Submission to Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights

Supreme Court Decision in the case of
D.L. , A.O. & Ors v Minister for Justice, Equality and Law Reform
(23 January 2003)

Tuesday 13th May 2003

Executive Summary

• The Irish Council for Civil Liberties (ICCL) respectfully disagrees with the reasoning of the majority of the Supreme Court in the case of L. and O. v Minister for Justice, Equality and Law Reform, as we believe that the constitutionally protected rights of the Irish citizen children at the centre of this case were not vindicated. We believe that the effect of the majority ruling is that certain Irish citizens enjoy a lesser scope of constitutional rights than others, simply on the basis of who their parents are. We believe that this is fundamentally wrong. On this basis we agree and support the minority rulings in the case, although we accept and acknowledge the authority of the majority in setting out the boundaries of the law in this area.

Lobe and Osayande Decision

• The ICCL would like to reiterate that the case of L. and O. v Minister for Justice, Equality and Law Reform was about the constitutional rights of an Irish child citizen to reside in Ireland in the company of his/her family where his/her family are not Irish citizens. It was not a case about immigration or refugee law, but only the extent to which issues of immigration policy may be legitimate grounds to limit the constitutional rights of Irish citizens. It will effect all Irish Children, whose parents are non-nationals, whether their parents are asylum seekers, refugees, migrant workers, students or otherwise lawfully in the jurisdiction. The case does not effect the determination of whether someone is declared to be a refugee, nor does it effect the status of anyone who has already been recognised as a refugee in Ireland.
• The Supreme Court found that as Irish citizens, no child born to non-national parents in Ireland, can be deported, and that such a child citizen has rights of residency. The ICCL recalls the findings of the majority judges on this point (references are to individual judge's judgement)

Keane C.J.

- *" 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. " Para. 29*
- *" … 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." Para. 31*
- *"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." Para. 33*

Hardiman J.

- *"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" para. 292*

Denham J.

- *"I am satisfied that the children born in Ireland have a right of residence in Ireland." Para. 14 (iv)*
- The Supreme Court decision also clearly sets out that Irish child citizens have the constitutionally protected right to the company of their parents and therefore that there is a *prima facie* case flowing from this for the family to reside in the State with their child. In the words of Murray J.
- *"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." Para. 170*
- However the Court also found that the family rights of an Irish child citizen are not absolute and can be restricted in certain circumstances, including for reasons relating to immigration policy. This therefore allows for the possibility of deporting non-national parents of Irish children in certain circumstances, as they are not by reason of constitutional imperative automatically entitled to residency, although their child, as an Irish Citizen, is. It does not of course require the deportation of the family of an Irish child.
- In any case where the deportation of the family of an Irish child is contemplated, it is also clear from the Supreme Court decision, that the case must be considered on its individual merits.
- In any determination on residency for the family of an Irish Child, there is a presumption in favour of the right of the family to stay within the State, and then in the Minister may then consider whether there are, in the words of the Keane CJ "grave and substantial reasons associated with the common good which nonetheless required the deportation of the non-national members of the family". These grave and substantial reasons may include reasons of immigration policy. However at all times, each case must be considered on its own merits, in what Justice Hardiman called "a detailed exercise". This has been re-inforced by each of the members of the Supreme Court.

Denham J.

- *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.*

Keane C.J.

- *When this reason (integrity of the asylum system) 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.*

Factors central to policy responses

• On the basis of the decision of the Supreme Court, it is essential therefore that the government policy adopted following this case recognises that
A) There is a presumption in favour of Irish children residing in the state in the company of their family.
B) Each case must be examined in detail on its merits, and that the particular circumstances of each family must be taken into account.
C) Each case must be considered by way of a fair and proper procedure.
D) In each case there needs to be clearly identified grave and substantial reasons for a deportation order
E) The deportation order must be a proportionate response to the grave and substantial reasons, in light of its impact on the constitutional rights of the child
• There are also minimum standards and safeguards in International and Human Rights law which government policy must comply with, in particular the Geneva Convention on Refugees and the International Convention on the Rights of the Child (ICRC). The government has undertaken a number of international obligations, which it must respect. The Supreme Court's ruling that the Dublin Convention constituted an international obligation which the Minister could consider, applies equally to other longer standing, international obligations undertaken by the State.
• The paramount factor in determining whether a deportation order should be served on anyone is whether it would expose him or her to the possibility of persecution in violation of the Geneva Convention, or otherwise to torture, inhuman or degrading treatment in violation of the prohibition on torture. The decision of the Supreme Court does not in anyway diminish or restrict the obligations on the State to provide refuge to those fleeing persecution, or undermine the principle of non-refoulement.
• An equally important factor, where a deportation order will effect a minor, is the impact on the welfare of the child and the rights of the child as protected in the Convention on the Rights of the Child. These concerns must be central to the decision making process, and where the deportation order is not in the best interest of the child, or will violate the rights of the child under the ICRC, the deportation order should not be served.
• The policy adopted by the Government must also not be discriminatory. It is not acceptable that the government adopt policies, which target particular families because of their nationality for example. In the case of Abdulaziz, Cabales and Balkandali v UK and the East African Asian case, two cases which considered the implications of immigration policy on family life protected by the European Convention on Human Rights, the European Commission and Court found that discriminatory practices are incompatible with the ECHR. Discriminatory immigration policies could also raise issues under Article 3, the prohibition on degrading treatment, where they reflect institutionalised racism.

Parents who withdrew from the asylum process

• The ICCL submits that the situation for parents of Irish children, who withdrew from the asylum system on the strength that they had applied for residency as parents of Irish children, is now grossly unfair and the uncertainty is causing anxiety and suffering for many thousands of families. As indicated the situation of these asylum seekers and indeed of refugees must be decided in compliance with international law on asylum and refugees and cannot undermine any of the rights there under. In this respect we support and endorse the position of the Irish Refugee Council relating to the cases of refugees and asylum seekers.
• We would further note that respect of families who currently have an application for residency pending, the ICCL submits that they have a legitimate expectation that they will be granted residency. This arises because of the law based on Fajujonu at the time at which the applications were made, and in many cases because of representations made to them at the time of their

applications. It is widely accepted that prior to the Supreme Court decision in O and L, many asylum seekers were advised that if they had an entitlement to residency as parents of an Irish citizen, that it was safe to withdraw their case from the asylum process. The withdrawal from the asylum process on such representation cannot in anyway be allowed act to the detriment of the asylum seekers.

Current Policy responses

- The ICCL submits that the responses of the Minister for Justice, Law Reform and Equality to the decision to date have been extremely disappointing, and not in keeping with the spirit or letter of the judgement. The response of the Minister has been to withdraw the possibility for individuals to apply for residency on the basis that they are the parents of an Irish child, and to seek to proceed with issuing deportation orders in individual cases.
- The ICCL welcomes the fact that the Minister immediately after the judgement assured persons that there would not be mass deportations. However this measure would not have been possible, with or without the Minister's assurances.
- The response of the Minister to withdraw the possibility for individuals to apply for residency on the basis that they are the parents of an Irish child is a disproportionate and improper response to the Supreme Court decision. The decision clearly confirmed the residency rights of the Irish child and the positive constitutional rights of the child to the company of his/her parents. The Minister has, by removing the possibility to apply for residency, denied any channel through which the constitutional rights of the child may be tested and vindicated. The only opportunity for that to arise now, is for the constitutional rights of the child to be raised as a shield against deportation. It is unacceptable where issues of fundamental constitutional rights are at stake, they can only be asserted as a shield and not as a positive right.
- Moreover the measure of withdrawing the possibility to apply for residency applies to all non-national parents, including those who were never part of the asylum process. Individuals lawfully living and working in Ireland on a work permit or student permit, who have a child in Ireland, have no possibility to regulate their situation in the State in the interest of their child, even though they may be in the state for a long period of time. If they wish to seek residency they must now deliberately fall foul of the law and await a deportation order before they can seek residency and take action to stabilise the situation for their family and in the interests of their Irish child.
- The second response which is to deport individuals even though they had applied for residency is also clearly in breach of the Supreme Court ruling. This has been confirmed in the recent case of Oja. In this case the applicant, Bola Ojo was served with a deportation order, notwithstanding that her case had not been properly considered (The applicant was told in December 2002 that her residency application would take a year, but on 6 February 2003, the day of a bail hearing, she was handed a note that the Minister had refused her residency application.). The High Court held that in addition to her detention being unlawful, that fair procedures had not been followed in her case. In each case, anyone who has applied for residency, must have their case considered on its merits and in accordance with due process. It is recalled that in this case the Refugee Appeals Tribunal found that Ms. Ojo's husband, and the father of the Irish child Daniel, was in danger from criminal elements in Nigeria. It is hard to imagine that the impact on Daniel of this danger, and the risk of losing his father were considered in the decision to deport his mother.

Recommendations

- The right to apply for residency be immediately re-instated. It is unacceptable that there is no avenue for any Irish child of non-national parents to have their rights of residency and family rights considered except by deliberately confronting the criminal law, through a deportation order.

- The Minister should make clear that the decision does in no way effect the refugee status of any refugee in Ireland, nor does it effect the right of persons seeking asylum, even where they may have previously withdrawn from the system on the basis of an Irish child.
- The current applications for residency must be based on the following principles:
- There is a presumption in favour of residency and there is a legitimate expectation for those who applied prior to the Supreme Court ruling, to a favourable decision in favour of residency.
- All applications for residency must be properly considered in line with requirements of the Supreme Court decision, and based on the fact that the constitutional rights of an Irish child are at issue;
- All applications must enjoy due process and full respect for human rights obligations and international law must be shown in the decision making process;
- There can be no policy decisions, which are based on discriminatory factors such as race or ethnic origin.
- All decisions must be taken in a fair, rational, non-arbitrary fashion
- The Department must set out clear, transparent and fair guidelines, incorporating the aforementioned factors, about how decisions on residency will be made. These guidelines will allow families to have some element of certainty about the possibility of remaining in the state with their Irish born child.
- The Department must set out how it intends to uphold the rights of the Irish child citizens if they remain in the state without their family, and how the rights of the Irish child will be upheld, if they are removed from the jurisdiction of the state.