation order had been made in respect of the ***Fajujonus*** they had been requested to leave the jurisdiction and when they initiated their proceedings they clearly anticipated that a deportation order would be made and endeavoured to prevent this.

On the facts there is no doubt that the facts in the present cases can be differentiated from those in ***Fajujonu***, and it may well be that both Finlay C. J. and Walsh J. had a degree of sympathy for the particular human circumstances of the ***Fajujonu*** family. I do not believe, however, that the ***Fajujonu*** decision was merely a type of sympathetic aberration, which can readily be set aside if the detailed circumstances of another case are different. The ***Fajujonu*** decision was firmly grounded on the *"full recognition of the fundamental nature of the constitutional rights of the family"* Finlay C.J. (at Pg. 162). It follows on from and is consistent with the powerful line of decisions on the constitutional rights of the family which went before it. Is the fundamental nature or importance of these rights altered by the length of residence of the Irish-born child or the number of children in the family? If length of residence or number of children is to be the test in the Lobe and Osayande cases, what is to be the proper test in future cases? Must all families in a similar legal situation measure up to the ***Fajujonu*** length of residence and number of children? Or in another case would, say, five years residence and two Irish-born children be sufficient? It must be borne in mind that the Minister is not challenging the ***Fajujonu*** decision itself. If this Court's decision is to distinguish these cases from ***Fajujonu*** on length of residence and number of Irish-born children it seems to me that a situation will be created where future cases must be pleaded and decided on a "sympathy" basis, on the varying circumstances, carrying with it the danger of inconsistency and arbitrariness.

In this context it is notable that in their commentary on the ***Fajujonu*** case the authors of Kelly on the Constitution (3rd edition page 1002) remark:

> *"There is evidence in the passages quoted from both judgments that the judges were influenced by the fact that the Plaintiffs had resided in Ireland for quite some time and that the family had made its home here. An obvious implication is that an alien family, one of whose children is fortuitously born in the country, thereby acquiring citizenship, might not be in the same fortunate position as the* ***Fajujonus*** *when it comes to the matter of deportation. However it is submitted that, as the rights of the child derive from its citizenship, the length of time which the family as a unit has resided in the State would appear to be irrelevant in this context. For once the child, as a citizen, is entitled to reside in the State it is difficult to see how its right to the company, care and parentage of its parents, derived from Articles 41 and 42, can depend on the length of this period of residence. Furthermore, in policy terms, the desirability of promoting and protecting the psychological bond between parent and child must also call into question any linkage between the child's rights to the company of its parents and the length of time which the family has resided in the State."*

The same must surely apply to the number of Irish-born children in the family. Bearing these factors in mind I do not consider that the present cases can properly be distinguished from ***Fajujonu*** on this basis.

I therefore turn to the final reason given by the Minister for the affirmation of the deportation orders – the need to preserve respect for and the integrity of the asylum and immigration systems. This is described as an *"overriding"* need in Mr Lohan's memorandum. It is well established that the State has a right to set up, as it has done by statute, a controlled immigration system. Also under the terms of the Geneva Convention it has accepted the obligation to provide asylum in properly defined cases. This Court has accepted in earlier cases that the maintenance of the integrity of the asylum and immigration system is a legitimate and proper aim for the Respondent Minister and for the State authorities generally. In the present cases, however, the question at issue is whether this particular reason is sufficient to meet the standards set by this Court in ***Fajujonu***, and whether it is sufficient to outweigh the family's, and the child's constitutional rights. Finlay C.J. held that *"in the light of a full recognition of the fundamental nature of the constitutional rights of the family"* the reason for the removal of the family from the State *"has to be a grave and substantial reason associated with the common good."* The Minister (and the Court) have to be *"satisfied that for good and sufficient reason the common good requires that the residence of these parents within the State should be terminated, even though that has the necessary*

consequence that in order to remain as a family unit the three children must also leave the State". Walsh J. concludes his judgment by stating:-

> *"In my view he (the Minister), for stated reasons, that the interest of the common good of the people of Ireland and of the protection of the State and its society are so predominant and so overwhelming in the circumstances of the case, that an action which can have the effect of breaking up this family is not so disproportionate to the aim sought to be achieved as to be unsustainable."*

Senior Counsel for the Appellants, Mr Hogan, argues that in the circumstances of this case the reason which would justify a deportation order would have to be a matter connected in a personal way to the immigrant concerned – such as for instance criminal behaviour. I concur with Fennelly J. that this need not necessarily be so, since the immigrant concerned might belong to a particular group whose presence in this country, on the evidence, might be inimical to the common good. But even in the more general situation where the illegal immigrant concerned may be part of a class which poses a danger to the common good, it seems to me to be necessary for the Respondent to have before him in his consideration of the case some specific evidence of the danger to the common good which is related to the illegal immigrant parents concerned, whether as individuals or as members of a class or group. The parents in the ***Fajujonu*** case were at all times illegal immigrants. It could readily have been argued in that case that their continuing presence in Ireland lacked respect for the integrity of the then immigration system. It is clear from the decision of this Court that their illegal presence in the country was not in itself sufficient reason to outweigh the constitutional rights of the child and the family. Walsh J. speaks of reasons which are *"so predominant and overwhelming in the circumstances of the case"* (my emphasis). This surely envisages some reason more specific to the individuals in the family concerned than a general statement as to the maintenance of the integrity of the asylum and immigration system.

In ***Osheku v Ireland*** [1986] IR 733 Gannon J., in the passage quoted earlier, spoke of the protection of the fundamental rights of the State which *"may involve restrictions in circumstances of necessity"* on the fundamental rights of individual citizens (my emphasis). It seems to me that if the State is to rely, as it does, on this dictum the *"circumstances of necessity"* which permit it to restrict not alone the rights of the individual citizen but the rights of the family should be set out fully, explicitly and in detail.

A further difficulty with this reason as framed by the Minister is that it is so general in nature, that if accepted in this case, it could be applied in every case, including a future case with facts similar to ***Fajujonu***, thus, as it were, overturning ***Fajujonu*** by the back door. There is a danger in my view that phrases such as

"respect for the integrity of the immigration and asylum system" or *"preserving the integrity of the immigration and asylum system"* can become too widely used. There are, of course, situations where the need to preserve and maintain the integrity of the immigration and asylum system is a perfectly sufficient and satisfactory reason for the Minister to make deportation orders affecting illegal immigrants; a number of them had been the subject of decisions by this Court. But in my view it is questionable whether such a general and undefined reason can be sufficient in a case where the constitutional rights of an Irish citizen and his or her family are at stake. In my view *"the grave and substantial"* or *"predominant and overwhelming"* reasons must be defined reasons, and reasons justified by evidence as to their actual impact on the common good of the people of Ireland.

United States Cases

A number of cases decided in the Courts of the United States were opened to the Court by Counsel for the Respondent, for example, ***Perdido v Immigration and Naturalisation Service,*** [1969] US App.: United States Court of Appeals for the Fifth Circuit), ***Acosta v Gaffney*** [1977] US App: (United States Court of Appeals for the Third Circuit) and ***Gonzalez-Cuveas v Immigration and Naturalisation Service*** [1975] US App: (United States Court of Appeals for the Fifth Circuit). These dealt with circumstances somewhat similar to the present cases, where a child was born in the United States to parents who were illegal immigrants, or, as it is sometimes described, undocumented immigrants. Since the United States accepts the *ius soli* rule, the children in these cases were United States citizens. The United States Courts recognised the importance of the family and its rights, but nevertheless refused to permit the illegal immigrant parents to remain in the United States, even if this meant in the words of the Court the *"constructive deportation"* of the US citizen child.

The difficulty in accepting the reasoning in these cases as being wholly persuasive, however, is that there is no equivalent in the United States Constitution to Articles 41 and 42 in Bunreacht na h-Eireann. Given that the ratio in ***Fajujonu*** is firmly and explicitly based on the family rights set forth in Articles 41 and 42, and given that the Respondent accepts the reasoning and the decision in ***Fajujonu***, it seems to me that the United States decisions, however carefully reasoned, cannot be of decisive influence on this Court in deciding the present cases.

Dublin Convention

A further reason given by the Respondent for the confirmation of the deportation orders is the application of the Dublin Convention to which Ireland is a party. In regard to this aspect of the case I entirely agree with the views expressed by Fennelly J. and have nothing to add.

Proportionality

Finally, in his judgment in ***Fajujonu*** Walsh J. refers to the action of breaking up the family being *"not so disproportionate to the aim sought to be achieved as to be unsustainable".*

The Appellants dealt in their submissions with this principle of proportionality. This principle was expressed by Costello J. (as he then was) in ***Heaney v Ireland*** [1994] 3 IR 593 (at 607) thus:-

> *"In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society…The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:*
>
> *"(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations,*
>
> *(b) impair the right as little as possible, and*
>
> *(c) be such that their effects on rights are proportional to the objective.* ***Chaulk v R*** [1990] 3 S.C.R. 1303 at pages 1335 and 1336.
>
> ***Cox v Ireland*** *[1992] 2 IR 503 is an example of a case in this country in which disproportionate means to obtain a legitimate object invalidated a statutory provision. It dealt with the constitutional validity of section 34 of the Offences Against the State Act 1939. That section provided that whenever a person convicted by a Special Criminal Court of an offence set out in the schedule to the Act was, at the time of his conviction, an employee of the State, then he should forfeit his office or employment and be disqualified from holding office or employment in the State Service for a seven year period. In holding that the section was invalid, the Supreme Court pointed out that:-*

> *'the State is entitled, for the protection of public peace and order, and for the maintenance and stability of its own authority by its laws to provide onerous and far reaching penalties and forfeitures imposed as a major deterrent to commission of crimes threatening such peace and order of State Authority, and is also entitled to ensure as far as practicable that amongst those involved in the carrying out of functions of the State does there is not included persons who commit such crimes.'* (page 523*).*

> *But the Court went on to point out that in pursuing these objectives the State must continue to protect as far as is practicable the constitutional rights of the citizen. Having examined the operation of the section it concluded that because the State had not as far as was practicable protected the citizens constitutional rights, notwithstanding the fundamental interests of the State which the section sought to protect, the provisions of this section were impermissibly wide and indiscriminate."*

The Appellants submit that the interference with the constitutional rights of the family in the present cases amounts to a denial of fundamental constitutional rights. They argue that the aim or objective upon which the Respondent seeks to rely in justifying that denial falls far short of the objectives involved in the ***Cox*** case or in the Offences Against the State Act 1939. Indeed there was no evidence before the Minister in the present cases that there was any real threat to public order or to the authority of the State.

If the Lobe and Osayande parents are now or in the near future to be deported from this country the Minister assumes that they will take their Irish-born children with them. Indeed he goes so far as to say that this is their duty under Articles 41 and 42 of the Constitution. It is not, one understands from correspondence in the case, entirely certain that this will be the case. Leaving aside these particular cases it is certainly possible to envisage situations where illegal immigrant parents might regretfully but sincerely believe that it was contrary to the interests of their Irish born children to bring them back to a country where the child's welfare might be under threat for reasons arising from, say, religion, gender or tribal origin. In the situation faced by the Lobe and Osayande families they have an unenviable choice between breaking up their families or denying Kevin

Lobe and Osaze J. Osayande their right to reside and be brought up and educated in their native country – their *"entitlement and birthright"* to be *"part of the Irish nation"*.

I would accept the submission of the Appellants that the overriding reason for maintaining the deportation orders as framed by the Minister is not proportionate to the effect which his proposed course of action will have on these families. It seems to me that it could not be said, in the words of Costello J., to *"impair the right as little as possible"* or to be such that its effect on the families rights is proportional to the objective to be achieved.

The matter of the standard for judicial review of administrative decisions was not argued in this case and was specifically stated by Counsel for the Respondent not to be relevant to the case. I would, however, concur with Fennelly J. in believing that where constitutional rights are at stake as in this case the standard of judicial scrutiny as set out in particular in ***O'Keeffe v An Bord Pleanala*** [1993] 1 IR 39 may fall short of what is likely to be required for their protection.

I made reference to this question and to the approach taken to it by judges in the United Kingdom in my judgment in ***Z v The Minister for Justice Equality and Law Reform*** (Supreme Court, unreported, 1st March 2002). I said:-

> *"The outcome of judicial review proceedings in many cases and in many contexts is of crucial importance to Applicants. The Court is committed to submitting the decision making process in all cases to careful scrutiny… I have a certain difficulty in the interpretation of the phrases used by the English Courts in the cases to which we have been referred – 'anxious scrutiny', - 'heightened scrutiny', and similar phrases. From a humane point of view it is clear that any Court will mostly carefully consider a case where basic human rights are in question. But from the point of view of the law, how does one define the difference between, say, 'scrutiny', 'careful scrutiny', 'heightened scrutiny', or 'anxious scrutiny'? Can it mean that in a case where the decision making process is subject to 'anxious scrutiny' standard of unreasonableness/irrationality is to be lowered? Surely not. Yet it is otherwise difficult to elucidate the legal significance of the phrase. It must be said that this aspect of the case was not fully argued before this Court so that my remarks in this context are*

merely a preliminary impression. Further consideration must await a fuller argument in a future case."

In this context I bear in mind the dictum of Finlay C.J. in ***O'Keeffe v An Bord Pleanala*** (at page 72):

"I am satisfied that in order for an Applicant for judicial review to satisfy a Court that the decision making authority has acted irrationally in the sense which I have outlined above so that the Court can intervene and quash its decision, it is necessary that the Applicant should establish to the satisfaction of the Court that the decision making authority had before it no relevant material which would support its decision."

If this standard is to be applied, especially when it is combined with a generalised reason such as respect for the integrity of the immigration and asylum system, it makes, as pointed out by Fennelly J., the decision in cases such as the present virtually immune from review. On this account it would, in my view, be of assistance to have this matter fully argued in a future case.

Conclusion

In conclusion, given the repeated emphasis by this Court in its decisions over the years on the nature, weight and importance of the rights of the family set out in Articles 41 and 42 of the Constitution – rights which the Minister accepts are rights possessed by these children and these families – I am not satisfied that respect for the maintenance of the immigration and asylum system is sufficiently grave and substantial a reason or so predominant and overwhelming a reason in the circumstances of the cases and in the context of the common good to justify the denial of the constitutional rights of these children and their families. I would allow the appeal.

THE SUPREME COURT

Keane C.J. ***109/02 & 108/02***
Denham J.
Murray J.
McGuinness J.
Hardiman J.
Geoghegan J.

Fennelly J.

BETWEEN/

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

Aplicants/Appellants

and

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

Respondent/Respondent

BETWEEN/

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

Applicants/Appellants

and

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

Respondent/Respondent

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

These cases concern two families who sought asylum in England on the basis that they were refugees from their respective countries of origin. When these applications were unsuccessful, they came to Ireland and made identical applications here. On arrival, each of the wives was pregnant. It was decided,

pursuant to the relevant international convention, to send the applicants back to England to complete the asylum procedure where they had started it. Before this decision could be implemented, each wife gave birth to a child in Ireland.

It is now claimed that this event effectively confers a right to remain indefinitely in Ireland on the parents, and any brothers or sisters, of the Irish born child. It is conceded that this right, if it exists, would be unique in the world. But it is said to follow, inexorably or virtually so, from the child's Irish citizenship and from the constitutional status of the family.

ASSYLUM AND PARENTHOOD: THE CLAIM.

Over the last six years or so Ireland has received a greatly increased volume of applications for refugee status, now exceeding 11,500 applications per year. Typically, these are made by persons who arrive in the State for that purpose rather than applying from abroad, even from a safe country. Each application requires to be examined in a painstaking manner under our domestic legislation and our international obligations. The applicant typically stays in the State while this is done. There is detailed provision in law for the examination of the application, for appeal to an independent tribunal and for unsuccessful applicants to seek that they should not be deported on humanitarian grounds. For those who are unsuccessful at each of these stages, there is scope to seek judicial review of an adverse decision in the courts, which

is widely availed of. To assist their participation in these procedures, the State makes available to applicants an elaborate system of legal advice and free legal representation, as well as Social Welfare or direct provision for their needs. All this is as it should be.

But these elaborate procedures take time and will always do so, even administered with maximum efficiency. A year to eighteen months is not an untypical time span. One consequence of this is that female applicants who are pregnant at the time of their arrival in the State or become so thereafter may give birth to a child in Ireland. This case is concerned with the consequences of that event for the parents and siblings of this Irish born child, and for the State in dealing with them and providing for them. Only a small percentage of applications for refugee status turn out to be well founded. In the other cases, deportation or voluntary repatriation is the normal consequence of the failure of the claim. The fact that only a small percentage of asylum applications are successful is emphatically not a relevant consideration in considering any particular application. The human and legal consequences of refusing asylum where it is properly sought are so grave that each application must be meticulously examined on its own merits. But the fact that the system must deal with a large number of cases which turn out to be unmeritorious is a significant factor in the length of time which elapses before any particular application is finalised. If, however, a child has been born in Ireland to

applicants for asylum in the interval between their application and their departure, it is submitted that the very fact of the birth virtually precludes their deportation and that of other family members.

THE ISSUE IN ITS FACTUAL BACKGROUND.

I gratefully adopt the findings of fact in the judgment of the learned trial judge, which have not been challenged on the hearing of this appeal. I set out below a brief summary of those facts which seem particularly relevant only.

Apart from the two Irish born children the applicants in these cases are all individuals who have no personal right to be or to remain in the State. Each of them left their native countries (the Czech Republic and Nigeria respectively) and went to the United Kingdom. They all applied for asylum there on the grounds that they were refugees. These applications were refused. They subsequently came to Ireland and made identical applications here. In the case of the **Lobe** family the previous history in the United Kingdom was disclosed; in the **Osayande** case it was concealed. Pursuant to the provisions of the Dublin Convention, each was, in view of their history, liable to be sent to the United Kingdom for the further consideration of their asylum application. The United Kingdom has agreed to accept the transfer of each applicant for that purpose. It is common case that there is no reason to believe that the United Kingdom will not comply with its obligations under the 1951 United Nations

Geneva Convention as amended by the 1967 New York Protocol, and with its obligations under the Dublin Convention. In these circumstances, the Minister made deportation orders in respect of each applicant. The applicants seek to quash these orders.

In each case, the mother of the family to which the applicants belong was pregnant at the time of coming to Ireland in early 2001, and each gave birth to a child in the latter part of that year. Each of these children was referred to in the course of argument as an "Irish born child".

Following the birth of the respective children, the applicants stated in their proceedings that the Irish born child, who is, of course, an Irish citizen, wished to remain in Ireland. On that basis, and on the further basis that the child is a member of a family as that term is used in the Constitution, and, therefore, entitled to the society of the other members of the family, the applicants assert that neither the parents nor any siblings of an Irish born child may be deported other than in rare and extreme circumstances, for a "special and overwhelming reason". These circumstances, it is claimed, are limited to those arising from serious criminal convictions of family members or to their being a threat to public order.

If this argument is correct, then parents who have no personal right to reside in the State will acquire a right to reside here if it happens that a child is

born to them here. This may occur for any number of reasons, including chance, misfortune, emergency, arrangement or contrivance. The applicants contend that the circumstances of the birth are wholly irrelevant. The sole consideration, they say, is that a child was in fact born into each family in Ireland. Once this has happened, the circumstances in which it happened, the length of time the family was in Ireland, and the dealings which preceded the birth in Ireland are all equally irrelevant, in the submission of the applicants.

A NOTE ON TERMINOLOGY.

Accordingly, it is claimed that the birth of an Irish born child transforms the entitlements of his or her parents and siblings to remain in the country. The dramatic nature of this transformation is reflected in the language used in arguing the case. The Irish born child was described by counsel for the appellants as "the anchor child", presumably because he or she is seen as the anchor securing the rest of the family to this country. The birth of such child was contended to have a dramatic effect on the position of family members who were, at the time of the birth, liable to deportation. It is said to make such deportation virtually impossible since (again in the words of counsel for the appellants) "the immigration stork has landed". Counsel for the respondents, who regarded the same development as having a much less dramatic effect, characterised the birth of the child and the argument it opens to the parents as "a fortuity".

Citizenship

The first contention of the applicants relates to the citizenship of the Irish born child and what they say follows from this citizenship.

The persons entitled to Irish citizenship have been specified in law at all times since the creation of the Irish Free State. Article 3 of the Irish Free State Constitution provided for citizenship for those domiciled in the State on the date of coming into operation of the Constitution (6th December, 1922) on one of three alternative bases. These were birth in Ireland; birth of one parent in Ireland or continuous residence by the
putative citizen "in the area of the jurisdiction of the Irish Free State (Saorstát Eireann) for not less than seven years."

The Irish Nationality and Citizenship Act of 1935 was the first legislative provision for Irish citizenship. It closely followed the scheme of The British Nationality and Status of Aliens Act, 1914 by providing for citizenship by birth or descent. It provided that persons within the scope of this provision be referred to as "natural-born citizens".

Article 9 of the Constitution provides for citizenship for any person "who is a citizen of Saorstát Éireann immediately before the coming into operation of this Constitution". Article 9(1)(2) provides:

> "The future acquisition and loss of Irish nationality and citizenship shall be determined in accordance with law."

Modern Irish citizenship stems from the Irish Nationality and Citizenship Act, 1956, as amended. This provides, at s. 6(1) that "Every person born in Ireland is an Irish citizen from birth". Citizenship can also be acquired by descent.

Article 2 of the Constitution, dating in its present form from 1998, provides as follows:-

> "It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage."

This form of words involves and perhaps elides the two concepts of nationality and of citizenship. All persons born in Ireland are, by s.6 of the Act of 1956, citizens of Ireland. What the first sentence of Article 2 acknowledges is their entitlement "…to be part of the Irish Nation". The concepts of Irish nationality and of citizenship of Ireland are distinguished in

the first two sentences of Article 2. This corresponds to the distinction drawn in the Constitution between "the Nation" and "the State". It is not clear to me that, as regards citizens, the first sentence of Article 2 confers, as opposed to acknowledges, any right. Since, by Article 9.2 all citizens are said to have a fundamental political duty of fidelity to the nation, it could hardly have been denied (even before Article 2 took its present form) that such citizens are "…part of the Irish Nation". Having regard to the statutory provision mentioned above, the question of whether being part of the Irish Nation necessarily involves a right to citizenship does not arise in this case. In the third sentence of Article 2 it is the Nation, and not the State, which has a "…special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage." This relationship clearly does not imply citizenship or a right to it. On the other hand the phrase "…otherwise qualified in accordance with law to be citizens of Ireland" in the second sentence of the Article is (at least if one ignores the statutory provision for citizenship) not easy to understand without an implication that the condition of being "…part of the Irish Nation" entitles one to citizenship.

Neither the "entitlement and birthright" mentioned in the Article's first sentence, nor the "special affinity" mentioned in the third, requires for its existence that the persons enjoying them should have been reared or educated in Ireland or should have resided here. Irish birth alone is the precondition of the

first. Even that is unnecessary for the "special affinity" which the State cherishes. A person who may never have visited Ireland may enjoy this special affinity if he or she is of Irish ancestry and shares Ireland's cultural identity and heritage.

It may also be noted that the "entitlement and birthright" referred to is an option open to a person meeting the condition of Irish birth, and not an intrinsic characteristic. The Article does not for example seek to claim that a British subject born in Ireland is thereby automatically "part of the Irish Nation" or liable to the duty set out in Article 9 of "fidelity to the Nation and loyalty to the State". It is an option, personal to him and to be exercised at his discretion.

But the construction of Article 2 does not arise in this case. Firstly, on no view of the Article can it be read as conferring a different status as citizen on the applicants than that which they enjoy by virtue of s. 6 of the Act of 1956. Secondly, the respondents have not been concerned to deny the childrens' claim to citizenship couched as it is (*inter alia)* in terms of Article 2. Most fundamentally, the question at the nub of this case is not whether the Irish born children are citizens, which they most certainly are, but what the consequences of that may be in the case of an infant Irish citizen who is a member of a family which contains persons who are non-citizens and who are *prima facie* liable to deportation.

Ireland is unusual in its offer of citizenship to anyone born on its soil. Only a few European countries still grant automatic citizenship on the basis of birth in a country's territory. The United Kingdom and Australia repealed laws providing for citizenship on the basis of birth in the country during the 1980's. The best known provision for citizenship on the same basis is that contained in the Fourteenth Amendment to the Constitution of the United States which provides that:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside".

There is no doubt whatever but that each of the Irish born children of the families of the applicants is himself an Irish citizen. As such, the child is himself immune from deportation and no deportation order has been made in respect of either. The point of greatest novelty raised by the case is the capacity of such child to "*anchor"* the remainder of his family to the State, making it virtually impossible (the applicants contend) to deport any member of his family at least while the child remains in the family's care. It was not seriously disputed that long before that state of affairs ended it would be open to the family members to apply for naturalisation, and to engage in business or employment to support the child.

Anchoring

In the course of argument it was admitted by counsel for the applicant that he could not say that the right of the family of a locally born child to remain in the latter country of birth had been recognised in any other jurisdiction anywhere in the world. But that international reality, counsel said, did not at all prevent an *Irish* born child from being an "anchor" securing the rest of his family to the State. That effect, counsel submitted, arose from the unique and uniquely strong assertion in Article 41 of the Constitution of the position, rights, authority and prerogatives of the family.

Counsel for the applicants based his case very firmly on Article 2 of the Constitution, and the statutes which provide for the Irish born child's citizenship and on Article 41 which he contended secures the right of the Irish born child to be reared *in Ireland* by his family.

It was not, however, contended that this right was an absolute or unqualified one. It was admitted that the parents had no right to remain in the State other than one derivative from the Irish born child. The parents' (or siblings') right to remain in the State might be defeated if there were a very grave reason for deporting them. But he submitted that such a reason would

have to be not merely very grave, but specific and personal to the family member in question – that he had a serious criminal conviction or was a threat to public order. Specifically, he denied that "routine immigration reasons" or considerations of State policy towards immigration in general (no matter how rationally defensible or well-founded such policy might be) could justify the deportation or transfer out of the country of a member of the family of an Irish born child once "the immigration stork had landed".

The applicants then invited the Court to examine the reasons given for the decision to deport them in light of the contentions summarised above. Thus viewed, it was contended, the reasons given fell at the first hurdle. They substantially relied on considerations of a general nature – the application of the Dublin Convention to which Ireland is a party, and the overriding need to preserve respect for and the integrity of the asylum and immigration systems. They also referred to the short length of time each of the applicant's families had been in the State. The applicants contended that each of these matters was a wholly irrelevant consideration.

Immigration and the State

This topic was very extensively canvassed in the judgment of this Court in **In the Matter of Article 26 of the Constitution and section 5 and section 10 of The Illegal Immigrants (Trafficking) Bill, 1999** [2000] 2 I.R. 360,

especially at p. 382 ff under the heading "The Constitutional Status of Non-Nationals". I respectfully agree with all that is said there. In particular, I would point to the recognition in that judgment and in the judgment of Keane J. (as he then was) in **Laurentiu v. Minister for Justice** [1999] 4 I.R. 42 that a sovereign State enjoys, as a characteristic of its sovereignty, the power to expel or deport aliens. This is for the reason given by Gannon J. in **Osheku v. Ireland** [1986] IR 733 where he said:-

> "The control of aliens which is the purpose of the Aliens Act, 1935, is an aspect of the common good related to the definition, recognition, and the protection of the boundaries of the State. That it is in the interests of the common good of a State that it should have control of the entry of aliens, their departure, and their activities and duration of stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter. The integrity of the State constituted as it is of the collective body of its citizens within the national territory must be defended and vindicated by the organs of the State and by the citizens so that there may be true social order within the territory and concorde maintained with other nations in accordance with the objectives declared in the preamble to the Constitution."

I have ventured to reiterate that well known and often approved passage because of its centrality on the topic of the nature, as well as the detail, of the State's power to control aliens. It leads to the principle described in the judgment already referred to in **Laurentiu** as follows:-

> "…the general principle that the right to expel or deport aliens inheres in the State by virtue of its nature and not because it has been conferred on particular organs of the State by statute."

The intrinsic and essential quality of this right of the State, and its antecedence to positive law including constitutional law, means amongst other things that the cases quoted are applicable to the present statutory scheme for the regulation of immigration, although some were decided in relation to an earlier statutory dispensation. It is also important to stress that the nature of this power has been the same throughout recorded history and over a vast range of political and geographical conditions. In my judgment in **P, L and B v. the Minister for Justice, Equality and Law Reform [2002] 1 I.L.R.M. 16,** I said:-

> "The inherent nature of these powers in a State is demonstrated by their assertion over a vast period of history and from the very earliest emergence of States as such, and its existence in all contemporary States even though these vary widely in their constitutional legal and economic regimes, and in the extent to which the rule of law is recognised."

The constitutional source of this power, and of all executive powers in relation to foreign affairs or otherwise, is now to be found in Article 6.1 of the Constitution: it is part of the executive power which is there referred to. By the following sub-article, it is exercisable exclusively by the relevant organ of State established by the Constitution, in this case the Executive Government, responsible to Dáil Eireann and thus to the people of Ireland. Article 29.4 deals

specifically with the Executive power in connection with International relations. But the detailed exercise of the power in relation to aliens is now heavily regulated by law.

In Ireland, the United Kingdom, the United States and other common law jurisdictions, and in the Member States of the European Union this inherent and intrinsic power is the subject of detailed regulation both by domestic law and by international instruments. The most relevant of these for Ireland have already been mentioned: the 1951 Geneva Convention, as amended by the 1967 New York Protocol and the Dublin Convention. There is detailed domestic provision ensuring the constitutional and human rights of applicants for asylum will be protected. In these cases it is to be presumed, and the history of the cases and the arguments addressed to this Court in any event demonstrate, that these rights have been fully vindicated in properly conducted proceedings. On the hearing of this appeal no point was urged as to the applicants' right to remain in the State on any basis other than that they were the parents or siblings of an Irish born child. Accordingly, the issue on this appeal is strictly confined to the question as to whether the applicants' status as members of the family of an Irish born child precludes their deportation.

The cases just cited, and others on the topic of the control of immigration, also deal specifically with the position of a non-national who has family ties in this State. In **Osheku**, the person whose deportation was in question was

married to an Irish citizen and was the father of their child, another Irish citizen.

In a passage immediately after that quoted above Gannon J. said:

> "It seems to me to follow that the personal rights guaranteed under the Constitution are not so absolute as to be capable of being considered entirely independently of the overall provisions over all of the Constitution. The personal liberty of the citizen is probably the greatest of the fundamental freedoms. It must be in the interests of social order and the common good from time to time in individual cases [necessary] to restrict the freedom of movement of a citizen within the State, as for instance by imprisonment or hospitalisation. This necessity may prevail over the related constitutional rights of members of the family of the individual concerned notwithstanding the recognition in the Constitution of the family "as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law…" and "…as the necessary basis of social order and as indispensable to the welfare of the Nation and the State." [Article 41.1.1 and 2].
>
> The right to reside in a particular place of the individual's choice is not a fundamental or constitutional right of a citizen whether he be married or single. The maintenance of social order, by imposing the sanctions of the law in the administration of justice, is a fundamental right of the State and of the body of its citizens. The right, if such there be as claimed in this case, of an individual citizen by reason of marriage or family bonds to have a place of residence of his or her choice within the State, is not one that could or should prevent the imposition of the sanctions of the law in the administration of justice."

Having described the circumstances of Mr Osheku, the learned judge went on:-

> "His marital status and the familial relations created by that lawful marriage can be recognised and protected by the State "in its constitution and authority" while applying to him sanctions for non-compliance with the law. In my opinion the prosecution of Mr Osheku for offences committed contrary to the provisions of the Aliens Act, 1935, or his deportation pursuant to the powers conferred on the

> Minister for Justice, if such be his determination in the exercise of his discretion, would not constitute an infringement of any of the constitutional provisions for the protection of marriage and the family."

This passage anticipates a number of the arguments advanced on the hearing of the present appeal on behalf of the applicants.

In **Pok Sun Shum and Others v. Ireland** [1986] ILRM 593, the applicant was married, apparently to an Irish citizen, and had three children who were born here. He contended that his deportation was precluded by these facts and would undermine his and the family's rights under Article 41 of the Constitution. Costello J. said:-

> "I do not think that the rights given to the 'family' are absolute in the sense that that are not subject to some restrictions by the State and, as Mrs Robinson SC (counsel for the State) has pointed out, restrictions are, in fact, permitted by law, when husbands are imprisoned, and parents of families are imprisoned and undoubtedly, whilst protected by the Constitution these are restrictions permitted for the common good on the exercise of its rights. It seems to me that the Minister's decisions and the Act, and orders made under it are permissible restrictions and I cannot hold that they are unconstitutional."

Moreover, in view of the importance placed by the applicants on the decision of this court in **Fajujonu v. The Minister for Justice** [1990] 2 I.R. 151, it is instructive to note the summary of that case in the dissenting judgment of Barrington J. in **Laurentiu v. The Minister for Justice** [1999] 4 IR 28 at p. 77 as follows:-

> "The important point is that the Oireachtas has seen fit to regulate this sphere of life and to do so on the basis of maintaining the distinction between citizens who have a right to reside in the State and aliens who have not. But, as **Fajujonu v. Minister for Justice** [1990] 2 I.R. 151, illustrates, the Minister, having fairly considered all the matters involved in the case can still deport an alien even though his decision may incidentally cause hardship to the alien's children who may be citizens of Ireland."

The case of **Fajujonu** will, as its centrality in the present appeal requires, be dealt with separately later in this judgment. But sufficient authority has been cited to demonstrate that our Superior Courts have on several occasions considered the constitutional propriety of deporting a person who is a member of a family within the meaning of the Constitution and whose spouse and/or children are Irish citizens. In none of the cases cited was the existence of a child who was an Irish citizen seen as precluding the deportation of a non-citizen parent, or as constraining in the manner alleged the reasons which may justify deportation.

Statutory Provisions and International Agreements

The regime which existed under the Aliens Act, 1935 and the Aliens Order, 1946, effectively conferred on the State a general discretion to deport, based on considerations of the common good. This area is now governed to a very large extent by statutory provisions and international agreements.

Prominent amongst these are the Refugee Act, 1996 and the Dublin Convention which is the Fourth Schedule to the Act, the Immigration Act, 1999, and in particular s. 3 relating to deportation orders, the Geneva Convention and the amending Protocol of 1967, and the Irish Nationality and Citizenship Act, 1956 as amended.

The power under which the deportation orders in these cases were made is s. 3 of the Immigration Act, 1999. Section 3(1) of this Act provides:-

> "Subject to the provisions of section 5 (prohibition of refoulement) of the Refugee Act, 1996 and the subsequent provisions of this section, the Minister may by order (in this Act referred to as "a deportation order") require any non-national specified in the order to leave the State within such period as may be specified in the order and to remain thereafter out of the State."

Subsection (2) of the section provides that a deportation order may be made in respect of a number of categories of person. One of these, mentioned at s. 3(2)(e) is:-

> "(e) a person whose application for asylum has been transferred to a convention country for examination pursuant to section 22 of the Refugee Act 1996."

This is what occurred in the cases of the present applicants. It thus appears that a transfer of an application under the Dublin Convention is specifically envisaged by statute as a ground for deportation.

It may also be noted that, pursuant to s. 3(6)(b) and (c) the Minister in determining whether to make a deportation order is obliged to consider the duration of residence in the State of the person to whom the order would apply, and that person's family and domestic circumstances.

Accordingly the liability of the applicants for deportation arises from the application to them of the provisions of the Refugee Act, 1996. The long title of this Act is:

> AN ACT TO GIVE EFFECT TO THE CONVENTION RELATING TO THE STATUS OF REFUGEES DONE AT GENEVA ON THE 28TH DAY OF JULY, 1951 THE PROTOCOL RELATING TO THE STATUS OF REFUGEES DONE AT NEW YORK ON THE 31ST DAY OF JANUARY, 1967, AND THE CONVENTION DETERMINING THE STATE RESPONSIBLE FOR EXAMINING APPLICATIONS FOR ASYLUM LODGED IN ONE OF THE MEMBER STATES OF THE EUROPEAN COMMUNITIES DONE AT DUBLIN ON THE 15TH DAY OF JUNE, 1990 TO PROVIDE FOR THE APPOINTMENT OF A PERSON TO BE KNOWN AS THE REFUGEE APPLICATIONS COMMISSIONER AND THE ESTABLISHMENT OFA BOARD TO BE KNOWN AS THE REFUGEE APPEAL BOARD AND TO PROVIDE FOR MATTERS RELATED TO THE MATTERS AFORESAID [26th June, 1996]

The International Instruments mentioned are the basis of an applicant's entitlement to have his claim to asylum considered in this State.

By s. 22 of the Act "[T]he Minister may make such orders as appear to him or her to be necessary or expedient for the purpose of giving effect to the Dublin Convention". It is then provided that, without prejudice to the generality

of the above provision an order under the section may do a number of things including specifying:-

> "…The circumstances and procedure by reference to which an application for asylum-
>
> (i) shall be examined in the State,
>
> (ii) shall be transferred to a convention country for examination".

It may also be noted that s. 22(2)(b) enables the Minister to provide for an appeal against a determination to transfer an application to a convention country. This is not required by the convention itself and Ireland is, apparently, one of only two convention countries to have provided for it. The relevance of this fact to the present cases is that a portion of the stay in Ireland of the applicant and their families is accounted for by a period after they had lodged appeals.

The Dublin Convention and the European Context.

This convention was signed on the 15th June, 1990 by the Member States of the European Union. It is, however, an Inter-Governmental Treaty and not an EU instrument. Article 2 of the Convention is the reaffirmation by the Member States of their obligations under the Geneva Convention as amended, and a commitment to co-operate with the United Nations High Commissioner

for Refugees in that regard. The first portion of Article 3 is self-explanatory. It provides:-

> "1. Member States undertake to examine the application of any alien who applies at the border or in their territory to any one of them for asylum.
>
> 2. That application shall be examined by a Single Member State, which shall be determined in accordance with the criteria defined in this Convention. The criteria set out in Articles 4 to 8 shall apply in the order in which they appear.
>
> 3. That application shall be examined by that State in accordance with its national laws and its international obligations."

The Geneva Convention of 1951 on the status of refugees did not determine which State was responsible for examining an application for asylum. This led to the phenomenon described as "refugees in orbit" whereby applicants for asylum were sent from one State to another without any State acknowledging itself competent or obliged to examine the application for asylum. The Dublin Convention was designed to end this position in the interests of applicants for refugee status and also to ensure that multiple or simultaneous applications for asylum are not made.

The context and effect of the Dublin Convention was recently considered in the neighbouring jurisdiction. In **R (Yogathas) v. The Home Secretary** [2002] 4 AER 800, The House of Lords was dealing with a case where two applicants for asylum in the U.K. had previously applied for it in Germany.

Before considering the issue in terms of U.K. domestic legislation, a number of the law lords outlined or commented upon the international instruments which provided the background to that legislation. Lord Hope of Craighead referred to the Geneva Convention and the European Convention on Human Rights in some detail and continued:-

> *"*By the end of the 1980ies the Member States of the European Union were faced with a rising number of applications for asylum. The burden of dealing with these applications, many of which turned out after examination to be unfounded, was causing increasing concern to the national authorities. Among other problems was the fact that the large number of applications which were unfounded was delaying the recognition of refugees who are in genuine need of protection. In the United Kingdom applications for asylum, which had been in the low hundreds annually in the early 1970s were already in the low thousands annually by the 1980s and were increasing year by year. The whole issue was also becoming increasingly political sensitive and various ad hoc arrangements were entered into with a view to increasing co-operation between the Governments of the Member States in immigration and asylum law...
>
> The creation of an internal market in which people could move freely between Member States created a further problem. It led to a concern

that asylum seekers might seek to abuse the system by lodging applications for asylum in two or more Member States. The Dublin Convention sought to address this problem by establishing a framework to ensure that a claim for asylum was heard only once in the European Union. It established the principle that the State through which the applicant for asylum entered the European Union is responsible for dealing with the application, even if it is lodged in another Member State. Under this system a State is responsible if it is the first point of entry into the European Union of an asylum seeker who crossed the border into a member State from a non-member State without complying with its entry requirements".

The Treaty on European Union, signed at Maastricht in February, 1992 provided in Title VI that, for the purposes of achieving the objectives of the Union, Member States were to regard various areas in the field of justice and home affairs as matters of common interest. These included asylum policy.

Subsequently, in December 1992, the European Council approved a Resolution relating to "manifestly unfounded" applications for asylum. The preamble to this stated that the Member States were determined, in keeping with their common humanitarian tradition, to guarantee adequate protection to refugees in accordance with the Geneva Convention, and it reaffirmed their commitment to the Dublin Convention. It also stated that the Ministers were

aware that a rising number of applicants for asylum in the Member States were not in genuine need of protection within the Member States within the terms of the Geneva Convention, and that they were concerned that such manifestly unfounded applications were overloading asylum determination procedures, delaying the recognition of refugees in genuine need of protection and jeopardising the integrity of the institution of asylum. (See Lord Hopes judgment, paragraphs 28 and 29).

These considerations appear to me to have a bearing on the question of the protection of the integrity of the asylum and immigration systems, which is one of the reasons cited for the Minister's decision in this case. This relevance does not appear to be limited to applications deemed manifestly unfounded.

In the present cases, the determination of the Member State responsible for examining or further examining the applicants application for asylum was in accordance with Article 8 of the Convention which provides:-

> "Where no Member State responsible for examining the application for asylum can be designated on the basis of the other criteria listed in this Convention, the first Member State with which the application for asylum is lodged shall be responsible for examining it."

This, undeniably, is the United Kingdom and that State has accepted that this is so.

The respective applicants' proceedings as originally issued contain certain challenges to the operation of the Dublin Convention but these were not persisted in on the hearing of this appeal.

The European Convention on Human Rights

This Court has already held in **Adam & Iordache v. Minister for Justice** (Supreme Court unreported 5th April, 2001) that an applicant is not at the present time entitled to rely on the provisions of this Convention, and the applicants here have not sought to do so. However, the Convention jurisprudence is of interest in a number of respects. It sets out apparently generally accepted principles of international law in regard to the rights of non-national relatives of locally born or legally resident persons. It also discusses in an informative way the rights and prerogatives of States in relation to this group of people as they are regarded in a significant declaration of rights to which Ireland has subscribed. It is convenient, for reasons that will appear below, to consider this before proceeding to consider the **Fajujonu** case.

The position under the Convention in relation to asylum generally is illustrated in **Vilvarajah v. U.K.** [1992] 14 EHRR 248. There it is said (para 102) that contracting States have the right, as a matter of well established international law and subject to their treaty obligations including Article of the European Convention, to control the entry, residence and expulsion of aliens,

and that the right to political asylum is not contained in the Convention or its protocols. It is also stated (para 103) that the expulsion of an asylum seeker by a contracting State may give rise to an issue under Article 3 where substantial grounds are shown for believing that the person concerned faces a real risk of being subjected to torture or degrading treatment or punishment in the country to which he is returned.

The jurisprudence of the Convention relevant to the present issue is conveniently summarised in the decision of the English Court of Appeal in **Mahmood v. Secretary of State for the Home Department** [2001] 1 W.L.R. 840, and certain material cited therein. At para. 55 of the judgment Lord Phillips MR had this to say:-

> "From these decisions I have drawn the following conclusions as to the approach of the Commission and the European Court of Human Rights to the potential conflict between respect for family life and enforcement of immigration controls:-
>
> 1. A State has the right under international law to control the entry of non-nationals into its territory, subject always to its Treaty obligations.
>
> 2. Article 8 does not impose on a State any general obligation to respect the choice of residence of a married couple.
>
> 3. Removal or exclusion of one family member from a State where other members of the family are lawfully resident will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family

member excluded, even where this involves a degree of hardship for some or all members of the family.

4. Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a State if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled.

5. Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8.

6. Whether interference with family rights is justified in the interests of controlling immigration will depend on:

(i) the facts of the particular case and
(ii) the circumstances prevailing in the State whose action is impugned."

It will be noted that this approach of balancing family and state rights closely reflects the approach in the Irish cases cited above. It is also consistent with the more general principles of constitutional construction applied in this country. These are best expressed in the passage from the dissenting judgment of Henchy J. in **The People (D.P.P.) v O'Shea** [1982] IR 384, which concerned whether Article 34.4.3 of the Constitution conferred on the prosecution in a criminal case in the Central Criminal Court a right of appeal against a directed verdict of not guilty. The learned judge said:-

> "I agree that if the relevant sub-section of the Constitution is looked at in isolation and is given a literal reading, it would lend itself to that interpretation. But I do not agree that such an approach is a correct method of constitutional interpretation. Any

> single constitutional right or power is but a component in an ensemble of interconnected and interacting provisions which must be brought into play as part of a larger composition, and which must be given such an integrated interpretation as will fit it harmoniously into the general constitutional order and modulation. It may be said of a constitution, more than of any other legal instrument, that "the letter killeth, but the spirit giveth life". No single constitutional provision (particularly one designed to safeguard personal liberty or social order) may be isolated and construed with undeviating literalness."

This passage has been subsequently approved in a number of judgments and in my view elegantly expresses the basis of a harmonious approach to constitutional interpretation.

Amongst the cases under the European Convention referred to in **Mahmood** is **Poku v. United Kingdom** [1996] 22 EHRR CD 94. This case related to a decision of the United Kingdom government to deport Ama Poku, a Ghanaian who had overstayed her leave to remain. The application was also made by six members of her extended family all of whom has a right to reside in the UK or were UK citizens. These included her second husband, her three children and a further child of her second husband. The Commission wrote as follows:

> "The applicants emphasise that they are all British citizens or have a permanent right to remain in the United Kingdom, save Ama Poku. Previous cases relied on by the Government involved the situation where neither parent had the right to remain and were being deported. Further, it is not reasonable to expect the applicants to continue their family life in Ghana since the older children are well settled into the educational system; Michael will

> lose regular contact with his father; Samuel Adjei will lose his legal residence rights in the United Kingdom and also lose contact with Sarah, his daughter by a previous marriage. The Commission recalls according to its established case law that, while Article 8 of the Convention does not in itself guarantee a right to enter or remain in a particular country, issues may arise where a person is excluded or removed from a country where his close family reside or have the right to reside.
> However, the Commission notes that the State's obligation to admit to its territory aliens who are relatives of persons resident there will vary according to the circumstances of the case. The Court has held that Article 8 does not impose a general obligation on States to respect the choice of residence of a married couple or to accept the non-national spouse for settlement in that country (ABDULAZIZ CABALES AND BALKANDALI judgment, (1985) 7 E.H.R.R. 471, para 68). The Commission considers that this applies to situations where members of a family, other than spouses, are non-nationals. Whether the removal or exclusion of a family member from a Contracting State is incompatible with the requirements of Article 8 will depend on a number of factors: the extent to which family life is effectively ruptured, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e.g. history or breaches of immigration law) or considerations of public order (e.g. serious or persistent offences) weighing in favour of exclusion …
>
> The Commission finds that there are no elements concerning respect for family or private life which in this case outweigh the valid considerations relating to the proper enforcement of immigration controls. It concludes that the removal does not disclose a lack of respect for the applicants' right to family or private life as guaranteed by Article 8(1) of the Convention."

In a number of other cases, including **Moustaquim v. Belgium** [1991] 13 E.H.R.R. 802 and **Beldjoudi v. France** [1992] 14 E.H.R.R. 801, the length of residence in the relevant country of the person sought to be deported (twenty

years and over thirty years respectively) was considered a relevant factor in considering whether there had been a breach of Article 8.

Considerations of policy and the common good

In addition to the policy considerations to be derived from the statutes and other instruments cited, Mr John Lohan of the Department of Justice swore an affidavit in these proceedings and referred to certain factual matters. He says there has been a dramatic increase in the number of persons seeking asylum in the State since 1995, and also a significant increase in the number of applications for residency on the basis of parentage of an Irish born child. The number of applications for asylum increased from 424 in 1995 to 10,924 in 2000. (The current figure is 11,503). Moreover, (though not stated on affidavit) the main reasons for withdrawals of asylum applications are that the applicant has become the parent or sibling of an Irish born child, has married an Irish or EU national, or voluntary repatriation. Up to November 2001 the Department of Justice received 5,247 applications for permission to remain in the country on the basis of parentage of an Irish citizen, from current or former asylum applicants (written response of the Minister for Justice to question 343, 11th December 2001).

From these figures it would appear that leave to remain in Ireland has in fact been granted over a period of years to a significant number of relatives of Irish born children. It is hard to see why else they would withdraw their applications for asylum. Whether this is so or not, and whether if it is so it acted as a "pull factor" to Ireland, and whether, if it did, that fact has any bearing on future applications for leave to remain by persons now long established in Ireland, are matters which the Minister, in his discretion, may wish to address in future applications.

It will be understood that this Court can have no concern with the formulation of the State or Government policy in relation to the facts mentioned above and can have no view on whether the developments they represent are desirable or otherwise. Their significance is confined, in my opinion, to two matters only. Firstly, they illustrate that the phenomenon of immigration to Ireland by asylum seekers is a significant one, capable of eliciting *some* reaction in terms of official policy. What that reaction or policy may be is not the concern of the Court so long only as it is rational and lawful. Secondly, the pace of increase in applications for asylum (still more striking if one considers that there were only 39 applications in the year 1992) illustrates that the requirements of the common good, such as the appropriate authorities may consider them to be, may not be static and may have to have regard to a rapidly changing factual position.

In putting before the Court the figures and statements mentioned above in the affidavit of Mr. Lohan, it seems to me that the Minister is relying on them. In considering a reason for deportation such as one of those given here, relating to the integrity of the asylum and immigration systems, one must consider these systems in context, and not as words on a statutory page divorced from all reality. But our concern with that reality, as opposed to that of the Minister, is strictly limited in the manner described above.

In the judgment which he will deliver in this case, Fennelly J. has referred to other sources of information from which a more detailed breakdown of the numbers of persons receiving permission to remain in the State on the basis of parentage of an anchor child is available. The pattern is indeed a dramatic one. No figures are available before 1996, but having regard to the very low number of applications for asylum in that period, one may assume that the numbers would be very small indeed, possibly nil in some years. The figure for 1999 (1428) is more than ten times the figure for the highest previous year, and more than thirteen times the figure for 1997. No applications were processed in 1998, because of a review of the system. Thereafter, however, the pattern of rising numbers has continued, the 2002 figure (2879) being more than twice that for 1999. When these figures are correlated with the overall numbers of applications for asylum, and with the rate of withdrawals of such applications, the significance of the right alleged to attach to parentage of an anchor child in

the context of the asylum system generally becomes clear. Moreover, it seems that from 2001, records are kept of applications, as well as grants of permission, to remain in the State on anchor child grounds. In that year, according to the figures obtained by Fennelly J., there were 6,570 anchor child applications, of which 5,924 were from current or former asylum applicants. As Fennelly J. says, it is not possible from these figures to extrapolate a precise figure for the success rate, historically, of anchor child applications because (for instance), one cannot know how many of the 2001 applications were processed in that year. It appears however that the success rate of such applications far exceeds that for asylum applications (about 9%). It would also appear, though one cannot be certain, that a considerable number of anchor child applicants are unsuccessful.

Fennelly J. quite correctly emphasises that these figures were obtained by him after the hearing and formed no part of the appellants' case. Nonetheless, he regards the facts summarised above as important and points out that the parents of the anchor children in the present cases are not being permitted to remain in the State although other parents of anchor children have been given such permission. He also points out that neither side informed the Court that a large number of applications by the parents of anchor children have been granted, or the basis on which this was done.

I have to say that my reaction to the figures obtained by the diligence of Fennelly J. is a very different one. To my mind, they demonstrate even more clearly than those cited in Mr. Lohan's affidavit, the very significant rise in applications for asylum and the very significantly increased role of anchor child applications as a factor preventing what were originally applications for asylum being dealt with as such. They illustrate very clearly why an applicant for asylum might prefer to advance his case to remain in Ireland on the anchor child ground. The figures demonstrate clearly that anchor child applications are capable of being regarded as a factor affecting the integrity of the asylum system. I discuss below whether it is legitimate for the Minister, in considering an individual application, to consider overall policy in relation to asylum, and whether that policy requires to be changed in light of changing circumstances. If it is legitimate to consider these factors, it seems to me that their existence is very strikingly established (at least having regard to the very limited role of the Court in relation to policy matters) by the figures quoted. I am, accordingly, unsurprised that no point was made on behalf of the appellants based on this material. I must emphasise that what I have said about these figures is obiter and in no way essential to the outcome of this case.

I do not consider it possible to infer from the fact that the State has granted leave to remain in the past to parents of anchor children that it would be impermissible to deny it to other such parents either then, now or in the future.

The applicants themselves concede that individual factors have a role to play in these decisions. Quite apart from that, general policy in relation to these applications need not be frozen, once and for all, in a form that may have seemed proper and desirable at some point in the past. To do this in an area where the numbers involved are increasing at the rate evidenced by the statistic cited would be to convert precedent into a straitjacket. The relevant authorities are entitled to consider whether an approach considered possible and desirable when applications were numbered in the tens or hundreds remains appropriate in present conditions. In **T.D. v. The Minister for Education** [2001] 4 IR 259 this Court held that the Executive was entitled to freedom to alter policy as well as to formulate it. This seems to me a proposition of fundamental importance in practice.

Asylum and immigration: a digression.

In his judgment in this case, Fennelly J. has referred to the phenomenon of asylum seeking in the context of contemporary immigration into Ireland and of Irish emigration in earlier times. I agree with all he says on the last two topics. Endemic emigration, first in a haemorrhage of population and then as a steady debilitating drain of people and energy, has scarred Ireland for over one hundred and fifty years up to very recent times. In our economic statistics, "emigrants remittances" formerly held a prominent place. Irish emigrants found

a new home in many countries, including all the great English speaking democracies and made conspicuous contributions to the lives and economies of those lands. It would be an act of historical blindness and ingratitude to forget this when, for the first time in modern history, we ourselves are attracting net immigration.

It must however be recalled that asylum seekers are a small minority of potential immigrants to Ireland. The great bulk of such immigrants are people who come here in possession of work permits, and their families. Over 40,000 such permits were issued or renewed last year, to people from over 100 countries from Albania to Zimbabwe. They work in thousands of Irish enterprises and manage some of them. They make a much needed contribution to Irish life by their skills and industry, just as Irish emigrants in the past made a valued contribution in their new homelands. This orderly process of immigration seems likely to continue, bringing further welcome and productive newcomers to Ireland. This case is not concerned with that large group of people which, however, constitutes the great bulk of immigrants to Ireland.

Fajujonu v. The Minister for Justice

This case is central to the arguments of both sides of the present appeal. Both sides accept that it was correctly decided, and each side claims that it assists their case.

It must be said immediately that it is not easy to distil a single *ratio* from the judgments in **Fajujonu**. In a case where the result is unanimously agreed but there is more than one judgment it is not, of course, necessary or inevitable that each judgment should reach the agreed conclusion in the same fashion. In this case, however, there is particular difficulty in isolating the authoritative content. There has been acute disagreement on this question in the oral and written arguments in the present case.

The essential facts of the case are that Mr. and Mrs. Fajujonu were Nigerian and Moroccan citizens respectively. They married in London in 1981 and almost immediately moved to Ireland. A child was born to them here in September, 1983. In December of that year Dublin Corporation allocated them a three bed roomed house. They subsequently had two further children, who are also Irish citizens. Mr. Fajujonu came to the notice of the Minister when he applied for a work permit for specific employment. The Minister for Labour refused to grant him a permit because he was an unauthorised alien and the Department of Justice asked him to make arrangements to leave the country. One reason given for this was that Mr. Fajujonu was unable to support his family without assistance from the State. While matters stood thus, without

any formal deportation order being made, the plaintiffs issued proceedings seeking orders restraining their deportation, and certain declarations essentially of their own entitlement to remain in the State and as of the un-constitutionality of certain provisions of the Aliens Act, 1935.

They were unsuccessful in the High Court where their action was dismissed in a judgment of Barrington J. Their appeal to the Supreme Court was dismissed; however it was held that the Minister should consider the case afresh. This was done for reasons and in terms which were the subject of acute dispute on the hearing of this appeal.

Barrington J. cited or referred to passages from **Osheku** and **Pok Sun Shun** which have been cited earlier in this judgment. In the latter case, he said, it was "held that the rights given to the family under the Constitution were not absolute and that the provisions of the Aliens Act, 1935 and the orders made under it were permissible restrictions." He fully acknowledged the constitutional provisions relating to the family in Articles 41 and 42 of the Constitution. He said:-

> "The rights of the family are declared to be 'inalienable' which means that they cannot be surrendered or given away. They are also declared to be 'imprescriptible' which means they cannot be lost or forfeited through the wrongful act of a third party over a period of time. One is therefore driven to the conclusion that the Constitution reserves to the family a certain sphere of authority and that within this sphere it has inalienable and imprescriptible rights. But this does not mean that the sphere of authority is unlimited or the rights absolute. There are certain matters which are outside

> and beyond the competence of the family; for example, issues such as peace or war or the foreign policy of the State."

Barrington J. continued:-

> "…the Constitution does not contemplate the family as existing in isolation but regards it as living in a larger community or society in which the State has a role to play as the guardian of the common good. Moreover Article 40 of the Constitution clearly contemplates that a citizen may under certain circumstances be deprived of his personal liberty, or even of his life, notwithstanding the fact that this may have tragic repercussions for innocent members of his family who may be deprived of his society and his support. In interpreting the Constitution it appears to me to be important to preserve the balance which the Constitution itself contemplates. Whatever the "inalienable and imprescriptible" rights of the family may be, they hardly comprise the right to dictate the foreign policy of the State. It appears to me that the control of the circumstances under which aliens may live or work in Ireland and the making of arrangements for rights of free travel between this and other countries are peculiarly matters within the competence of the Oireachtas and the Government and they are matters into which these courts should be slow to enter.
>
> In the present case the parents never had a right to live or work in Ireland. The child clearly has a certain right to be in Ireland. She also has the right to the society of her parents. But it does not follow from this that she has a right to the society of her parents in Ireland. I do not think that the parents can by positing on their child a wish to remain in Ireland in their society confer upon themselves a right to remain in Ireland such as could be invoked to override the legislation passed by the Irish Parliament to achieve its concept of what the common good of Irish citizens generally requires."

Counsel for the applicant/appellants disagreed strongly with this passage and said that it had in effect been overruled by the judgments of the Supreme Court in the same case. He conceded that the latter judgments did not entirely

preclude the deportation of the family of an Irish born child in all circumstances but he argued strongly that they envisaged that something extreme and overwhelming relating to the family members personally would be required before they could lawfully be deported.

The Supreme Court which heard the appeal in **Fajujonu** consisted of five judges. Judgments were delivered by Finlay C.J. and Walsh J. Griffin J. said "I agree with the judgments of the Chief Justice and of Walsh J.". Hederman J. and McCarthy J. each said "I agree".

Finlay C.J. said:-

> "I have come to the conclusion that where, as occurs in this case, an alien has in fact resided for an appreciable time in the State and has become a member of a family unit within the State containing children who are citizens, that there can be no question but that those children, as citizens, have got a constitutional right to the company, care and parentage of their parents within a family unit. I am also satisfied that *prima facie* and subject to the exigencies of the common good that that is a right which these citizens would be entitled to exercise within the State.
>
> I am also satisfied that whereas the parents who are not citizens and who are aliens cannot, by reason of their having as members of their family children born in Ireland who are citizens, claim any constitutional right of a particular kind to remain in Ireland, they are entitled to assert a choice of residence on behalf of their infant children, in the interest of those infant children.
>
> Having reached these conclusions, the question then must arise as to whether the State, acting through the Minister for Justice … can under any circumstances force the family so constituted as I have described, that is the family concerned in this case, to leave the State. I am satisfied that he can but only if, after due and proper

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

The learned former Chief Justice then made certain findings specific to the **Fajujonu** family which required a fresh consideration of whether to deport "…having due regard to the important constitutional rights which are involved as far as the three children are concerned" and went on to say:-

> "I am, however, satisfied also that if having had due regard to those considerations and having conducted such inquiry as may be appropriate to the facts and factors now affecting the whole situation in a fair and proper manner, the Minister is satisfied that for good and sufficient reason the common good requires that the residence of the parents within the State should be terminated, even though that has the necessary consequence that in order to remain as a family unit the three children must also leave the State, then that is an order he is entitled to make pursuant to the Act of 1935."

Walsh J. referred to the facts of the case and held "[T]here is no doubt that the family has made its home and residence in Ireland". He discussed the cases of **Pok Sun Shum** and **Osheku**:

He then returned to the facts of the case and held:

> "The father openly applied through his prospective employer for a permit to work as an alien from the Minister for Labour. He was refused that permit on the grounds that he was an unauthorised alien and one of the reasons advanced for refusing him permission to stay in the country was that he was unable to support his family without assistance from the State. The reason he was unable to support his family was precisely because he was refused permission to work. Therefore in effect he was not being permitted to support his family within the State because he was not permitted to work. Such a position could not arise in respect of the support of his family if the parents were citizens and therefore to that extent the members of the family who were Irish citizens were suffering discrimination by reason of the fact that their parents were aliens. The question which arises therefore is whether a family, the majority of whose members are Irish citizens, can effectively be put out of the country on the grounds of poverty. The dilemma posed for the parents by this attitude is that they must choose to withdraw their children who are Irish citizens from the benefits and protections of Irish law under the Constitution or alternatively effectively abandon them within this State, which would be obliged to support them."
>
> In view of the fact that these are children of tender age, who require the society of their parents and when the parents have not been shown to have been in any way unfit or guilty of any matter which makes them unsuitable custodians to their children, to move to expel the parents in the particular circumstances of this case would, in my view, be inconsistent with the provisions of Article 41 of the Constitution guaranteeing the integrity of the family.
>
> The Act of 1935 did not in any way contemplate a situation in which infant citizens of this State could in effect be deprived of the benefit of protection of the laws and Constitution of the State. In my view, therefore, the Act is not inconsistent with the Constitution. But it would **be ultra vires** the Act to exercise the powers which had been sought to be exercised by the Minister to disrupt this family for no reason other than poverty particularly when that poverty has been effectively induced by the State itself.

> I agree with the opinion expressed by the Chief Justice that there is nothing to suggest that the Minister has applied his mind to any of these considerations, and the matter will have to be reconsidered by the Minister, bearing in mind the constitutional rights involved. In my view, he would have to be satisfied, for stated reasons, that the interest of the common good of the people of Ireland and the protection of the State and its society are so predominant and so overwhelming in the circumstances of the case that an action which can have the effect of breaking up this family is not so disproportionate to the aim sought to be achieved as to be unsustainable." (Emphasis added)

The absolute centrality of the judgments in **Fajujonu** has rendered necessary this lengthy citation without which the exposition which follows would be difficult to understand.

It is clear that, as was observed in Byrne and Binchy *Annual Review of Irish Law 1989*, there is a difference of emphasis between the judgments of Finlay C.J. and Walsh J. Counsel for the Minister, however, contends that each of them is firmly based on the "factual matrix within which the family and the Irish born child in particular found itself". This, they say, is common to both judgments though within that factual matrix Finlay C.J. emphasised the length of time for which the family had been in the State and Walsh J. the reliance, in refusing permission to stay within the State, on the poverty of the family, notwithstanding that this arose from the denial of a work permit. Walsh J. also, however, held that the family had made its home and residence in Ireland.

Counsel for the appellants, on the other hand, contended that each of these factual aspects was irrelevant to the true *ratio* of the decisions. They contended that, in so far as the family's eight years residence in the State and their poverty arising from the refusal of a work permit, (which poverty was then relied on as a ground to compel them to leave the State) are mentioned in the judgments, they are mentioned merely as part of the background facts. These facts are not, counsel contended, at all essential or even important to the result of the case. The result is dictated solely and sufficiently by the existence of the Irish born children, any one of whom is sufficient to anchor the entire family to the State. It followed from that, the appellants contended, that while the Minister was not absolutely precluded in all circumstances from deporting family members of an Irish born child he could only do so for overwhelming reasons, which must be related to the family members personally such as a very serious criminal record.

Counsel for the respective parties emphasised the different forms of words used in the judgment to describe the circumstances in which deportation could occur. The phrases particularly emphasised were Finlay C.J.'s statement that the family members could be deported only after "…due and proper consideration" with "full recognition of the fundamental nature of the constitutional rights of the family" and leading to the conclusion that deportation would be justified by "…a grave and substantial reason associated

with the common good". The Minister would have to be satisfied "that for good and sufficient reason the common good requires" exclusion from the State. Much emphasis was also placed on the dictum of Walsh J. that the interests of the common good would have to be "so predominant and overwhelming in the circumstances of the case, that an action which can have the effect of breaking up the family is not so disproportionate to the aims sought to be achieved as to be unsustainable." These phrases, of course, relate to the nature of the Minister's consideration, and of the reasons he requires to deport, and not to the criteria for judicial review.

I do not accept that the particular facts of the **Fajujonu** case, over and above the existence of children who are Irish citizens, are irrelevant to the *ratio*. In particular, I believe it would ignore the plain words of the judgment of Walsh J. to conclude that he regarded as irrelevant or inessential the fact that inability due to poverty to support the children was a ground for refusing permission to stay in the State, although that poverty was state induced. The learned judge himself defined what he saw as the essential issue as follows:-

> "The question which arises therefore is whether a family, the majority of whose members are Irish citizens, can effectively be put out of the country on the grounds of poverty."

He also stated:-

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

Contrary to the Appellants' submission, it seems to me that this aspect of the case – the refusal of a work permit followed by reliance on the family's poverty – was for Walsh J. a central feature of the case. No other conclusion is possible, I believe, from a perusal of the lengthy extract from his judgment set out above.

I do not accept, either, that the reference in the judgment of Finlay C.J. to the fact, also acknowledged in the other judgment, that the family had been in the State for an appreciable time (eight years) during which the father "… has become a member of a family unit within the State containing children who are citizens…" is irrelevant to the *ratio.* I do not believe that the references in both judgments to the fact that over that period of time the family had expanded so that the majority of its members were Irish citizens was mere crude head counting. On the contrary, I believe that the references to these two facts is an indication of the composite position that the family had been in Ireland for eight years during which in the natural course of events three children who are Irish citizens had been born and that the family had made its home and residence here.

These facts are, in my view, self-evidently relevant to the decision which the Minister must make. The facts of the particular case, including long residence, have been held to be relevant in cases under Article 8 of the

European Convention, as is demonstrated in a preceding section of this judgment. Section 3(6)(b) and (c) of the Immigration Act, 1999 now specifically requires the Minister to consider the duration of residence in the State and the family and domestic circumstances of a proposed deportee before he can make an order. Facts of the same sort were relevant, I believe, to such decisions even before either of the sources quoted came into being.

I believe that the factual matters referred to are central to the *ratio* of the **Fajujonu** case and, accordingly, that the case does not proceed simply on the basis of the existence of an Irish born child. The present cases are clearly distinguishable on the facts.

The other aspect of the **Fajujonu** case said to govern the present one is that relating to the nature of the reasons which might, in certain circumstances, justify deportation. The applicants' contention in this regard has been mentioned several times. The nub of it is that what were referred to in the course of argument as "routine immigration reasons", or reasons of general policy, cannot provide a sufficient reason to deport. The reason must be exceptional and case-specific. Counsel for the applicants said that "what those exceptional circumstances might be was not spelt out in **Fajujonu**, but clearly a general desire to maintain the integrity of the immigration system would not constitute such a reason."

In my view, no argument justifying this contention has been advanced. It seems wholly artificial to contend that "…a grave and substantive reason associated with the common good", in the words of Finlay C.J., is to be read as excluding general considerations of that common good including the statistical pattern of immigration and asylum seeking, the demands thereby created on the State's resources, the State's international obligations and the need to ensure that one applicant for permission to reside in the State does not gain an unfair advantage over others. Some statistical indication of the extent of the phenomenon of asylum-seeking was given in the affidavit of Mr. Lohan. I agree with the judgment of the learned Chief Justice in rejecting the submission that neither the High Court nor this Court is entitled to have regard to the factual context in which recent legislation was enacted and administrative decisions taken in the implementation of that legislation. It would be unreal not to have due regard to the manifest truth that factual conditions in Ireland, in terms of immigration and otherwise, are very different to those that prevailed in 1989, 1992 or even in more recent years. Apart from the statistical information quoted above, the legal landscape has been transformed by the passage of the legislation cited earlier in this judgment and the giving of effect to the Dublin Convention. Just as the length of time for which the applicants have been in the State is not merely a relevant consideration but one which the Minister is legally obliged to consider, so it is relevant in deciding whether to apply the Dublin Convention. The same applies to the applicants' family and domestic

circumstances generally, including the circumstances which render them liable to be sent to Britain for the consideration of their applications for asylum. Again, since the State has undertaken international obligations in relation to applications for refugee status, the bulk of them highly favourable to applicants, it is manifestly in the interests of the common good that these obligations receive due consideration in each individual case. So also must what the European Human Rights Commission described as "valid considerations relating to proper enforcement of immigration controls" be duly weighed.

I therefore conclude that there is nothing in the judgments in **Fajujonu** to limit the Minister's discretion by excluding from his consideration anything which can reasonably be regarded as bearing on the common good. This phrase must be construed realistically in light of contemporary and changing conditions.

The decision in **Fajujonu** to require a fresh consideration of the applicants' case was based on the finding that the Minister did not appear to have considered the constitutional rights of the members of the family who were Irish citizens in deciding to request the father to leave the country. These rights are undoubtedly weighty ones, but the decision goes no further than that. Finlay C.J. specifically held that if the Minister were satisfied that if "…for good and sufficient reason…" the parents should be deported then "…even though that has the necessary consequence that in order to remain as a family

unit the three children must also leave the State, that is an order he is entitled to make pursuant to the Act of 1935."

I would only add that the Minister, in my view, if duly satisfied as to the requirements of the common good, is also entitled to make a deportation order under the Act of 1999.

I agree with the judgment of the learned Chief Justice, for the reasons which he has given, that the judgments in **Fajujonu** cannot be read as questioning, much less overruling, the decisions of the High Court in **Osheku** and **Pok Sun Shun**. I would go somewhat further. I do not regard the observation of Walsh J. on the latter case as indicating a basis for distinguishing it from the circumstances of the present one, and I do not think that Walsh J. necessarily intended to distinguish it in **Fajujonu**. The judgment of Costello J. makes it clear that the instance of imprisonment as a lawful interference with family rights was an illustration offered by counsel to counteract the view that the family's rights under Article 41 are absolute. The substance of Costello J's decision was that the making of deportation orders under statutory power can be permissible restrictions on family rights, so that he could not declare the relevant statute unconstitutional. There is nothing to indicate that Walsh J. intended to dissent from this view, and he indicated no basis for so doing.

Walsh J. specifically refrained from making any observations on **Osheku** on the basis that the trial judge in that case, Gannon J., had felt that it was premature to grant declarations about a decision to deport which had not yet been taken. At the end of his judgment, however, Gannon J. set out seven numbered propositions which he described as "…my determinations in the following affirmative terms…". The third of these was:-

> "Mr. Osheku … is not entitled to remain nor reside in nor leave nor re-enter the State otherwise than in conformity with the Aliens Act, 1935, and the orders thereunder."

The fifth proposition was:-

> "An order by the Minister for Justice deporting Mr. Osheku … if made in the due execution of the discretion vested in him by the Aliens Act, 1935 and the statutory orders there under, would not infringe the constitutional rights of any of the plaintiffs."

There is nothing whatever in the judgment of Walsh J. to indicate disagreement with, nor an intention to overrule, this determination.

THE FAMILY IN AND AFTER FAJUJONU.

A child has a personal right to the society and nurture of his parents. The latter have no personal right to reside in this State. The ordinary consequence of these facts is that the parents will rear and nurture the child elsewhere. Does the fact that a child, alone of his family, is an Irish citizen alter that position? The answer depends on whether the child's right to the Society and nurture of

his family is a right to enjoy these things *in Ireland*. The applicants submission seems to me to assume, rather than to establish, that it is. Decisions as to nurture and rearing are normally matters for the parents, to be taken within the scope of their abilities, resources and entitlements. The State's right to restrict the exercise of family rights within the State by the deportation of a non-national parent of an Irish born child has already been affirmed in **Osheku** and **Pok Sun Shun**: these cases have not been overruled. Accordingly it seems to me that the existence of an Irish born child does not fundamentally transform the rights of the parents, though it requires the specific consideration of the Minister who must reasonably be satisfied of the existence of a grave and substantial reason favouring deportation. Whether this position is altered by the attribution to the child of an intention to remain in Ireland is the next point arising from the appellants submissions.

The statement of Finlay C.J. in **Fajujonu** that the parents "... are entitled to assert a choice of residence on behalf of their infant children, in the interests of those infant children…" requires close analysis for its proper construction. This case has been expressly pleaded on the basis that it is the Irish born child himself who has, in his first few days or weeks of life, formed a wish and intention to reside in Ireland. This is a contrived and wholly unrealistic statement.

I do not consider that a parent in taking a decision in relation to the welfare, education or residence of a child can realistically be described as exercising the child's choice for it. On the contrary, such parent is making his or her own decision for or on behalf of the child. This, however, is a parental decision, made in the ordinary course of the care and custody of a child and not a delegated exercise of some notional authority of the child's. The myriad decisions, ranging from crucial to banal, which parents habitually take in relation to children are not usually so analysed as to their legal character and would not be here unless there was some point to be gained. In the case of an infant of about one year, it is wholly unrealistic to regard a decision as to place of residence as being anything but the parents' decision. As such, it is constrained by the parents' capacities: they are not at large in the decisions they can take but constrained by their material circumstances, their own needs and entitlements and the laws which apply to them. I believe that what the parents have done in this case was aptly described by Barrington J. in **Fajujonu**: they have posited on the child a wish to remain in Ireland. But this wish is wholly notional: the only persons at present capable of wishing or electing anything in relation to residence are the parents: the decision is theirs, subject only to their capacity and the laws applying to them.

In **North Western Health Board v. H.W.** [2001] 3 IR 622, which is relied on by the applicants in relation to the rights of the family, the issue

centred on whether parents could be compelled to present their child for a particular medical test. This was resisted by the parents, but not on the basis of any view of the test imputed to the child or asserted as the child's by the parents. It was resisted on the basis that the parents, according to our constitutional order, were the appropriate decision makers on a matter plainly within the authority of the family. The fundamental issue in the case concerned who would take the decision to accept or reject the test: a State body or the parents. It did not occur to either side to suggest that the decision was the child's, and merely articulated by someone else as his agent. It is unrealistic to consider any decision made on the child's behalf as his own. It would not, I think, occur to anyone so to describe a parental decision except under the artificial constraints of a need to support a particular argument. What is unusual about the present case is that the child has a right, which is not shared by the parents, which he is at present incapable of exercising. Accordingly, he will be bound by whatever decision the parents may lawfully make in his regard. A decision about a child's medical treatment is, *prima facie*, within the authority of his family. A decision about an alien parents desire to live in the State is not.

In my view, the artificiality of the applicants' contention emerges clearly from the proceedings which they have launched. In each case, the statements required to ground the application for judicial review was amended to include

pleadings specific to the Irish born child. In the **Lobe** case, the amended statement filed the 14th of January, 2000 says at para. (viii):

> "The sixth-named applicant was born on the 2nd of November 2001 in University Hospital Galway and is the child of the first-named and second-named applicants. The sixth-named applicant wishes to and intends to reside in the State of which he is a citizen and as such has a right to do so." (Emphasis added)

In the case of the **Osayande** proceedings, the amended statement is undated in my papers but was clearly filed after the 4th of October, 2001. The title in the proceedings themselves were amended to include the Irish born child, Osaze Joshua, as an applicant.

Para. (x) of the amended statement reads as follows:-

> "The second-named applicant was born on the 4th of October 2001 in Mayo General Hospital and is the child of the first-named applicant and Mrs. Flora Osayande, the first-named applicant's wife. The second-named applicant wishes to and intends to reside in the State of which he is a citizen …"
> (Emphasis added)

I repeat that it is unreal to think or speak in terms of an infant one year old having wishes or intentions. He is both practically and legally incapable of forming an intention and if a wish can rationally be posited on him, it can only be a wish to be with his parents.

The form of words used seems to me to reflect consciousness on the part of the pleader of a great difficulty in the applicant's case, and his attempt to

address it. The parents undoubtedly have wishes and views as to where the family should reside. But they lack the power and capacity themselves to decree that they or their children (other, perhaps, than the Irish born child) will reside in this State. But the Irish born child, as a citizen, is said to be in a different position. Accordingly the parents' wish, which they lack the capacity to translate into an effective decision, is expressed instead as the wish and intention of the new born child. And if that wish and intention can be made effective, it is proposed that that fact will itself "anchor" the rest of the family to this jurisdiction.

There is no doubt that the Irish born child, in each case, when he reaches his majority, will be capable of deciding to reside in this country if he so wishes. But his status as an Irish citizen does not enable him now to express a wish, or form an intention, which is plainly beyond the capacity of a child in his first year of life. The form of words quoted above is designed to avoid or obscure this contradiction. The phrase "… on behalf of …" which is also used in this connection, is likewise unhelpful, extending as it does to two separate meanings which require to be distinguished: "…as regards or on the side of…" but also "…as agent for...". It is in the former sense only that the phrase can properly be used in the present context. There can be no question of a delegation of a capacity or authority which the child is not himself in a position to exercise.

This, indeed, seems to have been acknowledged by the applicants in the L case at least at one stage of their dealings with the authorities. By their solicitor's letter of January 2002 they observed that the Minister seemed to presume that the family would take the Irish born child with them if they were deported, and also seemed to consider that they were under a duty to do this. They said that this presumption was incorrect. The letter went on:-

> "We are instructed that the first and second named applicants will decide whether (the Irish born child) should leave the State with them if they are deported, or whether he should remain in the State, in accordance with what they consider to be the best interests of the child. We now call upon you to set out precisely what measures you propose to take and put in place for the care of (the Irish born child) in the State in the event that his parents are of the view that his best interests and welfare are served by him continuing to reside in the State, albeit in the absence of his family".

There is no question here of a contention that it may be the wish or intention of the Irish born child to remain in Ireland even in the absence of his parents and siblings. Indeed, it would be unnatural to attribute such a wish and intention to a very small child. The terms of the letter are inconsistent with any view on the part of the applicant parents other than the view that they will of their own motion make a decision as to the residence of the child, even if they are not entitled to elect residence in Ireland for themselves or their other children. If this reflects the legal and human reality of this second decision, it must equally reflect the reality in relation to the first decision as well. In other words, the parents have themselves decided, in the exercise of their own

powers, and not as agent or surrogate for the child, where they wish him to live. His place of residence will be decided by his parents and (like every other decision) this decision will be subject to the constraints of what they are practically and legally entitled and able to do. There simply does not exist a notional, inviolable decision of the child to which every other consideration must yield.

I agree with the judgment of Geoghegan J. as to the reasons for the differing approaches of Barrington J. and of the Supreme Court in **Fajujonu** and have nothing to add in that respect.

The present proceedings

All of the foregoing is essential background to a decision in the present proceedings. Since no aspect of the case originally made other than that related to the Irish born child was argued in this Court, I confine my summary to that aspect.

The core relief sought in each case is the quashing of the decision to deport. Though the grounds on which this is sought were more elaborately set out in the **Lobe** case than in the other, I do not regard the cases as raising different issues. Substantially, it is claimed that the decision should be quashed on the basis that:

(a) There is simply no power to deport the family of an Irish citizen.

(b) Alternatively, there is such a power only in very restricted circumstances.

(c) The actual decisions took into account matters which are legally irrelevant i.e., the length of time the applicants had been in the country, the Dublin Convention, and the need to preserve respect for the asylum and immigration systems.

(d) The reasons given by the Minister do not represent a proper consideration of the question of whether the applicant should be deported and failed sufficiently to recognise their constitutional rights as members of the family of an Irish born child, alternatively, the said child's rights to their society in the State.

All other reliefs are dependant on this core relief being granted.

It will be clear from what is said in the preceding sections of this judgment that the first three claims must be rejected. Even if one were to interpret **Fajujonu** in the way the applicants propose it would not be possible to say that it is never lawful to deport members of the family of a locally born child. Furthermore, I have already rejected the view that the requirements of the common good which the Minister is entitled to take into account are limited to matters relating to the private character of the persons sought to be deported. In **PBL** cited above, an argument which was in some way the obverse of this was advanced. It was contended that, in invoking the requirements of the

common good as a basis for deportation the Minister was necessarily indicating that he held an opinion derogatory of the applicants' characters, and he had not communicated the basis for this opinion to them. In my judgment in that case, I referred to **Laurentiu** and continued:

> "It follows from this that the invocation of the [sic] 'the common good' in section 3(6) does not require or imply any opinion derogatory of the individual whose case is being considered. It simply entitles the minister to have regard to the State's policy in relation to the control of aliens who are not, on the facts of their individual cases, entitled to asylum."

In turn, it follows from the passage just cited that the requirements of the common good may have a bearing on an individual case even though there is nothing known or relied on which reflects badly on the individual concerned. Specifically, the Minister is entitled to have regard to the State's general policy in relation to immigrants and specifically to asylum seekers; to the jurisprudence on the same subject as it evolves; to the volume of persons seeking asylum and the social and economic demands which this imposes; to changing patterns in this volume; to the matters he is required by statute to consider including the length of time a particular person has been in the State and his or her family and domestic circumstances, to the constitutional rights of all persons concerned including the Irish born child and the State itself to the requirement of a coherent and efficient immigration and asylum system and to our international obligations.

The number of so called anchor children cases and any changing patterns in their incidents; their effect on the operation of the asylum system (as illustrated for example by the draws of applications for asylum by people who have become the parents of an Irish born child); the making of previous applications for asylum elsewhere, the results of such applications, and the subsequent arrival here of families which shortly come to include an Irish born child all seem to me capable of having implications for the integrity, the proper operation, of our domestic asylum system and our international obligations with regard to asylum.

If the contrary view were taken, a family whose asylum application had been conclusively determined to be appropriate to another jurisdiction would, by reason of the fortuity of the birth here of a child, become entitled to override the ordinary procedures relating to asylum and to indefinite residence here, even if their claim to asylum were unfounded. If the birth took place after the asylum procedures had been completed, then the humanitarian reaction of this State in abstaining from the immediate deportation of a heavily pregnant woman would have had the consequence of conferring on the whole family an indefinite right of residence.

This situation appears to me quite inconsistent with any fair and rational operation of an asylum system. A result dictated not by a careful examination of each case according to statutory criteria, but by the happenstance of the relative progress of the asylum procedures on the one hand and a pregnancy and its complications on the other, is irrational, chance-determined and therefore quite unfair. It would be internationally anomalous and frankly risible in the eyes of informed observers.

All these considerations emphasise the social and legal need for a proper discretion in these cases to be exercised with due regard to the individual circumstances of applicants (including applicant families) and the common good of the Irish community. This includes the public interest in a fair rational and effective asylum and immigration system. This interest seems to me to constitute a grave and substantial matter of high importance.

All these matters form an ensemble, to use the word of Mr. Justice Henchy in the passage quoted above. There is no single consideration which is determinative of the matter. The Dublin Convention now forms an important part of our system and the system of our European Union partners for dealing with the volume of asylum applications which are made to them. It is certainly true that, notwithstanding the provision in cases such as the present for having the asylum applications examined in the country which they were first made, it

would also be possible for the State itself to examine them. But the fact that the State could do so does not mean that it must do so. It is plainly a matter of executive discretion whether to exercise this power or not. In my view, there is nothing, including the fact of the birth of the Irish born child, to deprive the Minister of the discretion he clearly has under the Convention.

Ireland, like other States, has undertaken considerable obligations in relation to refugees or people who claim to be such. These responsibilities, undertaken in the name of the vindication of human rights, have now involved the State in providing for the hearing of over 11,500 such applications each year. The incidents and logistics of this have been described at the start of this judgment, as has the administrative structure involved. It is a very elaborate structure indeed. It must aspire to high standards of fairness, transparency and consistency and in general it does so successfully. It must also aspire to treat all applicants as far as possible equally. It is thus legitimate to enquire whether a person who comes to the State and remains here on foot of a claim which may be unfounded should thereby gain an advantage over a person who pursues his claim, where possible, in the prescribed manner from abroad.

All of the factors indicated above are proper to be considered by the Minister. The actual mode of consideration is manifest here with total transparency in the form of the memorandum for the Minister's consideration written in each case by Mr. Lohan (*"The Lohan Memorandum").* I agree with

what is said about this document in a judgment of Mr. Justice Fennelly: it contains a fair summary of the facts, the constitutional rights claimed by the child in each case, as a citizen and a member of the family and it "sets out in detail the reasoning behind the Minister's decision" This memorandum, in each case, was in my view, correctly described by Fennelly J. as "a scrupulously careful and accurate document", although, as he says, its legal correctness is contested. I also agree with Fennelly J's summary of the reasons for the Minister's decision. Those common to each case were:

"1. The length of time the family has been in the State-

Lobe case: only nine months; Osayande case only seven months at this stage with less than four months of the time of making the deportation order.

2. The application of the Dublin Convention to which Ireland is a party.

3. The overriding need to preserve respect for an integrity of the asylum and immigration systems."

I also agree with Fennelly J. that the last of these reasons is the most important and the one most strongly relied on at the hearing. I consider, however, that it is closely related to the previous reason, citing the Dublin Convention.

In my view, the need to preserve respect for the asylum and immigration system (including the Dublin Convention) is a generally applicable open ended administrative reason capable of satisfying the test in **Fajujonu**. When this reason is given it must, of course, be considered in the light of the facts of each individual case – a set of facts such as those in **Fajujonu** might lead to a different conclusion than the facts of another case. Equally, the consideration of individual cases should as far as possible be consistent one with the other. The detailed exercise required in each individual case is a function of the Executive, to be discharged with reference to the finding of the relevant statutory bodies and with the advice of the Civil Service. The courts have no appellate role in this process. Their role is solely to ensure that all decisions are taken by the proper bodies and in a proper manner. The element of discretion in any such decision has been conferred, not on the judiciary, but on the Executive which is democratically accountable for it.

The issue, accordingly, is as to whether the applicants have established in relation to the decisions to deport them respectively what requires to be established, on the authorities, before an administrative decision can be quashed. These criteria are summarised in the decision of Finlay C.J. in **O'Keeffe v. An Bord Pleanala** [1993] 1 I.R. 39 as follows:

"1. It is fundamentally at variance with reason and common sense.

2. It is indefensible for being in the teeth of plain reason and common sense.

3. Because the Court is satisfied that the decision-maker breached his obligation whereby he must not flagrantly reject or disregard fundamental reason or common sense in making his decision."

On the hearing of this appeal no argument was advanced to the effect that the Court should adopt new or special criteria in relation to judicial review of deportation decisions. In the absence of submissions to that effect, I am not prepared to assume that a deportation decision which itself follows two careful and independent considerations of the respective applicants case requires the application of any less onerous criteria on judicial review.

It follows that the onus of demonstrating that the decision is in some way at variance with reason or common sense devolves on the respective applicants. I have already held that the matters taken into consideration by the Minister were appropriate to take into account. Accordingly, to meet the standards required for judicial review the applicants would have to demonstrate some irrationality in their application on the facts of the present case. No attempt has been made to do so.

It is perfectly true, as Fennelly J. says, that the Minister has not provided the Court with much in the way of background information or statistics regarding the impact of immigration generally or asylum seekers in particular on the life of the State, or any cost/benefit analysis of the phenomenon of immigration in general. There was in fact no statistical information put before

the Court except that already referred to from the affidavit of Mr. Lohan. But in my view there is no necessity for the Minister to provide the Court with the sort of information it might require if it were hearing an appeal against his decision, because it is emphatically not doing so. The issue before us is limited to whether the applicant has met the established standards for judicial review. I have already held that the statistical information which I have cited is, in accordance with the requirements of a judicial review application, relevant only for a very limited purpose, that of establishing that there is an area of rational policy choice which the Executive must address, and that the considerations which affect that choice are rapidly changing. If the Court were to consider whether the Minister's determination, apart from being lawful and rational, was conducted on the basis of acceptable policy decisions, we would be guilty of a clear invasion of the executive sphere.

The Lohan Memorandum discloses the nature of the Minister's consideration of whether or not to make deportation orders in these cases. It is so full and careful a document that it is really only by establishing that some one or more of the factors it mentions are irrelevant or legally improper to take into account that the decision could be quashed on Judicial Review. In my view all the matters it mentions are proper to be considered and no relevant matter is omitted. There is no reason to believe that the memorandum was not fully and fairly considered by the Minister.

I do not consider that the applicants have made any showing at all that the Minister's decisions are irrational or unlawful and would, accordingly, dismiss the appeals.

THE SUPREME COURT

Keane C.J.
Denham J.
Murray J.
McGuinness J.
Hardiman J.
Geoghegan J.
Fennelly J.
109/02 & 108/02

BETWEEN/

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

Applicants/Appellants

and

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

Respondent/Respondent

BETWEEN/

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

Applicants/Appellants

and

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

Respondent/Respondent

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

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

The appellants have heavily relied in these appeals on Fajujonu. As has been pointed out in the other judgments there are two arguments relating to Fajujonu which are particularly crucial to the appellants' case. The first is that little or no significance should be attached to the particular facts of Fajujonu in discerning the principles which this court enunciated. The second is that in a situation where the alien parents have a young child who is an Irish citizen the "*good and sufficient reason"* which the Minister must have before making a deportation order must relate to the particular individual proposed deportees as for instance that they were guilty of criminal misconduct or were a threat to the security of the State. More general considerations cannot be taken into account. I reject both of those arguments. In relation to the second, I am happy to rely on the points made by way of refutation of that argument by Mr. Justice Hardiman in his judgment though I reserve till a suitable case any consideration of whether in a judicial review of a Ministerial decision the courts are confined to an O'Keeffe v. An Bord Pleanála function. I would, however, like to make some observations of my own in relation to the first argument. In

considering the significance of any particular dicta by Finlay C.J. or Walsh J. in their respective judgments, it is important to bear in mind the context in which the appeal was argued in the Supreme Court which was significantly different from the case made in the High Court. It is, therefore, important first to examine the judgment of Barrington J. in the High Court. It is clear from that judgment that the issue of principle which the plaintiff sought to raise in the High Court solely related to the fact that a child of the marriage of two aliens was a citizen of Ireland. The learned trial judge adverted in passing to the fact that two other siblings were Irish citizens also but that they had not been joined as parties to the proceedings. He acknowledged that the same issues would arise in relation to them. The learned judge then went on to set out a letter written by the plaintiff's solicitors to the Department of Justice dated 17th of November, 1984 which read as follows:

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

> *her parents. Any order made in pursuance of the Aliens Act, 1935, prohibiting either or both of her parents from continuing to remain in the State is, in my opinion, in breach of her constitutional rights. Furthermore, any such order under the Aliens Act, 1935 amounts in this particular case to a threat to the family as a unit and a violation of the constitutional rights of both Mr. and Mrs. Fajujonu as well as their daughter Miriam."*

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

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

> "*I would be prepared to accept that the normal place for a citizen to be is within the State and that this must imply some form of right of residence as well as some form of right to free movement.*"

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

> *"The present case appears to me to raise much more complex issues. I am prepared to accept that the child has, generally speaking, a right, as an Irish citizen, to be in the State. I am also prepared to accept as a general proposition that the child has a right to the society of its parents. But does it follow from this that the child has the right to the society of its parents in the State? If, for instance, the parents were to decide that they wished to emigrate to Australia, could the child, as a general proposition, be heard to say that it did not wish to go to Australia and that moreover it wished to have the society of its parents in Ireland."*

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

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

> *"The child clearly has a certain right to be in Ireland. She also has a right to the society of her parents. But it does not follow from this that she has a right to the society of her parents in Ireland. I do not think that the parents can by positing on their child a wish to remain in Ireland in their society confer upon*

> *themselves a right to remain in Ireland such as could be invoked to override legislation passed by the Irish Parliament to achieve its concept of what the common good of Irish citizens generally requires."*

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

I now move to the judgment of Finlay C.J. on the appeal. First of all the former Chief Justice was at pains to point out that the case made in the High Court was quite different from the case made in the Supreme Court. He pointed out that the plaintiffs' case in the High Court *"was simply confined to a single net and complete issue, and that was an assertion that the third plaintiff as a citizen of Ireland was entitled to the protection of the constitutional rights to which she was entitled pursuant to Articles 40, 41 and 42 of the Constitution, and that amongst those rights was a right to remain resident within the State and have preserved for her the family of which she was a member as a unit of society within the State and to be parented by her parents within the State".* The former Chief Justice further pointed out that that had been asserted as an

absolute right which could not be defeated or infringed by any order made by the Minister under the Aliens Act, 1935. He then summarised the decision of Barrington J. as being to the effect that whilst the learned trial judge clearly recognised the constitutional rights in the third plaintiff as asserted that nevertheless these rights were not absolute and could be restricted "*by the proper exercise"* by the Minister for Justice of his powers under the 1935 Act. It would appear, therefore, that Barrington J.'s decision related only to the allegation of absolute rights and he was not called upon to consider the relevance of those rights to the proper exercise by the Minister of his powers.

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

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

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

But what is quite clear from both the judgments of Finlay C.J. and the judgment of Walsh J. is that the Minister in considering the fundamental constitutional rights of the family was not expected to do so in a vacuum but rather with particular reference to the actual facts of the particular case before him. At the bottom of p. 162 of the report, Finlay C.J. with reference to the

Minister's powers refers to "*the particular circumstances of a case such as this."* In the very same paragraph, the former Chief Justice refers to *"this family as it now stands, consisting of five persons three of whom are citizens of Ireland".* Earlier in the judgment Finlay C.J. had this to say:

> *"I have come to the conclusion that where, as occurs in this case, an alien has in fact resided for an appreciable time in the State and has become a member of a family unit within the State containing children who are citizens, that there can be no question but that those children, as citizens, have got a constitutional right to the company, care and parentage of their parents within a family unit. I am also satisfied that prima facie and subject to the exigencies of the common good that that is a right which these citizens would be entitled to exercise within the State."*

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

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

Early on in the judgment of Walsh J., he points out that the third plaintiff (which it must be remembered was the only one of the children to be a party to the proceedings) was one of three children all of whom were Irish citizens. It

is quite clear, therefore, that Walsh J. was regarding as a relevant factor that there were two siblings who were Irish citizens. The learned judge goes on to describe the nature of the family and ends by commenting that the family *"has made its home and residence in Ireland"*. Walsh J. goes on to point out that the father was unable to get a work permit because of being an alien and that as a consequence of that he was unable to support his family, even though members of it were Irish citizens who thereby suffered discrimination by reason of the fact that their parents were aliens. He then asked the rhetorical question:

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

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

> *"But it would be ultra vires the Act to exercise the powers which had been sought to be exercised by the Minister to disrupt this*

family for no reason other than poverty, particularly when that poverty had been effectively induced by the State itself."

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

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

THE SUPREME COURT

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

109/02 & 108/02

BETWEEN

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

Applicants/Appellants

and

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

Respondent/Respondent

BETWEEN

ANDREW OSAYANDE AND OSAZE JOSHUA OSAYANDE
(A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, FLORA OSAYANDE.)

Applicants/Appellants

and

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

Respondent/Respondent

JUDGMENT delivered on the 23rd day of January, 2003, by FENNELLY J.

Introduction

Article 2 of the Constitution declares that:

"the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage."

In one of the most fundamental changes in the basic law of the State, the people, in passing the nineteenth amendment to the Constitution, thus acknowledged the debt owed to past generations of emigrants. By the same act, the people decided to enshrine in the Constitution the birthright of every person born in Ireland to be part of that Irish nation.

It is an accident of history that, contemporaneously with the peace process, which culminated in the British-Irish Agreement of Good Friday 1998, Ireland was experiencing for the first time in its modern history the sort of influx of immigrants from many countries that frequently accompanies increased prosperity. Ireland has had to commence to live with the ancient biblical admonition:

"Thou shalt not vex a stranger, nor oppress him, for ye were strangers in the land of Egypt." (Exodus Chapter 22, verse 21. King James Version.)

The present appeals arise from the effects of these two very different events. The issue is whether a child citizen born in Ireland to parents, who have entered the State to seek asylum, can rely on family provisions of the Constitution to prevent the State from deporting his parents, when the asylum application has failed.

The legal issue is whether the present cases can be distinguished from that which was decided by this Court in *Fajujonu v Minister for Justice* [1990] 2 I.R. 151. ("*Fajujonu*")

The appellants say that they cannot. The Minister says that they can. Both sides accept that *Fajujonu* was correctly decided.

The Lobess

The Lobes are a family of Czech Roma origin. They arrived in the State on 31st March, 2001, with their three Czech-born children, then aged 11, 9 and 3 respectively. Mrs Lobe was pregnant. Mrs Lobe completed the asylum questionnaire and stated that asylum had previously been sought in the United Kingdom. The family applied for asylum in the State on 3rd April, 2001. The UK authorities confirmed, on being consulted, that Mr Lobe had applied for asylum there on 30th March, 1999, on behalf of the entire family. This asylum claim had been refused and subsequently appealed. Leave to appeal against the refusal was also refused, though Mr Lobe had instituted proceedings under the (English) Human Rights Act, 1998. The UK authorities agreed to accept responsibility for the case of the Lobes pursuant to Article 8 of the Dublin Convention. By letter dated 24th July, 2002, the Lobes received notice that the Refuge Applications Commissioner had ruled that their application should have been made in the UK in accordance with Article 8 of the Dublin Convention because the UK was the first Member State in which they had lodged an application for asylum.

The Lobes appealed this decision to the Refugee Appeals TribunaLobe A number of grounds were advanced relating to the validity of the implementation of the Dublin Convention in the State and the correctness of its application in the particular case. The Lobes argued that their asylum application should be handled in the State. As will later appear, these matters are no longer relevant. The Lobes also relied on the state of health of Mr Lobe's parents, who were residing in the State as well as on the fact that Mrs Lobe. was heavily pregnant and dependant on Mr Lobe. The appeal was rejected on 30th August, 2001.

The Lobes submitted further similar medical evidence, and asked the Minister not to remove the Lobes, but orders were made for the deportation to the United Kingdom of Mr and Mrs Lobe and their three children on 26th September, 2001. These were communicated on 2nd October, 2001. The Lobes were asked to present themselves in order to make arrangements for their deportation

The Lobes issued proceedings and obtained an interim injunction to restrain deportation. Judicial review proceedings followed on 5th October, 2001and led to a temporary undertaking not to deport before 23rd October, an undertaking which was extended to cover the period during which the proceedings would be pending.

Kevin Lobe was born on 2nd November, 2001 in the State.

The Osayandes

Mr & Mrs Osayande and their three-year-old daughter, Emmanuella, arrived in the State on 6th May 2001. They are Nigerian nationals.

Mr Osayande completed an asylum application on 15th May, 2001. He denied having applied for asylum in any other country. This was untrue. Following consultation of the UK authorities, it was discovered that Mr Osayande had entered the UK in September, 1999 on a false passport and that an asylum application had been made in that jurisdiction on 23rd September, 1999, and rejected on 17th March, 2001. There was no appeal. The family, as already stated, travelled instead to Ireland.

The UK authorities agreed, as in the *Lobe* case, to accept responsibility for the case of the Osayandes pursuant to Article 8 of the Dublin Convention. The Refugee Applications Commissioner, on 23rd July, 2001, rejected the asylum application for the same reasons as in the Lobe case.

Mr Osayande appealed to the Refugee Appeals Tribunal on grounds similar to those in the *Lobe* case. Mrs Osayande was heavily pregnant and bedridden. Mr Osayande's appeal was rejected on 29th August, 2001.

Although there was correspondence with the Minister concerning Mrs Osayande's condition, the Minister signed a deportation in respect of Mr Osayande on 29th September, 2001, though not of Mrs Osayande or Emmanuella. The Refugee Appeals Tribunal had not yet determined their cases. Mrs Osayande gave birth to a son, Osaze Joshua, on 4th October, 2001. At this point, the facts of the *Osayande* case become similar, if not identical, to those of the *Lobe* case. Various arguments, such as prohibition of refoulement were made, but the Minister made a deportation order. Initially judicial review proceedings were instituted against this order.

The Proceedings and the Lohan Memorandum

In each case, the grounds of judicial review were amended so as to base the claim essentially on the constitutional rights of the child as an Irish citizen. The parents claimed to have made a decision on behalf of the child to choose Irish residence.

At a resumed hearing, the Minister invited further representations in the light of the new circumstance of the existence of an Irish-born child. In each case, a further letter of representations was sent to the Minister on 7th December, 2001. Mr John Lohan, Principal Officer of the Immigrant Division of the Department of Justice, Equality and Law Reform then prepared a report for the Minister. This is dated the 19th December, 2001, and has been called the Lohan Memorandum. As a result of and in reliance on the latter document the Minister confirmed the deportation orders, in each case by letter dated 20th December, 2001, enclosing a copy of the applicable version of the Lohan Memorandum.

The legal process, in the two cases, has taken a similar route and the reasons for deportation are almost identical. There are only two differences worthy of any note between the facts of the two cases. Firstly, the Osayandes, but not the Lobes, falsely stated that they had not made an asylum application in any other state. Secondly, in the *Lobe* case, the Minister gave one additional reason for his decision to implement the deportation orders, namely one relating to the adaptability of the family to life in the Czech Republic.

The points of distinction between the *Lobe* and the *Osayande* cases are comparatively insignificant and the Lohan Memorandum is central to the case. It is a scrupulously careful and accurate document, though its legal correctness is contested. The main thrust of the recommendations of Mr Lohan is identical in the two cases. It will be necessary to consider it in some detail. In order to avoid repetition, I will postpone summarising it until I come to the decisive part of this judgment.

It is the Minister's decision to confirm the deportation orders, based on the Lohan memorandum, and notwithstanding the fact that an infant citizen had been born in the interim, which now forms the basis of the proceedings for judicial review.

There was also some correspondence concerning the intentions of the parents as to the continued residence of the child in the State and the Minister's attitude on this issue. In the *Lobe* case, the family contested the Minister's stated assumption that they would remove the child from the State. The Minister replied on 4th March, 2002, that he *was "indeed of the view that the [applicants had] a duty to bring the [child] with them if and when they [were] deported."* He continued:

> *"The Minister believes he is correct in that view in the light of Article 41 of the Constitution, which allows the Minister to assume that the interests of the* [child] *are best served by his remaining within the family unit."*

He also mentioned that, on the alternative hypothesis of the child remaining in the State, the provisions of the Child Care Act, 1991, could be brought into play. The Minister conducted very similar correspondence with the representatives of the Osayande family.

The High Court

In each case, the applicants referred to the Irish-born child as "*the anchor*" which connects or keeps connected to the State the families of non-nationals. They relied on the effect of Article 2 combined with Articles 41 and 42 of the Constitution as interpreted in *Fajujonu* (bearing in mind the new version of Article 2). The Minister argued that the rights of the family under the Constitution are not absolute but are subject to the exigencies of the common good. Counsel referred to the body of refugee legislation and to the decision of this Court in *P, L & B v The Minister for Justice, Equality and Law Reform* (Unreported, Supreme Court, 30th July, 2001) ("P, L & B").

Smyth J. accepted that *Fajujonu* could be distinguished especially because of the difference between the significantly longer period the Fajujonu family had spent in the State compared with either of the families in the present cases. He recalled the recent decision of this Court in *P, L & B.* He considered that the second and third reasons given by the Minister for deportation (reliance on the Dublin Convention and the integrity of the asylum and immigration process) were not inconsistent with the constitutional rights of each of the children. Reflecting the express language of the judgments in *Fajujonu, he held* that these reasons were *"not only grave and substantial, but also predominant and overwhelming."*

The applicants also advanced a number of grounds challenging the validity of the order implementing the Dublin Convention. Smyth J. also rejected these arguments and there is no appeal in this respect.

Following the dismissal of the applications for judicial review, the applicants have appealed. The grounds of appeal are effectively a repetition of the constitutional arguments advanced in the High Court. In summary, they state that the learned High Court judge was wrong in law in holding:

- that the length of time spent in the State by the family of the child or the adaptability of the child on deportation were relevant considerations for the Minister to consider;
- that the Minister had given adequate consideration to the rights of the child upon the deportation of his parents and, in particular, that the integrity of the asylum and immigration system was a grave and substantial reason;
- that the implementation of the Dublin Convention was a proper matter to be considered for the purpose of prevailing over the constitutional rights in issue.

There is no cross-appeal or notice to vary.

Issues and arguments

Mr Gerard Hogan, counsel for the appellants asserts that the question at the heart of the appeals is whether it is competent for the Minister to deport from the State the parents of Irish children of tender years, in the absence of special and overwhelming circumstances.

In support of this proposition, he relies upon the constitutional provisions concerning citizenship and the family.

An infant citizen, he says, has an unqualified right to reside in the State, a right which flows from Article 2 of the Constitution. This right is one of the fundamental, absolute and imprescriptible rights of a citizen. It is protected by Articles 9, 40.1 and 40.3. The European Convention on the Protection of Human Rights and Fundamental Freedoms ("the

European Convention") also protects this right. Under the recognised rules of public international law, states may not deport their citizens.

Since the infant citizen has the right, protected by the Constitution, to reside in the State and has an associated right to the care, company, nurture and protection of his parents, the choice to reside in the State must naturally, if real effect is to be given to it, in the case of a child of tender years, be exercised by his parents on his behalf. The State is obliged to respect this choice. Counsel for the appellant relied especially for these propositions on the decision of this Court in *Fajujonu* and particularly on the language used by Finlay C.J. and Walsh J as showing that the State may not deport the parents of Irish citizens of tender years except in exceptional circumstances associated with the common good. Counsel was at pains, however, to emphasise that no claim is made that the parents, independent of their children, have any rights. Only the rights of the children are at issue. I will consider *Fajujonu* in more detail later. The parties, each of whom analysed the judgments exhaustively, differed significantly in their interpretation of the reasoning.

With regard to the test propounded in *Fajujonu*, counsel for the appellant argued that routine immigration reasons, in particular that the parent of an Irish-born child was an illegal immigrant with no right to reside in the State, would not, in themselves, satisfy the standard of exceptional circumstances associated with the common good. Counsel argued that, in *Fajujonu*, the parents were at all relevant times illegal immigrants. It is implicit in the judgments of Finlay C.J. and Walsh J. that this fact was insufficient to justify the deportation of the parents in that case.

The Minister does not contest the proposition that Osaze Joshua Osayande and Kevin Lobe, because they were born in the State, are entitled to the benefit of Irish citizenship. This was so even before adoption of the nineteenth amendment of the Constitution in 1998. Under Article 9.2 of the Constitution, the acquisition and loss of

citizenship is to be defined by law. The two children would have had the same rights under the Irish Nationality and Citizenship Act, 1956. Mr Paul Gallagher, Senior Counsel for the respondent, says that the issue to be decided is as to what extent that fact confers an automatic right of residence on their parents. Counsel says that the rights of the Irish-born child must be considered in the light of the common good and the fundamental rights of the State itself. He placed special reliance on the dictum of Gannon J. in *Osheku v. Ireland* [1986] I.R. 733:

> *"The control of aliens which is the purpose of the Aliens Act, 1935, is an aspect of the common good related to the definition, recognition, and the protection of the boundaries of the State. That it is in the interests of the common good of a State that it should have control of the entry of aliens, their departure, and their activities and duration of stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter."*

This Court approved that statement, counsel for the respondent points out, in several cases, notably in *Laurentiu v. Minister for Justice, Equality and Law Reform* [1999] 4 I.R. 26 and *P. L and B.*

Counsel for the respondent laid especial emphasis on the prerogative or sovereign right of the State to control immigration into and out of the national territory. There have been very great changes in the legislative context since the decision of this Court in *Fajujonu*. The Refugee Act, 1996, the Immigration Act, 1999, and the Illegal Immigrants

(Trafficking) Act, 2000 constitute a body of legislation establishing a coherent scheme to give effect to the Geneva Convention relating to the Status of Refugees, 1951. This confers valuable rights to avail of a statutory mechanism on persons seeking the right to reside in the State, provided that they can show that they are entitled to be considered as refugees for the purposes of the Convention. The State is entitled to expect that this legislative scheme will be respected. If the entire family of a failed asylum seeker is to acquire the right to continue to reside in the State as a result of the mere *"fortuity*" of a child being born in the State during, or, as in this case after the termination of the statutory procedures, this would set aside the whole carefully contrived system. It would result in the parents deriving substantial rights to which they are not entitled. These could include the right to be considered, after five years residence in the State, for Irish citizenship. The Minister, in deciding to give effect to the deportation orders, assumed that the decision as to the residence choice of the child would be made in the latter's best interests and that this would, in reality, mean that the child would go with his parents. The case of *North Western Health Board v HW and CW* [2001] 3 I.R. 622 (*NWHB*) justified him in making this assumption.

In these cases, the Minister claims that he was justified in giving, as a reason for refusing to permit the parents of the respective children to reside in the State, the need to protect the integrity and asylum system. This is an aspect of the common good recognised by the courts. In addition, he was entitled to rely on the terms of the Dublin Convention, an international agreement entered into by the State. Section 22(2)(e) of the Refugee Act, 1996, empowers the Minister, for the purpose of giving effect to the Dublin Convention, to require an asylum application to be transferred to a convention country (in this case the UK) and section 3(2)(e) of the Immigration Act, 1999 empowers him to make a deportation order in respect of a person whose application has been so transferred.

It is important to draw attention to one aspect of the facts of the instant case, which does not, in the event, concern the Court. The Osayande family did not disclose the fact that an application for asylum had already been made in the United Kingdom and they had thus misled the State. Counsel for the respondent made it clear that the Minister had not taken this factor into account as against the Osayandes. Thus, both cases are to be treated on the same basis.

Counsel for the respondent claimed that the European Court of Human Rights (ECHR) had recognised the integrity of the immigration and asylum system as a relevant and admissible consideration where the authorities of a Member State signatory to the Convention make decisions affecting family rights pursuant to Article 8 of the Convention. He adopted the summary of the case law of that court set out by Lord Phillips of Worth Matravers MR in *The Queen (Mahmood) v Secretary of State for the Home Department* ("*Mahmood*") [2001] 1 W.LobeR. 840 at p.861.

> *"(1) A state has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.*
>
> *(2) Article 8 does not impose on a state any general obligation to respect the choice of residence of a married couple.*
>
> *(3) Removal or exclusion of one family member from a state where other members of the family are lawfully resident will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family.*

(4) Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a state if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled.

(5) Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8.

(6) Whether interference with family rights is justified in the interests of controlling immigration will depend on:

(i) the facts of the particular case and

(ii) the circumstances prevailing in the state whose action is impugned."

Lord Phillips developed this summary, having reviewed a number of decisions of the ECHR.

Counsel for the respondent also referred, at the hearing of the appeal, to a number of decisions of courts in the United States. In *Gonzalez-Cuevas and another v Immigration and Naturalisation Service* [515 F. 2d 1222; 1975 U.S. App.] the United States Court of Appeals for the Fifth Circuit held that the deportation of parents, though it resulted in the *de facto* deportation of their children, who were US citizens, did not violate any constitutional rights of the latter. It stated:

"Petitioners who illegally remained in the United States for the occasion of the birth of their citizen children, cannot gain favoured status over those aliens who comply with the immigration laws of this nation. Any ruling which had this effect would stand these statutes on their heads."

In *Schleiffer v Myers* [644 F. 2d 656; 1981 U.S. App.], the Seventh Circuit of that court citing in part the following from a plurality ruling of the Supreme Court of the United States stated:

> *"The unique role in our society of the family, the institution by which "we inculcate and pass down many of our most cherished values, moral and cultural" Moore v East Cleveland* 431 U.S. 494, 503-504….*(plurality opinion), requires that constitutional principles be applied with flexibility and sensitivity to the special needs of parents and children. We have recognised three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."*

The Court, nonetheless, turning to the case *"where deportable aliens have sired children born in the United States who are therefore American citizens"* stated:

> *"Many courts of appeal have concluded that the constitutional rights of such citizen-children are not violated when the deportation of their parents necessitates de facto deportation. In such cases, it has been noted that the child's return to the foreign country "will merely postpone, but not bar, his (or her) residence in the United States if he or she should ultimately choose to live here."*

<u>Conclusion</u>

The question in these appeals is how to reconcile the conflict between two constitutional principles. On one side is the right of an Irish-born citizen of tender years to reside in the State and to have the care, also in the State, of his or her parents. Mr Hogan does not claim that this is an absolute or automatic right. To that extent, I do not think the Minister was correct in posing the question as one involving a claim to an automatic right to reside in the State arising from the fortuity of an Irish born child. On the other side, there is undoubtedly the prerogative and sovereign power of the State to control the entry into and residence in the State of aliens. The latter takes the concrete form of the statutory power of the Minister to deport unsuccessful asylum seekers. For the purposes of the power to make deportation orders of the type at issue in these appeals, section 3 of the Refugee Act, 1999, employs the less opprobrious term "non-nationals."

I propose to consider the matter under the following headings:

- The rights of citizenship and residence in combination with the rights of the family;
- The prerogative and sovereign rights of the State in respect of the entry and residence of non-nationals;
- The decision of this Court in *Fajujonu*;
- The United States cases (though not under a distinct heading);
- The case law of the European Court of Human Rights.

Citizenship

It is common ground between the parties that each of the two children is an Irish citizen. It is also agreed that an Irish citizen has the right to reside in the State. I will return a little later to the exercise of the choice of residence on behalf of a child of tender years. The

appellants ground their claim on Article 2 of the Constitution as it emerged from the nineteenth amendment. For the Minister, it is argued that this provision effected no change of substance.

Article 9 of the Constitution, having conferred automatic citizenship on living citizens of Saorstát Eireann, stipulated that

> *"the future acquisition and loss of Irish nationality and citizenship shall be determined in accordance with law."*

Section 6(1) of the Irish Nationality and Citizenship Act, 1956 provided that *"every person born in Ireland is an Irish citizen."* This represents the traditional common law principle of *jus soli.* It has, of course, been heavily qualified in the modern legislation of the United Kingdom following the break up of the former British Empire. It is clear that an Irish-born citizen, who benefited from section 6(1) of the act of 1956, could not have been retrospectively deprived of that status by amending legislation. To that extent, such persons even before the passing of the nineteenth amendment enjoyed the constitutional status of citizen.

Article 2 of the Constitution now reads:

> *"It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage."*

These words represent a particularly strong and solemn declaration made very deliberately by the people in referendum. They are a qualitative statement of the nature of citizenship going beyond what formerly resulted from the exercise of the delegated legislative competence effected by section 6 of the act of 1956. The *"birthright of every person born in Ireland ... to be part of the Irish nation"* must have real content and should not be treated as a piece of empty sloganeering. The Irish-born citizen's participation in *"the Irish nation"* includes its *"cultural identity and heritage."* This emerges from the third sentence of Article 2 and is what *"people of Irish ancestry living abroad"* share with Irish-born citizens.

The Minister, in his written submissions, having cited Article 2, goes on to say that it confers citizenship on a child born to holidaymakers on a short visa or one born prematurely to an air traveller landing in Ireland on an emergency. Counsel for the appellants expressed concern that these points tended to devalue the right. It is true that counsel for the respondent attached importance to the birth of each child in the State as having been a "*fortuity*," a term which is also used in some of the United States cases. It seems clear to me, however, that this factor can have no bearing whatever on the rights of each child as expounded on its behalf in this case. The child is either an Irish citizen or not. If it is, the quality of its rights as a citizen cannot be affected by the "*fortuity*" of his/her birth in the State. I will later discuss the distinct argument, based on the Minister's interpretation of *Fajujonu*, that the family rights of the child may be dependant on the length of time its members have spent in the State. At this point, it suffices to say that each child born in Ireland has its own unique value and enjoys the same rights as a citizen regardless of the circumstance of his birth.

The most natural right, one which inheres in citizenship, is the right to reside in the State of that citizenship. Its corollary is the principle of public international law, alluded

to by Walsh J. in *Fajujonu*, that a State may not expel its own citizens. There have, of course, been examples of the abrogation of that right. In former times, states exercised power to banish their citizens from their shores. It is notorious that the citizenship law of the United Kingdom has been drastically changed in the post-war period so as to deprive some citizens of the right of residence in the UK. Nothing of the sort arises in the present circumstances. As already stated, the Minister does not dispute the right of the two children to reside in Ireland. However, counsel for the respondent on his behalf, qualifies the practical effect of that accepted proposition by the statement that the Minister expected that, in reality, the child would, in each case, be removed from the State on the deportation of the parents. The Minister went so far as to state that he considered it the duty of the parents to take their children out of the State. That was because it was the Minister's view of what constituted the best interests of the child by reference to Article 41 of the Constitution.

The United States courts faced this issue frankly in characterising this situation as amounting to *"de facto deportation"* of the children. They did not see that it involved any violation of rights guaranteed by the United States Constitution. I believe that Walsh J. was also taking the view that deportation of the parents would amount to *de facto* deportation of the children in the following passage from his judgment in *Fajujonu:*

> *"... the effect must be that their children who are Irish citizens are faced with the choice of remaining within this State as they are entitled so to do and therefore being in effect compulsorily separated from their parents, or having to leave the State with their parents and thus ceasing to have the benefit of all the protection afforded by the laws and the Constitution of this State."*

At this point, it becomes necessary to refer to an important, possibly the crucial, aspect of *Fajujonu* which has not been challenged in any way by the Minister and which was accepted by the learned High Court judge. Finlay C.J. said that, although the Fajujonu parents, being aliens and not citizens, could not claim any constitutional right to remain in the State,

> *"they* [were] *entitled to assert a choice of residence on behalf of their infant children, in the interests of those infant children."*

Walsh J. used different words, but it seems to me implicitly spoke to the same effect. He said:

> *"It is abundantly clear that citizens of this State may not be deported. The third plaintiff is one of three children of the first two plaintiffs, all of which children are citizens of Ireland".*

The other three members of the Court said that they agreed with both judgments.

Once it is established that the parents have the natural right to make the choice, on behalf of their child, to reside in Ireland and that a valid choice to that effect has been made in both these cases it is, no doubt, labouring the obvious to reiterate that each of the two children has a constitutional right to reside in Ireland. In my view that constitutional right of the child, the right not to be expelled from the State, is unqualified. The State cannot expel an adult Irish citizen from the national territory. Nor can it expel a child citizen who has validly elected through his parents, to remain in the State. It does not avail the Minister to state that he assumed that any decision made in the interests of the children would mean their

leaving the State with their parents on the deportation of the latter. From the words of Finlay C.J., it is clear that it was for the parents to decide what was in the best interests of their child. It was perfectly rational for the parents, considering, in particular, the terms of Article 2 of the Constitution, to decide that the child remaining in Ireland would best serve those interests. Nor is it, in my view useful for the Minister to point out that, in very many cases a child will be moved from one country to another by its parents regardless of its citizenship. That occurs because parents, not the State, make family decisions; it provides no justification for the State seeking to substitute its views, in reality its wishes, so as to justify the *de facto* deportation of the child

The "*birthright ... [of the child] ... to be part of the Irish nation"* could not, on any realistic view, survive such *de facto* deportation. To be fair to the Minister, I do not think he suggests that it could. As already stated, his assumption was that the parents should and would decide that the child would not remain in the State. The proposition enunciated in the United States case of *Schleiffer* [644 F.2d 656; 1981 U.S. App.] cited by the Minister, attempts a justification in the following terms:

> *"Many courts of appeal have concluded that the constitutional rights of such citizen-children are not violated when the deportation of their parents necessitates de facto deportation. In such cases, it has been noted that the child's return to the foreign country "will merely postpone, but not bar, his (or her) residence in the United States if he or she should ultimately choose to live here."*

I have to confess that I am deeply unimpressed by the argument put forward in the last sentence of this passage, and based, be it said, on earlier US authority. The deportation of a child of tender years, in practice often in the early months of life,

automatically and unarguably deprives that child of the possibility of being nurtured and educated in the country of his or her citizenship. The notion of postponement is offensive to logic. It may be that, in reality, the *ratio decedendi* of these United States decisions is simply that a choice has to be made between the constitutional rights of the child and the power of the State and that, as stated in the first sentence of the passage, once the deportation of the parents is the desired objective the child has to suffer the consequences.

That approach is, in any event, in direct conflict with the reasoning of this Court in *Fajujonu*. Walsh J. was clearly right, in the passage quoted above, to say that:

> "*the effect* [of deporting the parents] *must be that their children …… are faced with the choice of remaining within this State … and therefore being in effect compulsorily separated from their parents, or having to leave the State with their parents…"*

Moreover, it is not possible, in my view, to reconcile the Minister's argument with the rights guaranteed and declared by Article 2 of the Constitution, which did not exist at the time of *Fajujonu*. A child, who is *de facto* deported from the State before his education commences cannot conceivably be *"part of the Irish nation"* or *"share its cultural identity and heritage."*

The Family

Article 41.1 of the Constitution assigns to the family an exceptionally important status and role in Society and in the "*welfare of the Nation and the State*." This distinguishes the Irish Constitution from the founding documents of many of the nations to whose legal systems we look with respect. The appellants have cited a number of authorities, which

demonstrate the deference allowed by our courts to the primacy of the family in certain practical contexts. The courts are sadly but frequently called upon to resolve disputes internal to the family, arising in proceedings relating to, for example, adoption or marriage breakdown. Less frequently, the State or one of its organs seeks the intervention of the courts, where it perceives a risk to the welfare of the child, i.e. the family, exceptionally, does not sufficiently protect the interests of one of its children. The present case is unique in that the State asserts that its own sovereign rights are so urgent and compelling that they should prevail and be accorded precedence over the constitutional rights of the child. Only in *Fajujonu* has this court previously considered this direct clash between the interests of a child and the rights of the State.

In re J. H., an infant [1985] I.R. 375 concerned a child placed for adoption by its mother, who was unmarried at the time of its birth. Upon her subsequent marriage to the father of the child, she and the father took steps to regain custody of the child so as to bring it up as part of their family. She applied to have the birth registered and refused further necessary consent to adoption. The High Court decided to leave custody with the adopting parents because of what was considered to be a risk of long-term psychological harm to the child. Lynch J. said (at page 389):

> *"I have come to the conclusion that the answer to my question is that there is not anything really worthwhile to be gained for the child by transferring her from the adopting parents to the parents. If custody were changed I think that the risk of long-term psychological harm, and therefore of unhappiness, is sufficiently proximate to outweigh the contrary factors referred to above."*

This Court allowed the appeal of the natural parents on the custody issue. It considered that the natural parents' marriage constituted them as a family with their child and that the High Court should have considered whether there were

> *"compelling reasons why the welfare of the child* [could] *not be secured to it in the family unit and by the parents…."* (per Finlay C.J. p. 396.)

In the course of his judgment, with which the other members of the court agreed, Finlay C.J. dealt as follows with the rights of the child within the family:

> *"The infant, being the child of married parents, now legitimised, has in addition to the rights of every child, which are provided for in the Constitution ……. Rights under the Constitution as a member of a family, which are: (a) to belong to a unit group possessing inalienable and imprescriptible rights antecedent and superior to all positive law (Article 41, s. 1); (b) to protection by the State of the family to which it belongs (Article 41, s. 2); and (c) to be educated by the family and to be provided by its parents with religious, moral, intellectual, physical and social education (Article 42, s.1."*

By this decision, this court reaffirmed the constitutional status of the family even to the extent that the risk of damage to the child had to be balanced against the rights of the family as a unit. Finlay C.J. emphasised this in a further passage, as follows:

> *"A child of over two years of age, as this infant is, in the dominant or general custody of persons other than its parents and continuing in such custody against*

the wishes of its parents, cannot be said to enjoy the right of education by its family and parents granted by Article 42, s. 1 of the Constitution."

This explains why Finlay C.J. adopted a test of "*compelling reasons"* if the primacy of the family unit was to be disrupted. It also seems to me to explain the use of different but equally strong words, *"grave and substantial reasons,"* in the judgment of the same learned judge in *Fajujonu*.

The other important authority to which the Court has been referred, and upon which the appellants particularly rely is *NWHB* [2001] 3 I.R. 622. In that case, a health board sought an order of the court permitting it to administer a P.K.U. screening test to an infant child, notwithstanding the refusal of the parents of the child to consent to the procedure. The case is of particular interest, because the court was asked to override the parents' rights to make conscientious though mistaken decisions affecting the welfare of their children. Each party has cited this case to some extent; the appellants for its exposition and elaboration of the nature of the family in the Constitution and the rights of the family; the Minister to agree that he was justified in his assumption that the parents would make a decision in the best interests of the child. This Court was particularly emphatic in holding that the rights of the family are antecedent to and prevail over the rights of the State itself. The judgments deal in their different ways with the constitutional status and the philosophical basis of the family in Articles 41 and 42. While it is true that Keane C.J. dissented as to the result of the appeal, his exposition of the philosophical rationale of the family was not in dispute.

Keane C.J stated at p. 686:

> *"Article 41.1 acknowledges the primary role of the family in society. In philosophic terms, it existed as a unit in human society before other social units and, in particular, before the State itself ...; the family existed before that unit and enjoys rights which, in the hierarchy of rights posited by the Constitution, are superior to those which are the result of the positive laws created by the State itself."*

The Chief Justice proceeded to delineate and describe, in a passage remarkable for its eloquence and clarity, the relationship in our constitutional scheme between the family and the State:

> *"What is beyond argument is that the emphatic language used by the Constitution in Article 41 reflects the Christian belief that the greatest of human virtues is love which, in its necessarily imperfect human form, reflects the divine love of the creator for all his creation. Of the various forms which human love can take, the love of parents for their children is the purest and most protective, at least in that period of their development when they are so dependant on, and in need of, that love and protection. I believe that Article 41, although couched in the language of "rights", should not be seen as denying the truth to be derived from the experience of life itself, that parents do not pause to think of their "rights" as against the State, still less as against their children, but rather of the responsibilities which they joyfully assume for the children's happiness and welfare, however, difficult the discharge of those responsibilities may be in the sorrows and difficulties almost inseparable from the development of every human being. The rights acknowledged in Article 41 are both the rights of the family as*

an institution, and the rights of its individual members, which also are guaranteed in Article 42, under the heading "Education", and which also derive protection from other articles of the Constitution, most notably Article 40.3.

Again, the Article speaks, not of the authority of parents, but of the authority of the family. While the family, because it derives from the natural order and is not the creation of civil society, does not, either under the Constitution or positive law, take the form of a juristic entity, it is endowed with an authority which the Constitution recognises as being superior even to the authority of the State itself. While there may inevitably be tensions between laws enacted by the State for the common good of society as a whole and the unique status of the family within that society, the Constitution firmly outlaws any attempt by the State in its laws or its executive actions to usurp the exclusive and privileged role of the family in the social order."

Denham J. spoke thus at p. 719:

"…the legislation and the rights of the child have to be construed in accordance with Article 41which places the family at the centre of the child's life and as the core unit of society."

At p. 725 she said:

"The bonds which bind a child in a family are strong. However, any intervention by the courts in the delicate filigree of relationships within the family has

profound effects. The State … should not intervene so as to weaken or threaten these bonds unless there are exceptional circumstances."

Murphy J. stated at p. 732:

"The Thomistic philosophy - the influence of which on the Constitution has been so frequently recognised in the judgments and writings of Walsh J. - confers an autonomy on parents which is clearly reflected in these express terms of the Constitution which relegate the State to a subordinate and subsidiary role. The failure of the parental duty which would justify and compel intervention by the State must be exceptional indeed."

While Murray J. did not think it necessary to consider the philosophy underlying the constitutional provisions as the terms of the Constitution were sufficiently explicit in themselves. They were not, he thought *"wholly unique."* He drew attention, *inter alia*, to the terms of the Universal Declaration of Human Rights on *"the inherent dignity and ... the equal and inalienable rights of all members of the human family."* He also stated, however:

"……the family as a moral institution enjoys certain liberties under the Constitution which protect it from undue interference by the State, whereas the State may intervene in exceptional circumstances in the interests of the common good or where the parents have failed for physical or moral reasons in their duty towards their children."

The fifth member of the Court was Hardiman J. He noted the *"exceptionally strongly worded provisions of Articles 41 and 42 of the Constitution…."* Later (p. 757), he remarked on the suggested provenance of Article 41 in Papal encyclicals and Catholic teaching, but thought that the same approach could be grounded otherwise. He cited an American academic authority to the effect that the common law.

> *"reflecting Bentham's view, has a strong presumption in favour of parental authority free of coercive intrusions by agents of the State."*

This lengthy exposition is, I think, justified in the very particular circumstances of this case. The present case pits the claims of the State itself against the constitutional rights of an Irish-born citizen child to be raised as a member of his family in the State. The words of Article 41 are, as stated by Hardiman J., *"exceptionally strongly worded."* I do not think that any of the international instruments to which reference has been made or any comparative national constitution benefits from the philosophical underpinning that is expressed in the clear language of the Article. Article 41.1 describes the nature of the family and the philosophical basis for its role in society. This is that it is a *"moral institution"* and that it is the *"natural primary and fundamental unit group of Society."* It follows that it enjoys rights. These are declared to be "*inalienable and imprescriptible"* as well as, what must be consequential, *"antecedent and superior to all positive law."* It remains impossible to improve on the compendious explication of this provision contained in the judgment of Walsh Js in *McGee v. Attorney General* [1974] I.R. 284, at p. 310:

> *"Articles 41, 42 and 43 emphatically reject the theory that there are no rights without laws, no rights contrary to the law and no rights anterior to the law. They*

indicate that justice is placed above the law and acknowledge that natural rights, or human rights, are not created by law but that the Constitution confirms their existence and gives them protection. The individual has natural and human rights over which the State has no authority; and the family, as the natural primary and fundamental unit group of society, has rights as such which the State cannot controLobe However, at the same time it is true, as the Constitution acknowledges and claims, that the State is the guardian of the common good and that the individual, as a member of society, and the family, as a unit of society, have duties and obligations to consider and respect the common good of that society."

Elsewhere in the same judgment the same learned judge explained that the moral foundation of the family and similar rights had to take account of the pluralist character of our society and said that: (at p.318)

"The Courts cannot as a matter of constitutional law be asked to choose between the differing views, where they exist, of experts on the interpretation by the different religious denominations of either the nature or extent of these natural rights as they are to be found in the natural law."

It is true that the common law is deeply influenced by the natural law, as suggested by Hardiman J. in the passage I have quoted. The great commentators made constant appeal to the divine inspiration of the laws. In modern common law countries, things are different. Legislatures make laws in an almost entirely secular context. Article 41 of the Constitution, however, situates the family on a moral plane reflective of Christian

notions of natural law. The important point is that the rights of the family are unambiguously founded on its character as a natural and moral institution. As has been frequently said the rights of the family are superior to those of the State itself.

The Sovereign Power of State

The Minister's case is, in its essence encapsulated on the proposition enunciated by Gannon J. in *Osheku v. Ireland* [1986] I.R. 733: (at p. 746)

> *"The control of aliens which is the purpose of the Aliens Act, 1935, is an aspect of the common good related to the definition, recognition, and the protection of the boundaries of the State. That it is in the interests of the common good of a State that it should have control of the entry of aliens, their departure, and their activities and duration of stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter."*

Counsel for the respondent drew attention to the approval that passage has received in some decisions of this Court. One of these was *Laurentiu,* [1994] 4 I.R. 26. From the historical point of view, it appears that the power to exclude or deport aliens was part of the Crown prerogative. This was stated by Barrington J in his judgment in *Laurentiu* (at p. 76) referring to its use in:

"earlier times to authorise the settling in Ireland of Huguenot refugees from France and Protestant refugees from the Palatinate."

It also appears from the citation by Keane J., as he then was, of Denning M.R. to that effect (p. 62) and on p. 91, where he recalls that it was accepted by all parties that

"the power of the State to deport aliens independently of any statutory power was part of the prerogative power."

Keane J. went on to remark that it was unnecessary to enter on the vexed question of the extent to which the Royal prerogative survived the enactment of the Constitution of Saorstát Éireann. It was sufficient, in his view, to say

"that at the time of the enactment of [the Aliens Act, 1935] the power of Saorstát Eireann to expel or deport aliens was, in the absence of legislation, vested in the Crown acting on the advice of the Executive CounciLobe"

He also noted, at page 91, however, that:

"It is, of course, the case that in modern times, both here and in other common law jurisdictions, the exercise of the power is regulated by statute, but that does not affect the general principle that the right to expel or deport aliens inheres in the State by virtue of its nature and not because it has been conferred on particular organs of the State by statute."

In the present case, the matter is precisely governed by statute. The Minister has made deportation orders pursuant to section 3(1)(e) of the Immigration Act, 1999, on the basis that each subject of the order is

> "*a person whose application for asylum has been transferred to a convention country for examination pursuant to section 22 of the Refugee Act, 1996.*"

The Minister says that the need to give effect to that order should prevail over the rights of the child.

Distinguishing Fajujonu

Counsel for the appellants summed up the case as raising, in effect the question whether, as Smyth J. in his judgment thought they could, these cases can be distinguished from *Fajujonu*. If they cannot, it is common case that the appellants should succeed. The Minister does not dispute the correctness of *Fajujonu* or ask this Court to overrule it or to disapprove its reasoning.

There are two suggested grounds of distinction. Firstly, in *Fajujonu* the non-national parents had lived in the state for an appreciable time before the matter came before the Supreme Court. Secondly, in that case three children had been born in Ireland, not merely one, as in each of these cases. On the first point, the Minister relies on a dictum of Finlay C.J. and on the second one of Walsh J. All three other members of the court appear to have expressed agreement with both judgments. I will refer to the relevant parts of the judgments.

The following summary of the facts is taken from the High Court judgment (Barrington J.) and was approved by the Supreme Court. It is as follows:

"The first plaintiff is aged 36 years and is a citizen of Nigeria. The second plaintiff is a Moroccan citizen. They met in London in the late 1970s where he, at that time, was a temporary resident studying accountancy. They were married in the city of Westminster in London on the 20th March, 1981. At the end of March, 1981, Mr. Fajujonu and his wife came to live in Ireland. Whether knowingly or not, they came as illegal immigrants and have at all material times been illegal residents in Ireland and subject to the risk that a deportation order might be made against them pursuant to the provisions of s. 5 of the Aliens Act, 1935. No such deportation order has in fact been made though the plaintiff Mr. Fajujonu has been asked by the Minister for Justice to make arrangements for his departure from the State and it was this request, coupled with the fear that a deportation order would follow, which gave rise to the present proceedings. A deportation order was apparently made against Mr. Fajujonu in the United Kingdom in July, 1981, but this order, I am informed, was invalid and is no longer in force.

I am satisfied that at all material times since he came to Ireland Mr. Fajujonu has been anxious and willing to work. He has not however succeeded in obtaining a work permit nor has he succeeded in completing his accountancy studies. For a time he drew unemployment assistance. To obtain this he had to sign a certificate saying that he was available for work. He was "available for work" in the sense that he was physically able and anxious to work but he was not legally "available for work" in the sense that, not having a work permit, he was not legally entitled to work for reward. In December, 1983, Dublin Corporation

offered Mr. and Mrs. Fajujonu a house at 27 Croftwood Crescent, Ballyfermot, Dublin, where they still reside. They are apparently popular with the local community. The secretary of the local tenants' association, Mr. Larkin, gave evidence on their behalf before me. Indeed it would appear that it was a request by the committee of the Ballyfermot sports and leisure complex to employ Mr. Fajujonu which brought his presence in the country formally to the attention of the Department of Justice. From enquiries made by the Department of Justice it would appear that, at one stage, when Mr. Fajujonu was stopped by police in England, he had in his possession a birth certificate purporting to show that he had been born in Ireland. It does not appear however that Mr. Fajujonu in fact used the certificate for any improper purpose. However, the issue of principle which the plaintiffs seek to raise in this case arises not from any of these matters but from the fact that the third plaintiff, Miriam Fajujonu, is a citizen of Ireland having been born here on the 24th September, 1983. Since then Mr. and Mrs. Fajujonu have had two further children. These also are Irish citizens and, though they have not been joined as parties to these proceedings, the same issues arise in relation to them as arise in Miriam's case."

The material part of the judgment of Finlay C.J., at p. 162, is:

"I have come to the conclusion that where, as occurs in this case, an alien has in fact resided for an appreciable time in the State and has become a member of a family unit within the State containing children who are citizens, that there can be no question but that those children, as citizens, have got a constitutional right to the company, care and parentage of their parents within a family unit. I am

also satisfied that prima facie and subject to the exigencies of the common good that that is a right which these citizens would be entitled to exercise within the State."

In addition, when deciding that the matter of the deportation had to be reconsidered by the Minister in the light of the possible new state of facts, he said at page 163:

"In any event the position of the family itself, the exercise by it of its rights to remain as a family unit and the exigencies of the common good which may be affected by the continued residence in the State of the first and second plaintiffs, are all matters which must, of necessity, have been subject to at least the possibility, if not the probability, of very substantial change since this matter was investigated in 1984."

Walsh J., in the course of a passage which I have already quoted, said:

"The third plaintiff is one of three children of the first two plaintiffs, all of which children are citizens of Ireland. If the first two plaintiffs, being the parents of the infant children, are deported, the effect must be that their children who are Irish citizens are faced with the choice of remaining within this State as they are entitled so to do and therefore being in effect compulsorily separated from their parents, or having to leave the State with their parents and thus ceasing to have the benefit of all the protection afforded by the laws and the Constitution of this State. In my view, the first two plaintiffs and their three children constitute a

> *family within the meaning of the Constitution and the three children are entitled to the care, protection and the society of their parents in this family group which is resident within the State. There is no doubt that the family has made its home and residence in Ireland."*

I leave over for consideration the argument that the circumstances of control of the entry of non-nationals has changed so substantially through the passing of the Refugee Act, 1996, and later statutes providing for the processing of asylum applications that the Minister is better able to justify his deportation orders. The present question is whether the duration of residence of the Fajujonus in the State or the fact that they had three children constituted part of the *ratio decedendi* of that case so as to distinguish it from the present appeals. To be truly distinguishable, it must be shown that the principles it lays down - the constitutional status of the child as an Irish citizen, the right of the parents to elect Irish residence for him, the need to show grave and sufficient reason based on the common good - can be set aside for the purposes of this case.

Finlay C.J. referred to the *"appreciable time"* that the Fajujonus had spent in the State. Both he and Walsh J. referred to the number of their children who had been born in the State. I have to ask what principle underlies the Minister's argument. It must, at this point in the argument be a matter of principle, not a question of balancing rights. The Minister's contention is that the principle underlying *Fajujonu* is restricted to cases of "*appreciable residence*" in the State and/or cases where there is more than one child.

It was, of course, the fact that the Fajujonus had resided in the State for a number of years and Finlay C.J. recited that fact. I cannot, however, discover any legal reasoning in the passage that would suggest that the constitutional rights of an Irish-born child depend on the length of time during which his parents have resided in the State. It seems to me, in fact,

that there could not be such a principle. Firstly, it is rightly conceded that the child in each of the present cases is in fact a citizen. It follows that the child enjoys the constitutional rights, as a member of its family, which are guaranteed by the Constitution and described in the case law. Indeed, the younger a child is, in many respects, the more pressing and urgent is its need for the nurture and care of its parents, particularly its mother.

I would reject the argument based on the number of children in the family for similar reasons. Again, in each case, the child is a citizen with the consequential right to the society, care and nurture of its parents in the State. There cannot, in my view, be a constitutional principle making those rights of an Irish-born citizen depend on the number of other Irish-born citizens in the family. In *Fajujonu*, there were three Irish-born children. Here there is one in each case. Would the Irish-born child lose its constitutional rights, for instance, if its mother gave birth to a later child or children outside the State?

In my view *Fajujonu* cannot be distinguished in any meaningful way.

When analysing the reasoning of *Fajujonu*, it is important to remember that the Supreme Court did not decide the issue of whether the Fajujonu family should be deported. It made an order permitting the plaintiffs to apply to the High Court (to include any appropriate application for amendment of pleadings) if they wished to challenge any further decision of the Minister granting or refusing a permit to remain in the State. The criteria to be applied by the Minister in making any such decision were laid down in the judgments and were that there would have to be *"grave and substantial reason"* (Finlay C.J.) or *"predominant and overwhelming"* reason (Walsh J) to justify a negative decision. That is the principle to be found in those judgments.

European Court of Human Rights decisions

Article 8 of the Convention provides:

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this 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 the protection of the rights or morals of others."

The passage from the judgment of Lord Phillips in *Mahmood* [2001] W.LobeR. 840 cited by counsel for the respondent on behalf of the Minister was clearly designed to extract such principles as would help to decide the case before the Court of AppeaLobe It does not purport to be a complete general summary of the approach of the European Court of Human Rights ("ECHR"). In particular, the third paragraph at p.861 needs careful reading. It reads:

"(3) Removal or exclusion of one family member from a state where other members of the family are lawfully resident will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family."

That paragraph does not imply to its converse; it does not follow that there is no infringement of Article 8 in any case where one family member is excluded from a state. Firstly, it should be noted that the paragraph deals with both *"removal and exclusion."* Exclusion, in the sense of refusal to admit a person who has never resided in a state will be easier to justify by reference to the first principle that a state is not obliged to admit non-nationals. Secondly, and most importantly, the paragraph does not address the distinct question of the need for a state to put forward a reason for expulsion.

It is hazardous to essay a summary of the case law of the ECHR, which was not, in any event, fully argued. It is possible, nonetheless to deduce some useful guidance from such authorities as have been opened.

Boultif v Switzerland [33 E.H.R.R. 50] 1179 concerned the refusal of the Swiss authorities in 1998 to renew the residence permit of an Algerian national, married to a Swiss citizen. He had been sentenced to two years imprisonment for robbery and damage to property in 1994. The Court, at paragraph 46 of the judgment set out the following principle:

> *"46. The Court recalls that it is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to deport aliens convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see the Dalia v. France judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I, p. 91, § 52; the Mehemi v. France*

judgment of 26 September 1997, Reports 1997-VI, p. 1971, § 34). (emphasis added).

47. Accordingly, the Court's task consists in ascertaining whether the refusal to renew the applicant's residence permit in the circumstances struck a fair balance between the relevant interests, namely the applicant's right to respect for his family life, on the one hand, and the prevention of disorder and crime, on the other.

48. The Court has only to a limited extent decided cases where the main obstacle to expulsion is the difficulties for the spouses to stay together and in particular for a spouse and/or children to live in the other's country of origin. It is therefore called upon to establish guiding principles in order to examine whether the measure was necessary in a democratic society.

In assessing the relevant criteria in such a case, the Court will consider the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he is going to be expelled; the time elapsed since the offence was committed as well as the applicant's conduct in that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; and other factors expressing the effectiveness of a couple's family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage, and if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse is likely to encounter in the country of origin, though the mere fact that a person might face certain

> *difficulties in accompanying her or his spouse cannot in itself exclude an expulsion."*

The State seeking to justify expulsion even of a person convicted of a crime must be able to point to *"a pressing social need."* In *Boultif* , the Court was impressed by the good behaviour of the applicant in the six years following the conviction. While accepting the Swiss fears of danger to public order and security, it ruled that they were mitigated by the circumstances and found a violation of Article 8. While *Boultif* is not one of the "*immigration*" cases of the ECHR upon which the Minister relies, it illustrates both the principle of the need for the state to justify its action and the fact that the ECHR will consider each case on its own individual merits.

I will next refer briefly to two of the cases cited by Lord Phillips and from which he derived his summary.

One of these was on *Abdulaziz v UK* (1985) 7 EHRR 471. Three women of different nationalities had rights of residence in the UK but not, it is important to note, citizenship. They wished to be joined by their non-British spouses, who had by various means obtained access to the UK. The ECHR held that there was, in each case, a sufficient family relationship for Article 8 to apply. However, there was not a breach. The Court observed that the cases did not relate to immigrants who already had a family, which they left behind in another country until they had achieved settled status in the United Kingdom. It was only after settling in the United Kingdom, as single persons, that the applicants contracted marriage. Article 8 did not, in the view of the ECHR, impose a general obligation on a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country.

In addition, at the time of their marriages the respective spouses were aware of the improbability of their respective spouses being granted access to the UK.

The other is a more recent case, *Gül v Switzerland* (1996) 22 EHRR 93. A Turkish Kurd father failed in his asylum application in Switzerland. He was allowed, nonetheless, permanent residence and then, for humanitarian reasons, because of her poor health, to be joined by his Turkish wife. The case concerned a later request to be joined by his 12 year-old son who had never left Turkey. The Court reiterated that it followed:

> *"from the concept of family on which Article 8 is based that a child born of a marital union is ipso jure part of that relationship and hence, from the moment of the child's birth and by the very fact of it, there exists between him and his parents a bond amounting to "family life",… which subsequent events cannot break, save in exceptional circumstances."*

The court continued:

> *"The present case concerns not only family life but also immigration, and the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest. As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.*
>
> *Moreover, where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples*

of the country of their matrimonial residence and to authorise family reunion in its territory. In order to establish the scope of the State's obligations, the facts of the case must be considered.

Furthermore, although Mr and Mrs Gül are lawfully resident in Switzerland, they do not have a permanent right of abode, as they do not have a settlement permit but merely a residence permit on humanitarian grounds, which could be withdrawn, and
which under Swiss law does not give them a right to family reunion ….”

This short digression through the case law of the ECHR does not provide an easy or automatic answer to any particular case of suggested violation of Article 8. It seems clear that the jurisprudence of the Court continues to evolve. At the least, it demonstrates that a State needs to justify its decisions on a case by case basis. None of the cases mentioned above involved citizenship rights. It was material to the decisions in the last two cases that the residents in the UK or Switzerland respectively were not, in the first case, citizens (they exercised a choice to reside there) and, in the second case, had no permanent right of residence. None of the cited cases exhibits the common features of the present appeals that the children are Irish citizens and have constitutional family rights under the Constitution. It seems probable - I would not go further - that the ECHR would not accept as a reason for expulsion, which had disruptive effect on family life, an abstract argument, unrelated to some concrete need of the state, but based simply on the general need to maintain the integrity of the immigration system.

When drawing upon the case law of the ECHR, I am not assuming that the Convention has direct effect in Irish law. This Court has frequently said that it has not. It

might have been argued that, where the State seeks to justify a decision on the basis of the need to operate one international agreement - in this case the Dublin Convention - it should not be free to ignore its obligations under another. No such argument has been made in this case. It is also important at all times to bear in mind that the Convention merely lays down minimum standards. It is open to the Member States to adopt stricter ones. In other words, it is not valid to deduce from the fact of compatibility with the Convention, that the impugned act complies with the Constitution. It may, conversely, be possible to argue persuasively that an act which does not satisfy the minimum standards of the Convention should not lightly be considered compatible with the more rigorous demands of the Constitution.

The Minister's decision

Finally, I consider whether the decision of the Minister in each of these cases should be quashed.

The reasons can be taken as those given in the Lohan memorandum. In each case, the following three reasons were given:

- The length of time the family has been in the State- [*Lobe* case: only nine months]; [*Osayande* case: only 7 months at this stage but less than 4 months at the time of making the deportation order];
- The application of the Dublin Convention to which Ireland is a party.
- The overriding need to preserve respect for and integrity of the asylum and immigration systems.

In the *Lobe* case, the following additional reason was given:

- The Lobe family and Kevin Lobe can adapt to the family's return to the United Kingdom and the Czech Republic and that their lives and wellbeing would not be endangered.

It seems to me that the last reason relating to the integrity of the asylum and immigration systems is the most important. It is the one upon which the Minister most strongly relied upon at the hearing.

The Lohan Memorandum sets out in detail the reasoning behind the Minister's decision. The following is a summary of the essential parts which are common to the two cases. I substitute "*child*" for the name of the child in each case and father or mother, where relevant. Mr Lohan proposed to the Minister:

> *"In assessing this case, the various judgements of the courts in respect of matters elated to the rights of non-nationals have been considered – including in particular the cases of Osheku, Fajujonu and more recently the matter of P, L and B.*
>
> *In view of the fact that the deportation of the Lobe family/Mr Osayande could result in the removal of* [the child,] *an Irish citizen , from the State in circumstances which could be interpreted as a constructive deportation, the Minister should weigh up the rights of that Irish citizen against the needs of the common good.*
>
> *It is accepted that* [the child] *is an Irish citizen and may have rights to reside in the State. It would also appear that he has the protection of the Constitution in*

terms of guaranteeing him the right to the company, care and parentage of his family/parents. However, against those factors are the need for the Minister to preserve the integrity of and respect for the State's asylum and immigration laws. The Lobe family have not been in the State for a lengthy period …….. [Refers to periods and UK asylum applications]

It is well established that the State's right to expel or deport non-nationals is regarded as an aspect of "the common good related to the definition, recognition and protection of the boundaries of the State." This was acknowledged most recently in the judgement of the Supreme Court in P, L and B v. Minister for Justice, Equality and Law Reform … . The maintenance and integrity of the immigration and asylum systems is certainly a factor which the Minister is entitled to have regard to in this case. In this context, the Minister is entitled to take into account the manner in which the family entered the State…… the actions of the applicant(s) in the proceedings are designed to circumvent the operation of the Dublin Convention to which the State is a party and to which it is the policy to apply the provisions, is a factor which the Minister should take into account.

On balance, the interests of the common good and of the protection of the State through seeking to preserve the respect for and integrity of the asylum and immigration systems are seen in this case as outweighing the countervailing claims which the father of the Irish-born child and consequently [Lobe case only] *his family have made to the Minister."*

The Lohan Memorandum contains a fair summary of the constitutional rights claimed by the child in each case, as a citizen and member of a family. Those rights are not absolute, but they are personal rights to which the Constitution, by its express terms, accords a particularly high value. They relate to the fundamental unit of Society in this State. This Court has repeatedly said that these rights can be invaded by the State, even in the interests of the child of the family only in exceptional circumstances. The dictum of Finlay C.J. in *In re J. H.* [1985] I.R. 375 establishes a standard of "*compelling reasons.*" In *Fajujonu*, the Court recognised that this could happen if, in the words of Finlay C.J. there were "*grave and substantial reasons."* Walsh J. in the same case said that the Minister would have to consider the matter according to the following standard:

> *"In my view, he would have to be satisfied, for stated reasons, that the interests of the common good of the people of Ireland and of the protection of the State and its society* are <u>*so predominant and so overwhelming*</u> *in the circumstances of the case, that an action which can have the effect of breaking up this family is not so disproportionate to the aim sought to be achieved as to be unsustainable."* (emphasis added).

These passages are unanimous in requiring reasons of a very high and compelling order to justify the invasion of family rights of the sort that are at issue in this case. The Minister's reasons are to be found in the Lohan Memorandum. The reason, which is said to outweigh the constitutional rights, is the need for respect for the integrity of the asylum and immigration systems. It is not explained how or why that is so. I will consider separately the individual aspects of the *Lobe* and *Osayande* cases. At this point what is crucial is that there is no allegation against either family or any member of it of any misbehaviour, incapacity or

malady calling, in the interests of the common good, for their removal from the State. In short, the Minister does not claim that their presence in the State would in itself be inimical to the common good.

I do not accept counsel for the appellant's argument that the sort of reason which would justify a deportation order in circumstances such as are present in this case must always be individual to the non-national involved. It is conceivable that such matters as general criminality of certain groups, prevalence of infectious diseases, racial or communal tensions, strains on the resources of the State or high levels of unemployment in the State would justify such action. However, nothing of the sort has been advanced by the Minister.

In my view, the need to preserve the asylum and immigration system is an abstract, open-ended administrative reason that could not satisfy the test propounded in *Fajujonu*. The Minister relies, in this context, on the judgment of Hardiman J., speaking for this court in *P, L & B* (Unreported, Supreme Court, 30th July, 2001). The applicants in the three cases there before the Court had each applied for asylum and been validly refused. As Hardiman J. stated in his judgment, their *"rights had been fully vindicated in unchallenged proceedings conducted pursuant to statutory provisions."* They had at most the legal right to have their representations on humanitarian grounds considered in accordance with fair procedures. The Court held that this had been done. The Minister included *"the interests of public policy and the common good in maintaining the integrity of the asylum and immigration system ..."* as a ground for making the deportation orders. There was, however, no question of an Irish-born child and, therefore, crucially, no constitutional rights over which the State policy had to prevaiLobe For that reason, I do not consider the case of *P, L & B* to be helpful in deciding these appeals.

I do not accept either that this result is altered by the changed statutory regime represented by the three statutes that have passed into law since the decision in *Fajujonu*.

Counsel for the respondent offered this as an additional reason why the Minister was entitled to expect that the integrity of the asylum and immigration systems would be respected. I do not regard this as amounting to any more than a repetition of the previous argument. The Minister calls in aid only the existence of the statutory machinery. It is beyond debate that the advent of a large number of asylum seekers and the concomitant establishment of a statutory regime to deal with them represents a significant change to some important aspects of the life of the State. Here, it has to be recalled once more that the Minister is not relying on the admittedly great increase in the number of persons presenting asylum applications in recent years. That, after all was not a reason given by the Minister for his decision. The Minister has not provided the Court with any background information or statistics regarding the impact of immigration generally or asylum seekers in particular on the life of the State. Immigration can be beneficial or prejudicial to the interests of the common good. The Minister has not furnished any cost/benefit analysis. The Court is left to assume that the presence in the State of the parents of the two children involved in these cases is *ipso facto* and self-evidently inimical to the common good, simply because they are failed asylum-seekers. I do not think that the very real change in statutory circumstances gives any added force to the Minister's reliance on the need to preserve respect for the system.

There is an additional reason for serious concern that the Minister should require that the Court should accept such a reason. It seems to be assumed that the normal standard for judicial review of such decisions should be that usually applied to administrative decisions and called the *Wednesbury* test, as more fully developed in *The State (Keegan) v Stardust Compensation Tribunal* [1986] I.R. 642 and *O'Keeffe v An Bórd Pleanála* [1993] I.R. 39. That is that the decision, in order to be quashed, must be so defective as to attract the description variously expressed by Henchy J in the former case and summarised by Finlay C.J. at p. 70 of his judgment in the latter:

"1. It is fundamentally at variance with reason and common sense.

2. It is indefensible for being in the teeth of plain reason and common sense.

3. Because the court is satisfied that the decision-maker has breached his obligation whereby he 'must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision'."

It appears to have been the view of Denham J., with whom Hamilton C. J. agreed, in *Laurentiu* [1994] 4 I.R. 46 (see p. 62 of her judgment) that review of deportation orders is to be conducted in accordance with these principles. Counsel for the respondent, when asked about this matter at the hearing, argued that it was not relevant to the present case. The matter was certainly not argued on these appeals and, to that extent, any further remarks about it must be *obiter*. It seems to me that, where as in this case, constitutional rights are at stake, such a standard of judicial scrutiny must necessarily fall well short of what is likely to be required for their protection. This appears to have led to some modification of the test in other jurisdictions. In *Mahmood,* the decision of the English Court of Appeal, upon which the Minister has relied, Laws L.J. and Lord Phillips both applied a significantly modified *Wednesbury* test, one based on "anxious scrutiny" to a case involving interference with fundamental rights. In a case such as the present, the routine application of the unmodified *Wednesbury* test it makes decisions of the Minister virtually immune from review.

The position of the State, as presented to this Court is, in effect, as follows. The Lobe and Osayande families enjoyed the right to present asylum applications in accordance with prevailing statutory provisions. In each case, these applications failed, because they should have been pursued in the UK, pursuant to the Dublin Convention. In each case, the

birth in Ireland of a child to the family, with the right of citizenship, did not warrant permitting the child to continue to enjoy the benefit of the society and nurture of its parents in the State. This was because the need to preserve the integrity of the asylum system, including the operation of the Dublin Convention overrode any such rights. It was not based on circumstances peculiar to the two children involved. This, it seemed at the end of the hearing of the appeal, represented a considered and consistent State policy. It seemed reasonable to presume that the State would, as a matter of such policy, deport the non-national parents of every child born in the State once their asylum application had been resolved. In other words, all persons similarly situated will be deported. The Minister, as a matter of policy will not allow such persons to remain in the state.

At this point, I wish to refer to certain material, which was not before the Court, but my remarks upon it are necessarily *obiter*. It is, of course, not normal to refer, in the judgments of this Court, to matter not presented to the Court during the conduct of an appeal. However, I have come to the conclusion that it would not be right to ignore some important information, taking the form of answers to parliamentary questions, which was not presented to the Court by either side.

It has come to my notice, firstly from a news item and, then from consultation of the record of the Oireachtas, that the policy actually operated by the State in cases such as the present appears to have been, in many cases, to allow the parents of a child born in the State to remain here. On 21st February 2001, the Minister for Justice, Equality and Law Reform stated in the Dáil, in the course of an answer to a parliamentary question:

> "*The number of applications received by my Department for permission to remain on the basis of parentage of an Irish citizen child during 2001 was 6,570, of which 5,924 were in respect of current or former asylum applicants. Prior to*

2001, statistics were only maintained on applications granted, not on applications received. The total number of persons granted permission to remain in the State on the basis of their parentage of an Irish citizen was 1,515 in 2000 and 1,428 in 1999. No applications of this type were granted in 1998 as the basis for granting such permission was under review at that time. Figures are not available for the number of persons granted permission to remain on this basis in 1997 and 1996 other than for current or former asylum seekers. In 1997 and 1996, 107 and 142 current or former asylum applicants were granted permission to remain on the basis of their parentage of an Irish citizen. Statistics are not available for either 1994 or 1995."

On 17th December 2002, the Minister furnished a further parliamentary answer as follows:

"For the period 1996 to 2001 a total of 4,853 persons were granted leave to remain on the basis of an Irish born child. From 1 January to 30 November 2002 a total of 2,879 persons have been granted leave to remain on the basis of an Irish born child. The above figures represent current or former asylum seekers.

The result of the foregoing would appear to be that the following numbers of persons were permitted to remain in the State "on the basis of an Irish born child":

1996	142
1997	107

1998	nil
1999	1,428
2000	1,515
2001	1,661
2002	2,879

The reason for the absence of any such cases in 1998 was, as stated by the Minister on 21st February, that the basis for granting such permission was under review. Thereafter, the practice of granting permission appears to have resumed, but it is not clear upon what basis. I have inferred the figure for 2001 by deducting the total for the years 1996 to 2000 (3,192) from the total given by the Minister on 17th December (4,853). I am unable to establish the proportion the cases in which permissions was granted to the total number of applications and it would be hazardous to attempt to do so. There are obvious problems with the figures. The Minister's statement that 6570 applications were received during 2001 seems at variance with the other figures. It is clear, however, that a substantial number of applications are successful. In these circumstances, I cannot help observing that the Minister has refused the applicant children the right to have their parents remain in the State, based essentially on the integrity of the asylum and immigration system and the operation of the Dublin Convention, when it is patent that, in many cases, where it could do so, the State does not choose to rely on that rationale. Mr Lohan, it is true, in his affidavit, said that there had been *"a substantial increase in the number of applications for residency on the basis of parentage of an Irish born child."* He did not, however, state that a large number of these applications are granted or on what basis. It is important to emphasise that it was at no point part of the case for the appellants, either in the High Court or, consequently and necessarily,

in this Court, that the decisions in their cases were incorrect, capricious, inconsistent or discriminatory by reference to any policy relating to permitting some persons to remain in the state "on the basis of an Irish born child." It seems to me, nonetheless, that it may be that many cases are resolved in a manner different from the present and in accordance with criteria not stated in the relevant decisions. Unlike the case of *Mahmood*, where the policy of the UK government regarding non-nationals marrying UK citizens was before the court in the form of written guidelines, the court knows nothing of the policy of the Minister past or present. Since the matter was not argued or referred to in any way during the conduct of the appeal, it is not possible to draw any firm conclusion.

I turn then to the reason expressed in these terms in the Lohan Memorandum: *"the application of the Dublin Convention to which Ireland is a party."* Since each family concerned had made a prior application for asylum in the United Kingdom, certain provisions of the Dublin Convention became relevant. That Convention is in force between the Member States of the European Union. It is, as stated in its title, for the purpose of *"determining the state responsible for examining applications lodged in one of the Member States of the European Communities."* The object is to avoid multiple applications for asylum by the same person in different states, called *"refugees in orbit."* In each case, an asylum application had been made in the UK prior to the arrival of the family in Ireland. A formal request was made to the UK to take the five family members, in the *Lobe* case, and Mr Osayande, in his case, back to the UK pursuant to Article 10(1)(e) of the Convention. The UK accepted responsibility pursuant to Article 8. That Article provides:

> *"Where no Member State responsible for examining the application for asylum can be designated on the basis of other criteria listed in this Convention, the first*

Member State with which the application for asylum is lodged shall be responsible for examining it.

Article 13 provides for inter-state requests to take back applicants. Thus, having been requested to take back the applicants, the UK was obliged to do so. That did not mean, however, that Ireland was bound to return the applications to the UK. It was free to process the applications itself. Article 3.4 provides:

"Each Member State shall have the right to examine an application for asylum submitted to it by an alien, even if such examination is not its responsibility under the criteria defined in this Convention, provided that the applicant for asylum agrees thereto."

Article 9 also provides:

"Any Member State, even when it is not responsible under the criteria laid out in this Convention may, for humanitarian reasons based on family or cultural grounds, examine an application for asylum, at the request of another Member State, provided that the applicant so desires."

It will be seen that it was perfectly possible for this State to examine the application for asylum in either of these cases in accordance with the terms of the Dublin Convention. It would not be in breach of its obligations if it chose to do so.

Accordingly, I do not think that the application of the Dublin Convention furnishes a sufficiently powerful reason to justify the Minister in deporting the parents of the Irish-born children in these cases.

Finally, I do not consider that the first reason given, relating to the length of time each family had resided in the State (or, in the *Lobe* case, the possibility of the Irish-born child adapting to another country than Ireland) can prevail over the constitutional rights of the child which is what has been in issue at all times in these cases. The fact that the parents have resided in the State for a longer or shorter period may be relevant to the consideration of their rights and interests. It seems to me that the State has throughout the conduct of the appeals approached the matter on the assumption that they are concerned with the rights of the parents. It has always been clear that they are not. I do not accept that the State has shown, in any respect, that there exists sufficiently powerful reasons for the State's rights to prevail over those of the child.

For all of these reasons, I would be in favour of allowing the appeal. In the circumstances, it is not appropriate for me to propose any order.