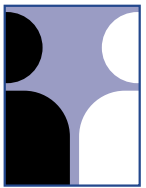


Advocacy Paper Series



NCCRI

**National Consultative Committee
on Racism and Interculturalism**

International perspectives relating to the future of Irish Born Children and their Non-National Parents in Ireland

Foreword and Acknowledgements

This report is the second of a new series of advocacy papers produced by the National Consultative Committee on Racism and Interculturalism (NCCRI). The first advocacy paper focussed on the reform and harmonisation of migration policy in Ireland. This second advocacy paper focuses on international perspectives relating to the future of Irish born children and their non-national parents and Ireland.

The purpose of these advocacy papers is threefold:

- To provide a focus on key public policy issues related to the remit of the NCCRI
- To make a range of policy recommendations/options to be considered by policy makers
- To contribute to broader public discourse, including identifying new issues and bringing new perspectives to existing issues.

The recent decision by the Government to hold a referendum on citizenship is not the focus of this advocacy paper, although much of this paper will be of relevance to that debate. Rather this paper focuses on the position of those people affected by the Supreme Court decision arising out of *Lobe and Osayande* in 2003.

These are the estimated 11,000 people who are waiting to hear whether they can remain in Ireland as a consequence of having at least one Irish born child. For many affected by this judgement, their lives are ‘on hold’ as they wait to find out if they will be deported or given ‘leave to remain’ in Ireland. This paper looks at the issue of Irish born children from a broader international perspective, including:

- Whether regularisation programmes have been carried out in other countries, and what we can learn from these (for example do such regularisations compromise immigration policy?)
- The conceptual basis of citizenship, which will also figure in the debate around the forthcoming referendum on citizenship.

- The importance (and limitations) of human rights instruments related to the focus of this paper.

In short this advocacy paper is intended to provide renewed focus on the plight of existing non-national families with Irish born children but should also serve as a useful background paper to inform debate around the forthcoming referendum.

We are very grateful and wish to fully acknowledge the work of Catherine Kenny of the Irish Human Rights Centre in NUI Galway. Catherine provided the research on which this advocacy report is based.

Anastasia Crickley

Chairperson of the NCCRI

Introduction

There has considerable public debate in Ireland in recent weeks about the forthcoming referendum on the citizenship. In the midst of this ongoing and often complex debate, the NCCRI is concerned that that position of the estimated 11,000 non-national parents with Irish born children who are in Ireland may be overlooked. These are the families who are waiting to learn whether they will be able to remain in Ireland, as a consequence of the ruling by the Irish Supreme Court in 2003 in respect of *Lobe & Osayande*.

From a policy and administrative perspective, this group of people are in a unique position, as they comprise those who applied for residency before this Supreme Court judgment. The Government has recognised the uniqueness of their position by establishing a dedicated unit under the aegis of the Department of Justice, Equality and Law Reform to assess whether the reasons offered by these families against their proposed deportation should be accepted or not, on a case-by-case basis.

There have been a number of concerns already expressed about the human dilemma of those who are now awaiting decisions as to whether they will be allowed remain in Ireland. There have been further concerns about the current decision process that has been put in place and the possibility that a significant proportion of those awaiting decisions may be deported, although it is still unclear if this will happen. A recent statement by the Irish Catholic Bishops Conference has highlighted many of the concerns, including:

- The uncertainty and anxiety of the families involved in the administrative process to assess whether they will be allowed remain in Ireland.
- Lack of free legal aid and lack of clarity related to the criteria to assess the reasons for why they should not be deported.
- The need to develop a regularisation process to replace the present case-by-case system¹.

Similar concerns have also been raised by NGO's campaigning on this issue, the Irish Human Rights Commission and the Coalition Against the Deportation of Children (CADIC)². The NCCRI shares many of these concerns but seeks to bring additional perspectives to the debate, particularly from an international perspective.

¹ Irish Bishop's Conference Press Release, March 11, 2004.

² CADIC includes bodies such as the Immigrant Council of Ireland, Children's Rights Alliance, the Irish Refugee Council and the Irish Council of Civil Liberties.

This paper highlights the fact that regularisation programmes have been undertaken in many other European countries and there have been examples of multiple regularisation programmes in some countries, such as the United States. There is no evidence that such regularisation programmes compromise existing immigration policy in these countries.

The paper advocates the Government should consider moving away from the ‘case by case’ approach toward the fast track regularisation of those existing families caught up in the present administrative system to assess whether they should remain in Ireland. The paper also supports the need for legal aid to be provided to such families but also advocates the need to consider other options for complementary advice and support if such aid is not going to be provided. In particular it recognises that key community and voluntary organisations working with migrants should be given increased financial support to provide information, advice and support to those affected non- national families.

Of further concern, which has not been widely highlighted, is that those whose legal status is regularised under the present approach will be given ‘humanitarian leave to remain’ status in Ireland. This is status which offers immediate protection but which is provided at the continuing discretion of the Minister for Justice, Equality and Law Reform. This paper advocates the need for the Government to move quickly to grant residency and the offer of Irish citizenship for those granted leave to remain in Ireland as a result of this process. It contends that leaving non-national parents and their children in the discretionary ‘humanitarian leave to remain’ status for a significant period of time could significantly militate against long-term integration into Irish society. The paper further advocates the need for targeted resources to assist in the integration of those people given leave to remain to provide the conditions that will them to get on with their lives and this could be achieved through a holistic approach, such as extending the remit of a statutory agency at national level but also ensuring there is strong local coordination and support.

Background

In January 2003 the Supreme Court, in *Lobe and Osayande v. the Minister for Justice, Equality and Law Reform*, held that the non-national parents of Irish citizens were not automatically entitled to reside in the State.³ It acknowledged that children born in Ireland of non-national parents are Irish citizens and as such, cannot be deported.

³ The judgment affects parents and siblings who are non-EEA and Swiss nationals. As a result of the 1994 European Economic Area Agreement, signed between the EU and Norway, Iceland and Liechtenstein and the European Communities and Swiss Confederation Act, signed between the EU and Switzerland, nationals of these states have rights of residency similar to those of EU nationals.

However, the family rights of children who are Irish citizens are not absolute and therefore, can be restricted. One such restriction on the family rights of Irish citizen children of non-EEA nationals is that they are not automatically entitled to have the care and companionship of their parents and siblings in Ireland and therefore, their family members may be deported.

The principal effect of the decision was that the policy, that was in place since the 1990 *Fajjonu* case of permitting the parents and siblings of Irish citizens to apply for leave to remain in Ireland was abolished by the Minister for Justice, Equality and Law Reform in February. This was later applied retrospectively to the cases already outstanding in addition to new cases. Over 11,000 cases are under consideration and deportation notices have been issued by the Department in respect of many families. Parents and siblings of Irish citizens will have the same opportunity as other non-nationals in respect of whom the Minister intends to make a deportation order, to make representations to the Minister setting out reasons why they should not be deported.

Following the judgement the Department of Justice Equality and Law Reform immediately ruled out mass deportations and the Department said that it would consider each application for residence on a case -by - case basis and would not be inflexible or unreasonable.

The Government has therefore decided that every outstanding claim to reside in the State on this basis would be examined and decided individually. In making such decisions, the Government has stated that it will take into account factors such as the person's individual family and domestic circumstances and humanitarian considerations. The primary rationale for this approach is based on the Government's determination to ensure that 'Ireland's immigration laws are not compromised'.

Subsequently the Department put in a train a process through which the applications for residency rights those affected by the judgement would be considered. The main elements of this process are as follows:

- The issuing of deportation notices which requires the people affected by the Supreme Court judgement to make representations as to why they should not be deported.
- The establishment of a unit within the Department of Justice, Equality and Law Reform to process applications.

Those people who succeed in their application not to be deported are granted ‘temporary leave to remain’, a legal status that is at the discretion of the Department of Justice, Equality and Law Reform.

Structure of the Report

This report is structured as follows:

Section 1: The rights of non-national parents and siblings of Irish children in Ireland.

This section will describe the evolution of law and policy relating to the parents and siblings in Ireland, in particular the judgments in the leading cases dealing with this issue, *Fajjonu* and *Lobe & Osayande*.

Section 2: International human rights law and the rights of non-national parents and siblings of children who are citizens or residents of the host state. The primary focus of this section will be on the jurisprudence of international human rights bodies including UN Human Rights Committee under the International Covenant on Civil and Political Rights and the European Court of Human Rights and relevant case law from States where the law on citizen is similar to that in Ireland.

Section 3: Citizenship. This section will examine the two principal types of citizenship, that deriving from the *jus soli* principle, which means that all persons born in the particular State is a citizen and this is what currently exists in Ireland and citizenship based on *jus sanguinis*, where, in order to be a citizen a person must have a parent who is a citizen.

Section 4: Regularisation of Status. In this Section the use of regularisations of status or ‘amnesties’ for non-nationals by States is analysed in particular in relation to regularisations for family reasons including for parents of children born in the host state such as France and New Zealand. Suggestions for best practice with regard to regularisation will be made.

Conclusion and recommendations

This section summarises a number of conclusions and recommendations that should be considered by the Government arising from this report.

Annex 1: Bibliography

Section 1: The rights of non-national parents and siblings of Irish children in Ireland.

1.1 Legislation and Constitutional provisions relating to Irish citizenship.

1.1.1 Legislation.

In the case of *Lobe and Osayande v. the Minister for Justice, Equality and Law Reform*, the fact that the children born in Ireland to both families are Irish citizens, was not disputed. Section 6 of the Nationality and Citizenship Act, 1956 sets out the categories of person entitled to Irish citizenship and Section 6(1) states ‘Every person born in Ireland is an Irish citizen from birth’. However, the Irish Nationality and Citizenship Act, 2001, states that ‘Subject to subsection (4) and (5) a person born in the island of Ireland is an Irish citizen from birth if he or she does, or if not of full age, has done on his or behalf any act which only an Irish citizen is allowed to do’. It is uncertain what may constitute ‘an act which only an Irish citizen is allowed to do’. The provisions of the 1956 Act were relied on in *Lobe and Osayande* and the 2001 Act was not referred to.

1.1.2 Constitutional provisions.

Under the Constitution every person born in Ireland is an Irish citizen. Article 2 of the Constitution 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 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.

Article 41 deals with the rights of the family. These rights are not confined to families who are Irish nationals.⁴ Article 41.1.1 reads,

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

The State undertakes to protect the family in Article 41.2.1.

⁴ *Lobe & Osayande v. Minister for Justice, Equality and Law Reform*. Para 241.

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 National and the State.

The role of the family in educating children is also recognised.

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.

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1.2 Cases decided prior to Fajujonu.

Prior to the Fajujonu case, two similar cases were decided. The first of these, *Pok Sun Shun & Ors v. Ireland & Ors* involved a Chinese national, who arrived in Ireland in 1978 and worked in a restaurant. He married an Irish national and they had three children, all of whom were Irish citizens. He was subsequently informed that he would have to leave the State. The family instituted proceedings and they argued that the wife and children as Irish citizens were entitled under the Constitution to have their family unit protected. The Court held that that rights given to the family were not 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’.

The second case *Osheku & Ors v. Ireland*,⁶ involved a Nigerian national who arrived in Ireland in 1979 and later married an Irish citizen and they had one child. The Minister informed Mr Osheku that he would not be permitted to remain in Ireland unless documentation proving that he could maintain himself and his family was submitted. This request was not complied with and the Osheku family later instituted proceedings. The Court held that the Constitutional rights of any of the family members would not be infringed by the deportation of Mr Osheku.

1.3 Fajujonu Case.

The Fajujonu case was central to the arguments of the families and the Minister in *Lobe and Osayande*. Mr and Mrs Fajujonu, Nigerian and Moroccan nationals respectively were living

⁵ *Pok Sun Shun & Ors v. Ireland & Ors*. [1986 ILRM 593

⁶ *Osheku & Ors v Ireland & Ors* [1986] IR 733

in Ireland without authorisation since 1981. In 1983 they had a child who was born in Ireland and therefore an Irish citizen. Subsequently they had two other children also born in Ireland who were not parties to the proceedings. The Fajujonu family came to the attention of the authorities when a prospective employer applied for a work permit for Mr Fajujonu. He was then requested by the Department of Justice to make arrangements to leave the State.

Proceedings were instituted in the High Court. The Fajujonu family argued that their daughter was an Irish citizen and as such, she was entitled to remain in Ireland with her family. It was argued that was an absolute right and therefore the Minister could not issue a deportation order in respect of the parents pursuant to the Aliens Act 1935. This argument was rejected by the High Court. It recognised that the daughter had constitutional rights deriving from her Irish citizenship, however, these rights were not absolute and could be restricted by, in this case the Minister for Justice exercising the powers granted to him under the Aliens Act 1935, i.e. to deport a non-Irish national. The High Court decision was appealed to the Supreme Court.

In the Supreme Court it was no longer argued on behalf of the family that the right of the daughter as an Irish citizen to remain in the State with her parents was an absolute right, but a constitutional right of great importance which could only be restricted for very compelling reasons. According to the then Chief Justice, Mr Justice Finlay,⁷ where ‘...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 went on to consider whether the Minister for Justice, pursuant to the Aliens Act 1935 could in any circumstances deport such a family. He concluded that the Minister could, ‘...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’.

In the same case, Mr Justice Walsh stated that if the Minister intended to deport the non-national parents of Irish children he [the Minister] ‘...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 is so predominant and so overwhelming in the circumstances of the

⁷ The Supreme Court, which heard this case, consisted of five judges. The judgments were given by the then Chief Justice and Mr Justice Walsh, the other judges agreed with them.

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' A high threshold was therefore set by the Supreme Court: the Minister would have to be satisfied that granting such parents leave to remain in Ireland would be contrary to the common good and the protection of the State. The Minister would also have to satisfy himself that deporting the parents was not disproportionate to the aim, which the Minister wished to achieve, i.e. protecting the integrity of the immigration system. The Minister was required to inquire into the facts and issues affecting the family concerned in a fair and proper manner.

1.4 Developments after Fajujonu.

Although the Fajujonu judgment did not prohibit deportation of the parents of Irish citizens, practice developed where parents and siblings of a child born in Ireland could make an application to the Department of Justice, Equality and Law Reform for leave to remain on the basis of their citizen child. At the time of the judgment, the numbers of non-EU nationals coming to Ireland either as asylum seekers or immigrants, such as workers, business persons, or students were very low.

However, in the mid-1990's the numbers of persons applying for refugee status in Ireland increased dramatically from a very low base ⁸and as the economy improved, the numbers of persons coming to Ireland for employment under the work permit and working visa/work authorisation schemes also increased significantly.

Concern was raised over the rise in the numbers of applications for leave to remain from parents and siblings of Irish citizen children and in particular that many of these applications were made by persons who had made an application for refugee status, the latter application being subsequently withdrawn in many cases.⁹ It was believed that the system was being abused and that non-nationals were coming to Ireland with the intention of having a child here in the knowledge that their child would be an Irish citizen and as a consequence family members could obtain leave to remain in the State on that basis.¹⁰ To date no comprehensive

⁸ In 2000 and 2001, the numbers of applicants for refugee status exceeded 10,000 and in 2002, the total number of applicants was 11,530.

⁹ According to the Refugee Applications Commissioner. 'Lots of people actually withdraw [from the asylum process] and having Irish-born children is by far the biggest reason for this'. Irish Times. 'Claims for asylum rise by 1,2000 this year'. December 31, 2002. 10,145 people have been granted leave to remain in Ireland on the basis on and Irish citizen child. Irish Times 'Immigrant parents face deportation'. July 28, 2003.

¹⁰ See for example: The Irish Times. 'Position of immigrant parents clarified'. July 18, 2003 and Irish Times. 'No room in the State for parents of citizen children'. September 2, 2003, describing the

research has been carried out on this issue, and it is therefore impossible to say that this perception presents an accurate picture of the intentions of immigrants.

In 1998, the Government decided to review existing policy with regard to granting leave to remain to the parents and siblings of Irish citizen children and no decisions on applications were made during that year. The following year the Department of Justice, Equality and Law Reform resumed accepting applications, and it continued to grant leave to remain to the parents and siblings of Irish children.

1.4 The Lobe and Osayande cases.

The Lobe family (parents and three children) arrived in Ireland in March 2001 and applied for refugee status. The family were nationals of the Czech Republic. They were informed, in July that a decision had been taken pursuant to Article 8 of the Dublin Convention to transfer their application for refugee status to the United Kingdom.¹¹ Their appeal against that decision was unsuccessful. A child, Kevin was born to the family in November and submissions were made to the Minister requesting that the family should not be deported on account of the birth of Kevin, who was an Irish citizen.

The family were informed that Minister has refused their application and the reasons for the refusal were set out in a Memorandum by a senior civil servant in the Department of Justice, Equality and Law Reform. These reasons were as follows: the length of time the family were in the State, the ability of the family including Kevin to adapt to life in the UK and the Czech Republic, the application of the Dublin Convention and the ‘overriding need to preserve respect for and the integrity of the asylum and immigration systems’. The circumstances regarding the Osayande family were almost exactly similar to those of the Lobe family, with some exceptions, including that the Osayande family were Nigerian nationals.

The families instituted proceedings and the types of relief sought included the quashing of the deportation order on the grounds that the children born in Ireland to the Lobe and Osayande

difficulties encountered by some maternity hospitals by the increase in the number of non-Irish nationals giving birth here.

¹¹ Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities (Dublin Convention) 1990. The Convention, which has now largely been replaced by the Dublin II Regulations, set out a mechanism for deciding which EU Member State is responsible for examining an application for refugee status. Section 8 of the Convention states, ‘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’.

families were Irish citizens and as such were entitled to the company care and parentage of their parents and siblings in the State and that as a consequence the Minister was not entitled to deport the other members of the families.

The High Court in rejecting the arguments of the families, held that these cases could be distinguished from the Fajujonu case in particular since the Fajujonu family had been in the State for an 'appreciable time'. It was also held that the reasons put forward by the Minister for deporting the families, the application of the Dublin Convention and the integrity of the asylum and immigration systems were 'not only grave and substantial, but also predominant and overwhelming'.

The decision of the High Court was appealed to the Supreme Court, the applicants arguing that the High Court judge was incorrect in law in holding that: the length of time the family spend in the State was a relevant consideration; the Minister had given adequate consideration to the rights of the child following deportation of the parents and in particular that the integrity of the asylum system was a grave and substantial reason and that the implementation of the Dublin Convention was a proper issue for consideration to prevail over the Constitutional rights of the Irish citizen child.

It was argued on behalf of the Minister that although the children were citizens, the rights conferred on citizens by the Constitution, must in certain circumstances yield to the requirements of the common good. It was also argued that the Fajujonu case was clearly distinguishable from the Lobe and Osayande case, in that the Fajujonu family had been in Ireland for eight years and they had three children born in Ireland. In addition since the Fajujonu case, a body of law relating to refugees and immigrants had been adopted. Therefore, the Minister was obliged to take into account Ireland's obligations under the Dublin Convention.

1.4.1 Decision of the Supreme Court – Relevant considerations.

The Supreme Court hearing this case consisted of seven judges, the majority (five) of whom dismissed the appeal made by the family. The Supreme Court does not usually sit as seven and the fact that it did in this case, reflects the seriousness of the issue before it.¹² As all seven judges handed down comprehensive individual judgments, it would not be possible to

¹² Fraser, Ursula. 'Two-tier citizenship – the Lobe and Osayande case'. Paper Presented at conference Women's Movement: Migrant Women Transforming Ireland held at Trinity College Dublin 20-1 March 2003. Available at: www.tcd.ie/sociology/mphil/dwnl/migrantwomenpapers.PDF

in this paper to provide an accurate summary of every issue discussed. The following are some of the principal issues that were considered by the Court.

1.4.1.1 Citizenship and family rights.

The Court recognised that the children in this case are Irish citizens, by virtue of the fact that they were born in Ireland. As Irish citizens, children in Ireland to non-nationals cannot be deported in any circumstances. The Court held that “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”.¹³

It went on to note that as citizens they had certain constitutional rights including the care and company of their parents and other members of their families. The Court noted that in a previous Irish case the rights of a child as a member of a family was set out: ‘(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.’¹⁴

However, it considered that this right to the care and company of its parents may be protected by residence in another jurisdiction

*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.*¹⁵

Adult citizens can choose whether or not to reside in Ireland, however, it was recognised that the situation regarding child citizens is different. Children cannot decide where they will reside, such a decision is normally made by the parents. Parental decisions are subject to the law and parents who have no right of residence in Ireland, cannot decide to reside in Ireland by deciding that their child should reside here. The Chief Justice noted that it would seem to him ‘...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’.¹⁶ He gave

¹³ *Lobe & Osayande v. Minister for Justice, Equality and Law Reform*. Para 33.

¹⁴ *Re J.H. (inf.)* [1985] I.R. 375.

¹⁵ *Lobe & Osayande v. Minister for Justice, Equality and Law Reform*. para 180

¹⁶ Para 37.

the example of US law, where it had been decided in several cases that the parents could not remain indefinitely in the US by deciding on behalf of their citizen children that they should reside in the US.¹⁷

It was noted that children of non-nationals could benefit from Irish citizenship as adults even if they had been removed from the State as children. According to Ms Justice Denham ‘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. (It) may benefit not only themselves but their descendants’.

The Court recognised that the family is the fundamental unit group in Irish society, however it held that ‘the rights of the family are not absolute. They have to be determined in balance with other conflicting rights and principles’. The State may, by law restrict family life in Ireland for the common good. It therefore, does not follow that the non-national families of Irish citizens have the right to reside in the State.

1.4.1.2 The Right of the State to control immigration.

The right of the State to control immigration was not in dispute. The judgment in *Pok Sun Shun v. Ireland* was cited in which the Court held that ‘(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’. It was acknowledged that legislation was adopted dealing with immigrants and refugees including the Refugee Act, which puts in place a system of processing claims for refugee status and incorporates the Refugee Convention into Irish law and the implementation of the Dublin Convention. It was also noted that the numbers of immigrants and persons applying for refugee status had increased considerably in recent years.

The Court held that the government was ‘...entitled to take the view that the orderly system in place for dealing with immigration and asylum applications should not be determined 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 application for asylum by

¹⁷ Para 41.

relying on the birth of a child to one of them during that period as a reason to permitting them to reside in the State indefinitely'.¹⁸

It had been argued on behalf of the families that 'ordinary immigration reasons' could not be a ground for deportation in these cases. In *Fajjonu* it was held that the family of an Irish citizen child could only be deported in exceptional circumstances and it was argued that 'what those exceptional circumstances might be was not spelt out in *Fajjonu*, but clearly a general desire to maintain the integrity of the immigration system would not constitute such a reason'. The Court rejected this argument and held that 'It is well established that the maintenance and integrity of the asylum and immigration systems is a legitimate aspect of public policy and the common good...'¹⁹ The priority and importance attached to maintaining the integrity of the asylum and immigration systems are greater now than when the *Fajjonu* case was decided, owing to the increased numbers of immigrants and asylum seekers coming to Ireland.²⁰ The Court held that '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'.²¹

With regard to compliance with the Dublin Convention, the court held that it is clearly in the interests of the common good that the State ensure that it applies the Convention to achieve the aims and objectives of the Convention and fulfils Ireland's obligation under the Convention.²²

Ms Justice McGuinness dissenting, also recognised the right of the State to control immigration, but questioned whether this reason was 'sufficient to meet the standards set by the Court in *Fajjonu*'.²³ She stated that it seemed necessary to her for the Minister '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'. She pointed to the danger of phrases such as 'respect for the integrity of the immigration and asylum system' being used to widely while acknowledging that there are situations where the integrity of the immigration and asylum systems must be maintained.

¹⁸ Para 103.

¹⁹ Para 130.

²⁰ Para 188.

²¹ Para 148.

²² Para 196.

²³ Para 279.

1.4.1.3 The European Convention on Human Rights and relevant case law from other jurisdictions.

While the European Convention on Human Rights had not been incorporated into Irish law when the *Lobe and Osayande* case was decided, several judges referred to judgments of the European Court of Human Rights relating to the balance between family rights and immigration control. In particular reference was made to the UK case of *Mahmood v. SSHD* in which the position of the European Court in relation to family rights and immigration control was summarised, including that States have a right to control immigration subject to their obligations under international treaty and removal of a family member does not necessarily infringe their rights under Article 8 of the ECHR providing that there are no insurmountable obstacles to the family living together in the country of origin even if this meant a certain amount of hardship for the family.

United States jurisprudence was cited in several of the judgments. It is particularly relevant as persons born in the US are also citizens irrespective of the nationality of their parents. In *Acosta v. Gaffney*, the US Court held that ‘...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’.²⁴ The Court also recognised that no case law had been cited from any State, which has similar citizenship laws as those in Ireland, supporting the rights of non-national parents of citizens to remain in the host state.

1.4.1.4 Distinction between Fajjonu and Lobe and Osayande.

The Court identified several issues on which the two cases could be distinguished. These included the appreciable time, over eight years which the Fajjonu family resided in Ireland, whereas both the Lobe and Osayande families were in Ireland for considerably shorter periods; the fact that the Fajjonu family had made its ‘home and residence’ in Ireland and the fact that Mr Fajjonu had been offered employment. Mr Justice Fennelly, dissenting, however could find no legal reasoning which would suggest the constitutional rights of the child was dependent on the length of time his or her parents were in the State nor the number of other Irish citizen children there may be in the family.²⁵

²⁴ Para 38.

²⁵ Paras 537 and 538.

The context in which the Minister was required to decide whether to make a deportation order in these cases was considerably different. There is now legislation in place and an increased number of asylum seekers coming to Ireland. It was noted that this legislation provides safeguards for non-nationals including the fact that the Minister is required to take certain factors into account before making a deportation order.

1.4.2 Consequences of the *Lobe* and *Osayande* Judgment.

The Supreme Court judgment was followed in February by an announcement by the Department of Justice, Equality and Law Reform that applications for leave to remain on the basis of an Irish child would no longer be accepted. The Department had a backlog of 11,000 applications dating back to September 2001.²⁶ A further announcement followed in July 2003 informing existing applicants that the separate procedure for examining applications from parents and siblings of Irish children would no longer apply. Persons who had already been granted leave to remain are not affected by the new measures.

In all cases where a decision to deport had been made, the person affected will be given the opportunity to make representations to the Minister under existing law. There is no provision for representations to be made prior to the affected person being notified that the Minister proposes to make a deportation order. In cases where the person otherwise liable for deportation wishes to leave the State voluntarily, he or she will be provided with assistance. However for those who wish to make representations, legal aid is not available. By mid-August at least 7000 families had received notification that the Minister proposed to deport them.²⁷

1.5 The Law relating to Deportation in Ireland.

Section 3 of the Immigration Act 1999, governs the deportation of non-nationals. It replaces the provisions dealing with deportation in the 1935 Aliens Act, which were found to be unconstitutional.²⁸ Section 3 permits the Minister for Justice, Equality and Law Reform to make a deportation order, which requires the person named on the order to leave the State and remain outside the State thereafter.

²⁶ The Irish Times. 'No room in the State for parents of citizen children'. March 2, 2003.

²⁷ The Irish Times. 'Refugees face being deported after new deadline'. August 12, 2003.

²⁸ In *Laurentiu v the Minister for Justice*, [1999] 4 IR 26, Section 5(1)(e) of the Aliens Act 1935, which provided for the deportation of non-nationals was found to be unconstitutional.

If the Minister intends to make a deportation order, he is required to notify the person concerned of the proposal to deport and the reasons for it, where necessary and possible in a language the person understands. A person who has been notified that the Minister intends to make a deportation order may make representations to the Minister and the Minister will take any representations into consideration before making a deportation order. The person will also be informed that s/he can agree to the deportation and the necessary arrangements will be put in place or s/he can agree to leave the State voluntarily and must inform the Minister as to his or her arrangements.

The Minister is required to have regard to the following factors when determining whether to make a deportation order:

- The age of the person,
- The length of time the person has lived in Ireland
- The person's family and domestic circumstances
- The nature of the person's connection with the State
- The person's employment record
- The person's employment prospects
- The person's conduct both within and outside the State
- Humanitarian considerations
- Representations made on behalf of the person
- The common good
- National security and public policy considerations.

Parents and siblings of Irish citizens are now required to make representations under this process if they are informed that the Minister intends making a deportation order.

Section 2. International human rights law and the rights of non-national parents and siblings of children who are citizens or residents of the host state

The rights of persons, which are non-nationals of the host State are protected under international human rights instruments, which Ireland has ratified, including the International Covenant on Civil and Political Rights and the UN Convention against Torture.²⁹ Among the rights protected are the right to respect for family, protection against arbitrary interference with family life, and protection against *refoulement*. The collective expulsion of non-nationals is also prohibited.

2.1 Family rights

From the Universal Declaration on Human Rights (UDHR) to more recent human rights treaties, particular emphasis has been placed on role of the family as the special group unit within society. According to Article 16 (3) of the UDHR: ‘The family is the natural and fundamental group unit in society and is entitled to protection by society and the State’.

2.1.1 European Convention on Human Rights

According to Article 8(1) of the European Convention on Human Rights: ‘Everyone has the right to respect for his private and family life, his home and correspondence’. Article 8(2) reads: 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 and morals or for the protection of the rights and freedoms of others’.

A married couple will be regarded as a family within the meaning of Article 8(1) as will a co-habiting couple where they can demonstrate a committed relationship akin to marriage.³⁰ The relationship between a child and his or her parents will generally constitute family life. The Court has concluded that family life exists in spite of the fact that the father was separated

²⁹ Full title is Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.

³⁰ *Abdulaziz, Cabales and Balkandali v United Kingdom* [1985].

from his partner before the birth of the child and did not formally recognise the child until 10 months after the birth and did not contribute to the child's maintenance.³¹

The Court has dealt with several cases involving claims by non-citizens that their removal from the host state, would amount to 'interference' in their family life. According to one commentator, when it has found that 'private and/or family life exists, the Court usually recognises the act of deportation, expulsion or permanent exclusion of a territory *per se*, to constitute and interference'.³²

However, States are not obliged to permit a family to establish itself in the country of its choice. The Court found that 'the duty imposed by Article 8 could not be considered as extending to a general obligation on the part of 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'.³³

In two UK cases *Jaramillo v UK* and *Sorajbee v UK*³⁴, the applicants were born in the UK and were British citizens by virtue of their birth there.³⁵ In both cases the applicants' mothers were living illegally in the UK and, their removal was sought by the British Government. The European Commission on Human Rights considered whether removal of the parent would be an unjustifiable interference with the family life of the applicants and in this case, held that it would not as the children were four years old and therefore at an 'adaptable' age.

In a similar case, *Poku v UK*, the Commission held that the removal of the mother of a 10 year old would not violate Article 8. However in *Mehemi v France*,³⁶ the applicant was the father of three children aged fifteen, fourteen and twelve. He was an Algerian national, born in France. His wife was Italian, legally resident in France. He was convicted of possessing a dangerous drug and in addition to a sentence of 6 years imprisonment, the French Court ordered that he should be permanently excluded from France. The Court held that the applicant's rights under Article 8 were violated. It was of the opinion *inter alia* that although enjoyment of family life was not impossible in Italy, it would mean a 'radical upheaval' for the children.

³¹ *Boughanemi v France* [1996] 22 ECHR 228

³² Lambert, Helene. *The European Court of Human Rights International Journal of Refugee Law* Oxford University Press. Vol 11 No 3 1999, pp 440-441.

³³ *Abdulaziz, Cabales and Balkandali v United Kingdom* [1985]

³⁴ Application No 24865/94, Admissibility Decision (23 October 1995 and Application No 23938/94 Admissibility Decision (23 October 1995). Available at <http://hudoc.echr.coe.int>

³⁵ Children born in the UK are, since 1983 citizens from birth only if one or both parents are citizens.

³⁶ *Mehemi v France* 26 September 1997

In *Dalia v. France*, although the applicant had a French citizen child, the European Court of Human Rights, held that her removal would not violate Article 8 despite the fact that she would be separated from family members including her son. The applicant in this case had a conviction for heroin trafficking. The Court held that although her family ties were mainly in France, she had 'certain family relations' in her country of origin, Algeria. In addition, it noted that because Ms Dalia gave birth to her French son while living in France without authorisation, she could not rely on this relationship in proceedings relating to her deportation.³⁷

2.1.1.1 Incorporation of the European Convention on Human Rights into Irish Law

In December, the European Convention on Human Rights Act 2003 finally came into force, incorporating the European Convention on Human Rights into Irish law. It is arguable whether the incorporation will have any impact on the rights of non-national parents of Irish citizens since cases of this type that received a favourable decision from the European Court of Human Rights, usually involved families that had been in the host state for a considerable period of time.

The method of incorporation has been described by Prof William Binchy as by 'legislation which contains an interpretive provision designed to encourage harmonising domestic law with Convention norms, supplemented by a sanction against State organs for failure to perform their functions in a manner compatible with the State's obligations under the Convention, as well as declarations of incompatibility, backed by the provision for *ex gratia* payments'.³⁸

The Act obliges 'organs of the State' to perform their functions in a manner which is compatible with the Convention unless that body is acting pursuant to a statute or rule of law. Organs of the State includes bodies such as tribunals, local authorities, health boards. The Dail and Seanad and the Courts are not included. Section 2(1) of the Act, obliges the Courts to interpret all legislation in so far as possible in accordance with the 'convention provisions'. If a person believes that she or he has suffered injury or loss because an organ of the

³⁷ *Dalia v. France*. 1998-1, Eur. Ct. H. R. 76 P54 (1998) cited in Starr, Sonja & Brilmayer, Lea. 'Family Separation as a Violation of International Law'. 21 Berkeley J. Int'l L. 213, 2003, p226.

³⁸ Binchy, William. 'The Bill, the Advantages and Disadvantages of the Approach Taken and Possible Alternatives'. Paper Presented at Law Society of Ireland Conference. 19 October 2002. The European Convention on Human Rights Bill 2001, p.9.

state has not performed its function in a manner compatible with the Convention, they may seek damages in the Circuit Court or the High Court.

If it is not possible to interpret a statute or rule in a manner compatible with the convention, then Irish law will prevail and the organ of state, will not then be obliged to comply with the convention even if the person's convention rights are infringed.³⁹ In such cases a person may seek a 'declaration of incompatibility', i.e. that the law in question is incompatible with Ireland's obligations under the ECHR. However, this does not mean that the law is invalid and it may continue in force. In such cases, the Courts do not have the right to grant any remedy and the applicant must apply to the Attorney General for damages.

Although many immigration cases have been taken under the equivalent UK legislation, the Human Rights Act 1998, it is unlikely that the incorporation of the European Convention on Human Rights will have a major impact on the rights of the non-national parents of Irish citizens.

2.1.2 International Covenant on Civil and Political Rights.

The most significant recent decision of the UN Human Rights Committee regarding a violation of provisions of the International Covenant on Civil and Political Rights prohibiting interference with family life is *Winata v Australia*.⁴⁰ This case involved an Indonesian couple Hendrick Winata and his partner who were living in Australia without authorisation. They had overstayed on a temporary visa and later applied for refugee status but were refused. Their child Barry was born in Australia and acquired Australian citizenship on reaching 10 years of age. They argued that removal of the parents would amount to a violation of their and their rights under Articles 17, 23(1) and 24(1) of the International Covenant on Civil and Political Rights (ICCPR).

Article 17 states: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family home or correspondence...' It also states: 'Everyone has the right to the protection of the law against such interference or attacks.' Article 23(1) states: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State'. In Article 24(1) it is stated that: 'Every child shall have without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right

³⁹ Lowry, Anthony. 'Practice and Procedure under the European Convention on Human Rights Act, 2003'. Bar Review November 2003, p183, 185.

⁴⁰ *Winata v. Australia* Communication 930/2000. 20 July 2001 CCPR/C/72/930/2000.

to such measures of protection as are required by his status as a minor, on the part of his family, society and the State’.

The parents argued that if they were deported to Indonesia and Barry remained in Australia, he would no longer have any family in Australia and if he accompanied his parents he would be ‘completely at sea and at considerable risk if thrust to Indonesia’. They were of the opinion that the removal of the parents would amount to an interference with their family life, which could not be considered reasonable, and would amount to an arbitrary interference within the meaning of Article 17 of the ICCPR. According to General Comment 16⁴¹ (on Article 17), the prohibition of ‘arbitrary interference’ is ‘intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances’.

The Australian Government argued that the Covenant only protects the right to family life, but not the right to family life in a particular country. It contended that if the parents returned to Indonesia they could visit Barry, a situation analogous to that experienced by many families whose children were in boarding school.

The Human Rights Committee, in this case considered that:

...a decision of the State to deport two parents and to compel the family to choose whether a 13-year old child, who has attained citizenship of the State party after living there for 10 years, either remains alone in the State party or accompanies his parents is to be considered ‘interference’ with the family...

The Committee acknowledged that States had a right to regulate the entry of non-nationals to their territory and to that end could deport persons residing there without authorisation. It noted that even where children are born in, and acquire the nationality of a State party, the removal of the parents would not necessarily be considered arbitrary under Article 17. However, the Committee took account of the fact that Barry had grown up in Australia and the family lived together there since his birth and therefore the State was required to ‘...demonstrate additional factors justifying the removal of both parents that go beyond a simple enforcement of its immigration law in order to avoid a characterisation of arbitrariness’.

⁴¹ General Comments are issued by the relevant UN monitoring committee, in this case the Human Rights Committee, as a guide to States in interpreting various provisions in the particular Convention.

If this decision were to be applied in the Irish context it would appear that the State may remove the non-national parents of Irish citizens. However each case must be dealt with on its own merits and removal of parents that have lived in Ireland with their children for a significant period of time could certainly be considered to amount to arbitrary interference with family life.

A similar case before the American Courts, involving the deportation of Eddy Maria, a national of the Dominican Republic who was a lawful permanent resident and whose parents and some of his siblings were US citizens, raised US obligations under the ICCPR. Mr Maria had been refused a 'hardship hearing', which would consider humanitarian issues in relation to the impact of a proposed deportation. The Court held that deportation without such a hearing would amount to an interference with family life contrary to international law, specifically the ICCPR. The Court held that deportation proceedings that do not take account of the impact of family separation may violate Article 17 of the ICCPR dealing with arbitrary and unlawful interference with family life and Article 7 prohibiting cruel, inhuman and degrading treatment.

2.1.3 UN Convention on the Rights of the Child (CRC).

The Convention on the Rights of the Child was adopted by the United Nations General Assembly in 1989 and has achieved almost universal ratification. Unlike other international human rights treaties, the CRC does not have a complaint mechanism, whereby an individual may complain to the treaty monitoring body, the Committee on the Rights of the Child that his or her rights under the Convention have been violated. However, the Committee as part of its function to monitor who states implement the Convention, examines periodic reports submitted by States. It will then issue concluding comments on the progress that the State Party has made in fulfilling its obligations under the Convention. States must report initially two years after ratification and then at 5 yearly intervals. Ireland ratified the Convention in 1992 and its first report was considered by the Committee in 1998.

The Preamble to the Convention emphasises the importance of family life to the development of children as follows:

Convinced that the family as the fundamental unit of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community. Recognising that the child, for the full and harmonious development of his or her personality should grow up in a family environment in an atmosphere of happiness, love and understanding.

Each child is granted in Article 7 ‘as far as possible the right to know and be cared for by his or her parents’ and Article 8(1) grants the ‘right of the child to preserve his or her identity including...family relations...without unlawful interference’. The article most relevant to the issue of family separation where the parents of a citizen or legally resident child are liable to deportation is Article 9, which provides that ‘States Parties shall ensure that a child shall not be separated from his or her parents against his will’. This is not an absolute right, but is limited ‘when competent authorities subject to judicial review determine, in accordance with applicable law and procedures that such separation is necessary for the best interests of the child’.

The family rights of children under the Convention have been considered by domestic jurisdictions in several states in deportation cases.

In *Beharry v. Reno*⁴², Mr Beharry was a Trinidad national, who was a lawful permanent resident in the United States. His six year old daughter and his sister were US citizens. He was convicted of a crime and during his imprisonment, deportation proceedings were initiated. He appealed this decision to the Board of Immigration Appeals (BIA), requesting three types of relief: a compassionate hearing, asylum and withholding deportation pursuant to the relevant US immigration legislation. His appeal was refused and he appealed to the Court, which overturned the decision and ordered that he should receive a full hearing by the immigration authorities.

The Court held that because Mr Beharry has a US citizen daughter, several of the provisions of the Convention on the Rights of the Child applied in this case including the requirement set out in the Preamble to the Convention for the ‘protection and assistance of the family’, Article 3 and Article 7 which states that a child has ‘as far as possible, the right to know and be cared for by his or her parents’.

The Court held that the fact that the US has not ratified the Convention was immaterial since the provisions of the Convention constitute international customary law on account of their universal acceptance and are therefore binding on the US.

2.1.3.1 Best interests of the child.

Article 3.1 of the UN Convention on the Rights of the Child, states:

⁴² *Beharry V Reno* 183 F. Supp. 2d 584 (E.D.N.Y. 2002).

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.

'Actions concerning children' have been held to include cases relating to the deportation of non-citizen parents of citizen children'.⁴³

2.1.3.1.1 Conclusions of the Committee on the Rights of the Child.

The Convention prohibits neither the deportation non-national children nor the deportation of non-national parents, which results in children who are citizens or residents being forced to leave. However, the Committee has expressed concern in concluding comments regarding states' lack of attention to the rights of the child in the immigration process and in particular that States do not reflect the 'best interests of the child' principle in legislation and procedures relating to immigration.

Considering the second report of the United Kingdom, the Committee recommended that the UK '...adopt the best interests of the child as a paramount consideration...in any legislation relating to ...' *inter alia* immigration practices.⁴⁴ The Committee specifically addressed the issue of the rights of children who face removal because their parents are liable for deportation. It regretted situations 'where refugee and immigrant children born in Canada may be separated from their parents facing a deportation order'.⁴⁵ In its consideration of Canada's second periodic report, the Committee was concerned that '...the principle that primary consideration should be given to the best interest of the child is still not adequately defined and reflected in some legislation, court decision and policies affecting certain children, especially those facing situations...' including deportation.⁴⁶

2.1.3.1.2 Relevant court decisions.

The Australian High Court, in 1995, stated that obligations under the Convention on the Rights of the Child, in particular the 'best interests of the child' must be a 'primary consideration' when making decisions on deportation.⁴⁷ A Malaysian national Ah Hin Teoh,

⁴³ Todres, Jonathan. 'Emerging Limitations on the Rights of the Child. The UN Convention on the Rights of the Child and its Early Case Law'. 30 Colum. Human Rights L. Rev. 159, Fall 1998, p171.

⁴⁴ Committee on the Rights of the Child. Concluding Observations: United Kingdom of Great Britain and Northern Ireland. CRC/C/15/Add.1888 9 October 2002.

⁴⁵ Committee on the Rights of the Child. Concluding Observations: Canada. 20 June 1995 CRC/C/15/Add.37.

⁴⁶ Committee on the Rights of the Child. Concluding Observations: Canada. CRC/C/15/Add.215.

⁴⁷ *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh* F. C. No 95?013(1995) 128 ALR 353, (1995) 69 ALJR 423, (1995) EOC 92-595 (extract). (1995) 183 CLR 273.

applied for a grant of resident status in Australia. He has been living there for some years having married his brother's widow (an Australian citizen), who had four children and three children were subsequently born to Mr Teoh and his wife. As Mr Teoh had a criminal record, he was deemed ineligible for this status and deportation proceedings were commenced. The decision was appealed to the Federal Court which held *inter alia* that as Australia had ratified the Convention on the Rights of the Child parents and children who might be affected by a relevant decision had a legitimate expectation that the Australian authorities would act on the basis that the 'best interests' of the children would be a 'primary consideration' and ordered that the original decision to refuse Mr Teoh's application be set aside and the deportation stayed until the application was considered by the Minister.

This decision was appealed by the Minister and the High Court in rejecting the Minister's appeal, held that while the Convention was not incorporated into domestic Australian law, 'ratification of a convention is a positive statement by the executive government and its agencies and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision makers will act in conformity with the Convention and treat the best interests of the children as a 'primary consideration'.

As a consequence 'if a decision maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course'. The Court rejected the Minister's argument that Mr Teoh's deportation was not 'an action concerning children'.

The Canadian Supreme Court decided a similar case in 1999. In *Baker v Canada (Minister for Citizenship and Immigration)*, which involved the deportation of a woman, Ms Baker who was the mother of four Canadian citizen children to Jamaica, the Court held the best interests of Canadian children must be taken into consideration. It held that 'substantial weight' must be given to children's interests, a principle which is reflected in the Convention on the Rights of the Child, to which Canada has agreed to be bound. However, the Court added that 'This is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying a humanitarian and compassionate claim, even when children's best interests are taken into consideration'.

The Court was critical of the official dealing with Ms Baker's claim who was according to the Court, 'completely dismissive' of the rights of Ms Baker's children. In his report, the official made derogatory comments about Ms Baker including she 'is a paranoid schizophrenic on welfare' and 'She has no qualifications other than as a domestic' which the Court found to be unacceptable. The Court also held that reasons must be given for making a deportation order.

2.1.3 Conclusion

As in Irish domestic law, the rights of the family are not absolute in human rights treaties. It would appear that families that residing in the host country for some time are in a stronger position than those that have recently arrived. The European Court of Human Rights and the UN Human Rights Committee have considered that removal of non-nationals in such cases amounts to interference where children are no longer at an 'adaptable age' and where their removal would result in a 'radical upheaval' for the children.

The Baker case in Canada, the Beharry case in the US and the Teoh case decided by the Australian Courts share circumstances similar to the position facing the non-national parents of Irish citizens, the non-national parent of a citizen or a resident is facing deportation. The Courts in both cases held that the Convention on the Rights of the Child must be considered when making a decision in these cases, and the best interest of the child or children must be given primary consideration.

However, in other jurisdictions the Convention has been interpreted in a more restrictive manner. The New Zealand High Court in *Patel v New Zealand* rejected an appeal against the making of a deportation order in respect of a couple and their child and stated that the Convention's '...obligations are stated in broad and relative terms and that in respect the best interests of the child it is 'a' not 'the' primary consideration and is not 'the' or 'a' paramount consideration'.

The Committee uses both phrases 'primary consideration' and 'paramount consideration' when setting out the obligations of States regarding the 'best interests of the child principle'. It has been made clear by the Committee that this principle is of the utmost importance when deciding issues relating to children including immigration cases and must not be ignored by decision makers. While deportation is not prohibited under the Convention, situations may arise, therefore where deporting the parents of non-national parents of citizen children may not in the best interest of the child. The treatment of Irish children of non-national parents

will undoubtedly be an area for concern for the Committee when Ireland presents its next periodic report.

2.1.2 The right to protection against *refoulement*

The 1951 Convention relating to the Status of Refugees, the International Covenant on Civil and Political Rights and the UN Convention against Torture all contain provisions prohibiting *refoulement*, the return of a person to where his or her life or liberty would be threatened or s/he would be subject to inhuman or degrading treatment or punishment. Extensive jurisprudence exists confirming the rights of non-nationals to protection against *refoulement*.

2.1.2.1. The Convention relating to the Status of Refugees.

Many of the parents and siblings of Irish citizens affected by the Supreme Court judgment will have been through the refugee determination procedure and will have been found not to be refugees. The refugee determination process followed in Ireland is set out in the Refugee Act 1996, as amended. This legislation incorporates the 1951 Convention relating to the Status of Refugees into Irish law. A refugee is defined in the Convention and the Refugee Act as a person ‘...who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country...’ Irish legislation defines the term ‘particular social group’ to include persons fearing persecution due to their sex, sexual orientation or membership of a trade union. States may not return a refugee where his or her life or freedom would be threatened on account of the enumerated grounds.⁴⁸

Before the State decides to return any person including the parents of Irish citizens, it must consider not only whether a person is a refugee but also whether there is a risk that return would place such persons in danger of treatment prohibited under human rights law. In some cases they may be at additional risk because of the birth of their child, for example, a single mother returning to a state where births outside marriage are not acceptable. In addition, situations may arise where the Irish citizen child could be at risk. Ms Justice McGuinness in her judgement in the *Lobe and Osayande* case noted that it would be possible to ‘envisage situations where illegal immigrants 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

⁴⁸ Convention relating to the Status of Refugees, Article 33. Refugee Act, 1996, (as amended) Section 5.

child's welfare might be under threat for reasons arising from, say religion, gender or tribal origin'.

2.1.2.2 European Convention on Human Rights.

Article 3 of the European Convention on Human Rights States that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. This right is absolute, therefore there can be no derogation from Article 3 whatever the circumstances that may exist including war, state of emergency, combating terrorism etc. All persons whether they are a national of the state or not,

are protected. Most significant to non-nationals is the duty of a State that has ratified the Convention, such as Ireland to protect them from the treatment prohibited, by not returning them to a State where they would be at serious risk of being subjected to such treatment. In *Soering v. United States*, the Court held:

Where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.

This provision also applies where a person is being deported for example, at the end of the asylum process. Whereas the Refugee Convention specifies that a link must exist between the persecution feared and certain grounds set out in the Convention, Article 3 applies when a person is at real risk of the proscribed treatment, irrespective of the reason. In addition to persecution by State and non-State agents, the lack of adequate medical facilities has been held by the European Court of Human Rights to amount to treatment prohibited under Article 3.⁴⁹ In order to amount to treatment prohibited under Article 3, the 'ill-treatment must attain a minimum level of severity if it is to fall within scope of Article 3'.⁵⁰ A higher level of proof than in refugee cases will be required.

The Court can request States not to deport persons until their case is decided, under Rule 39 which states: The Chamber or, where appropriate, its President may at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim

⁴⁹ In *D v. UK*, the applicant, a national of St Kitts, was convicted of a serious crime in the UK. While serving a prison sentence, he was found to be suffering from HIV. When he was released, he was ordered to be deported. He was, at that time very ill and receiving assistance from a UK charity. The European Court decided that he should not be deported as he would be unable in St Kitts to access the necessary drug treatment and he had no relatives or friends who could care for him. In view of the exceptional circumstances of this case, the Court found that his removal to St Kitts would amount to treatment prohibited under Article 3.

⁵⁰ *Ireland v. United Kingdom* (1978) Series A no. 25, p162.

measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it’.

2.1.2.3 The UN Convention Against Torture

The UN Convention Against Torture, which was ratified by Ireland in 2002, in Article 3(1) states: ‘No State Party shall expel, return (*refouler*) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture’. Torture is defined in Article 1 of the Convention as the infliction of severe pain or suffering.⁵¹ Such suffering may be both physical and mental. However, persons who are subjected to torture by non-state actors e.g. armed opposition groups, members of the local community or family members will not generally be protected under the Torture Convention.

States are prohibited from returning persons if there are ‘substantial grounds for believing’ that they would be in danger of being tortured. In such cases, the credibility of the person may be called into question by decision makers. However the Committee Against Torture, (the treaty monitoring body) has noted that complete accuracy cannot in general be expected from torture survivors and in *Khan v. Canada*, it stated that ‘even if there could be some doubts about the facts adduced by the author, it must ensure that his security is not endangered’.⁵²

2.1.2.4 International Covenant on Civil and Political Rights.

Article 7 of the International Covenant on Civil and Political Rights provides that ‘no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment’. The Human Rights Committee has held that this provision implies that States must not return a person to face such treatment in their country of origin. In an extradition case it noted that ‘if a State party extradites a person within its jurisdiction in circumstances such that as a result

⁵¹ The definition set out in Article 1 of the Torture Convention is as follows: ‘Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information of a confession, punishing him for an act he or a third party has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

⁵² *Khan v. Canada* Committee against Torture, communication No 15/1994, U.N. doc. A/50/44 at 46 (1995).

there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State Party itself may be in violation of the Covenant'.⁵³

2.1.2.5 Conclusion.

The Human Rights Conventions, by which Ireland is bound, prohibit persons from being returned to their country of origin if they are at serious risk of suffering torture, inhuman or degrading treatment or punishment. This means that careful consideration must be given to all cases where people have expressed a fear of return in order for Ireland to fully abide by its obligations under these treaties. In order for persons liable for deportation to be able to prepare their case, legal aid must be provided and sufficient time and resources should be afforded to people liable for deportation, including the parents of Irish children to enable them to secure documentary evidence including medical reports if relevant in the particular case.

While Ireland has now incorporated the European Convention on Human Rights, which means that infringements of rights set out in the Convention may be raised in Irish Courts, Ireland has not incorporated the International Covenant on Civil and Political Rights and the Convention against Torture, which means they may not be raised in the Irish Courts. If a non-national parent considers that his or her rights under the Covenant and Convention have been infringed, their only recourse may be to complain to the relevant monitoring body, which is usually a lengthy process.

Ireland has clear obligations to non-national parents under the Convention and Covenant not to return them where they would be at risk of torture and other prohibited practices.

2.1.3 Collective expulsion of non-nationals.

2.1.3.1 European Convention on Human Rights.

Collective expulsion of non-nationals is prohibited under Article 4 of Protocol 4 to the European Convention on Human Rights, which has been ratified by Ireland. Article 4 states: 'The collective expulsion of aliens is prohibited'. In a recent case before the European Court of Human Rights, *Conka v Belgium*, 74 Roma from Slovakia who had applied for refugee status in Belgium were deported in October 1999. The European Court of Human Rights found that their deportation violated Article 4 of Protocol 4 to the European Convention on

⁵³ *Kindler v. Canada*. Communication No 470/1991, Human Rights Committee, UN doc. CCPR/C/48/470/1990

Human Rights, which prohibits collective expulsion. The Roma had been lured to a police station under the pretext of competing additional papers in relation to their claims for refugee status. They were then taken to a closed detention facility from where they were deported. The deportation was carried out despite a request from the European Court of Human Rights requesting that the Belgian Government stay deportation for eight days while the Court considered whether such deportation would amount to a violation of the ECHR.

In relation to Article 4 of Protocol 4, the Court held that:

...at no stage in the period between the service of the notice on the aliens to attend the police station and their expulsion had the procedure afforded sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account.

The court found that there was a violation of Article 13, which guarantees the right of effective remedy, taken together with Article 4 of Protocol 4. The applicant had no guarantee that his case would be heard before the Conseil d'Etat (Council of State) before his expulsion. In addition the Court also pointed out that: 'In a State of rights, illegal persons are not without rights. They must be able to trust the communications of the administrative authorities...'

Moreover, Protocol 7, Article puts in place procedural safeguards relating to expulsion of aliens as follows:

1 An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

a to submit reasons against his expulsion,

b to have his case reviewed, and

c to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2 An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order

3.1.3.2 Conclusion

In the case of Irish citizen children, the Minister for Justice, Equality and Law Reform, guaranteed that he will not resort to 'mass deportations' of their parents and siblings and that each case would be dealt with on its own merits. This policy is in accordance with Ireland's obligations under Protocol 4.⁵⁴

⁵⁴ The Irish Times. 'McDowell rules out large scale deportation'. January 24, 2003.

Section 3: Citizenship.

3.1 The basis of citizenship.

There are four principal ways of acquiring citizenship, by birth, descent, naturalisation and registration. Citizenship in most States is based on either *jus soli* or *jus sanguinis*. *Jus soli* is citizenship by birth, where a child acquires citizenship of the host country, by virtue of being born there, irrespective of the nationality of the parents. This applies in common law states including Ireland, the United States, New Zealand and Canada and Latin American states including Brazil, Argentina and Venezuela.

Jus sanguinis is a system of acquiring citizenship, whereby citizenship is by descent (literally by blood). In order for the child to be a citizen, one or both of his/her parents must be citizens at the time of the child's birth. Some states that applied citizenship based on *jus soli*, including Australia and the United Kingdom amended their citizen laws restricting citizenship to those born in the state where at least one parent is also a citizen. Citizenship by descent is the most common way of acquiring citizenship and exists in most European States. However many states have adopted a combination of these systems, for example states which permit citizenship by birth, generally grant citizenship to children of citizens born abroad.

Citizenship by naturalisation occurs in most states, whereby the state confers citizenship on non-nationals who have fulfilled certain criteria, including a residence requirement. In Ireland this is generally 5 years. In addition the applicant must be of good character and is often required to meet language requirements. In some cases, the person is required to renounce his or her previous nationality.

Citizenship by registration occurs very rarely and may exist where countries have long-standing ties, for example in commonwealth countries.

3.2 Citizenship in various jurisdictions and the consequences for the families of citizens.

Only a few States have laws on citizenship similar to Ireland and in general, non-national parents and families of citizen children are liable for deportation. However, in general, additional factors may have to be taken into account, for example in the United States, non-national parents are permitted to remain if their deportation will result in 'extreme hardship'

for their children and in Canada also very serious consideration must be given to the rights of children in deportation cases involving non-national parents.

3.2.1 The United Kingdom.

All persons born in the UK before 1 January 1983 were British citizens based on the *jus soli* principle dating from the thirteenth century. Those born after that date become British citizens only if one or both their parents is a British citizen or is settled in the UK at the time of the child's birth.⁵⁵ As UK citizens, children have the right to reside in the UK or to return there as adults if taken to live in another state by their parents or if the parents were deported and as a consequence, the UK citizen child was removed from the UK.

However, UK citizens, in most cases of African origin in such cases have faced difficulties in convincing British High Commissions in other countries that they are UK citizens, travelling to third countries on British passports and encountering difficulties in convincing immigration officers that they are in fact, British and being arrested by the UK authorities as illegal entrants.⁵⁶

3.2.2 France.

In France, as a result of the Law of July 22, 1993 persons born in France of non-national parents can acquire French citizenship on reaching 18 subject to the expression of intention, if there are residing in France when they reach 18 and have been residing there since for five years since they were 11. Prior to that, generally, children born in France were French citizenship irrespective of the nationality of their parents.

France does not generally permit the deportation of parents of French citizen children and many of these families have had their status regularised by the French Government.

3.2.3 The United States.

The Fourteenth Amendment to the US Constitution provides that 'all persons born or naturalised in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State in which they reside'. In *US v. Wong Kim Ark* the Supreme Court

⁵⁵ British Nationality Act, 1981.

⁵⁶ Joint Council for the Welfare of Immigrants (JCWI) *Immigration, Nationality and Refugee Law Handbook*, p396.

held that a child born in America of Chinese parents was a US citizen ‘irrespective of parentage’.⁵⁷ US citizen children are, on reaching 21 entitled to sponsor their parents and other family members to come to the United States, if they are not already there.

In the United States, parents of US citizen children are deported if they are residing in the US illegally, and while the children have the right to reside in the US, in practice the parents take their children with them when they are deported. In *Acosta v Gaffney*, the Court held that a ‘citizen child of non-citizen parents cannot claim *de facto* deportation if the undocumented parents are deported and take the citizen child with them’.⁵⁸

In the US, the Attorney General may suspend deportation where deportation would ‘result in extreme hardship to the alien or to his spouse, parent or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence’. It is difficult for immigrant relatives of a US citizen to establish ‘extreme hardship’. The Supreme Court held in *INS v Jong Ha Wong* that the Attorney General’s Office ‘have authority to construe ‘extreme hardship’ narrowly should they deem it wise to do so’.⁵⁹

It would appear that where children are older and have lived their entire lives in the US, the Courts and the Board of Immigration Appeals are more willing to consider that they may experience hardship if the parent is removed. In a recent case, the Board held where the Taiwanese parents of US citizen children were being deported that ‘These children have lived their entire lives in the United States and are completely integrated into their American life styles. We are satisfied that to uproot the eldest daughter Claire, at this stage of her education and social development and to require her to survive in a Chinese-only environment would be a significant disruption that could constitute extreme hardship’.

As in Ireland, it has been suggested that women come to give birth in the knowledge that their child will be a citizen. However, no evidence has been found to support this by the Chair of the Commission of Immigration Reform who noted that ‘the vast majority of aliens do not come to America to bear children though it does happen. In three years and dozens of hearings, consultations and expert discussions no one has ever reported to the Commission

⁵⁷ *US v. Wong Kim Ark* 169 US 649 (1898) cited in Hsieh, Christine J. 'American Born Legal Permanent Residents? A Constitutional Amendment Proposal'. 12 Geo. Immigr. L. J. 511 Spring 1998, p518.

⁵⁸ *Acosta v Gaffney*. 558F. 2d 1158(3d. Cir.1977) cited in Hsieh, *ibid* at p526.

⁵⁹ *INS v Jong Ha Wong* cited in Wolf, Giovanna I. 'Preserving Family Unity: The Rights of Children to Maintain the Companionship of their Parents and Remain in their Country of Birth'. 4 Ind. J. Global Leg. Stud. 207, Fall 1996, p 219.

that the vast majority of births are anything more than a reflection of the large number of illegal aliens that are here.⁶⁰

3.2.4. New Zealand.

This is also the situation in New Zealand where under Section 3 of the Immigration Act 1987 guarantees the rights of New Zealand born children as citizens to remain in New Zealand and protects them from removal or deportation. However, the New Zealand High Court held in *Elika v Minister of Immigration*⁶¹ that the removal of the mother of New Zealand citizen children did not infringe that right. Each case is considered on its merits.

3.2.5. Australia.

Before 20 August 1986, almost all children born in Australia, became citizens at birth. Under amendments made to legislation relating to citizenship, children born in Australia to non-Australian nationals become citizens on their 10th birthday, providing they have been 'ordinarily resident' in Australia from birth.⁶² The child's Australian citizenship does not affect the status of his or her parents and if they are residing illegally in Australia, they are liable to deportation, despite the decision of the UN Human Rights Committee in the *Winata* case. Similarly, parents of children under the age of 10 years, who are not Australian citizens are liable to be deported.

The Sidney Morning Herald has reported several recent cases where non-national parents of children born in Australia have initiated proceedings before the Australian Courts in an attempt to remain in Australia with their children. In one case, a Russian mother of an 18 month old child born in Australia of an Australian father, and therefore, an Australian citizen, argued that she should be permitted to remain in Australia and would accept remaining in detention rather than being deported to Russia where she would not be able to see her child. However, the Family Court upheld the decision of the Federal Government to deport, stating that the Australian Migration Act, overrode the Family Law Act which enshrined the child's rights to know its parents.⁶³

⁶⁰ Hearings before the Subcommittee on Immigration and Claims and the Subcommittee on the Constitution and the House Committee on the Judiciary, 104th Cong, 1st Sess. 121-24 (1995) cited in Wolf, *ibid*, p220.

⁶¹ *Elika v Minister of Immigration* [1996] 1NZLR 741 (Williams J).

⁶² www.minister.immi.gov/

⁶³ www.smh.com.au/

3.2.6 Canada

Similarly under Canadian legislation, most children born in Canada are Canadian citizens from birth. However, non-national parents of Canadian citizen children are liable for deportation. In a recent case a Palestinian/Jordanian women, Mariam Ahmed, the mother of a three year old daughter, who is a Canadian citizen was ordered to be deported.⁶⁴ Since the Supreme Court judgment in the *Baker* case, the Courts have emphasised the obligations of immigration officers making decisions in these cases to take account of the rights of the children.

In a case involving a Jamaican mother of three Canadian children aged 9, 12 and 13 was refused leave to remain in Canada, the immigration officer stated that she considered the consequences for the children of the removal of their mother, but noted that the applicant made the decision to have children in Canada even though her immigration status was uncertain. The Court held that decision makers were required to be 'attentive and sensitive' to the rights of the children and to their best interest. It criticised immigration officer's comments in her report regarding the mother's choice to have children even though her status was uncertain.⁶⁵

3.2.5 Conclusion

The majority of states grant citizenship by descent, if a child is to become a national of the state she or he was born in, one or both parents must also be citizens. However, most common law states still retain the system of citizenship based on birth.

All States that grant citizenship on birth to children of non-nationals or those which permit the children to acquire nationality during their childhood, such as Australia permit the deportation of non-national parents. However, in most states, such cases are distinguished from deportations of persons who do not have a citizen child. In the United States, if it can be demonstrated that the child or children will face 'extreme hardship' on the deportation of their parents. While, proving extreme hardship is often a very onerous requirement for immigrant parents, there is a mechanism in place, whereby those families facing very difficult circumstances if the parents were to be deported, may be permitted to remain in the United States.

⁶⁴ www.ocap.ca/immigration/admed/html

⁶⁵ *Mulholland v. Canada (Minister of Citizenship and Immigration) 2001 FCT 597.*

In other countries, particularly Canada, particular attention must be given to the rights of the child in deportation cases involving the non-national parents of Canadian citizens. Decision makers are required to be 'attentive and sensitive' to the rights of children and their best interests. Courts are generally sympathetic to families where the rights of the child has not been considered adequately and will generally grant leave to judicially review such decisions.

Ireland should at a minimum adopt a policy similar to that in the United States, where families that can show the children would face particular hardship if the parents are deported, may be permitted to remain here. In addition the rights of Irish children should be carefully assessed and the best interests of the child given serious consideration in decisions on whether to deport the parents.

Section 4: Regularisation of Status.

4.1 Regularisation of Status or ‘amnesties’.

The majority of western states have regularised the status of groups of non-nationals residing without authorisation in recent years. Regularisations tend to benefit two types of unauthorised immigrant: those who entered the host country illegally and those who entered legally but who are no longer residing legally having, for example overstayed the duration of their visa or work permit.

Regularisations can be ‘one-off’ which is premised on the fulfilment of the conditions of the regularisation by a certain date. In general such regularisations provide for persons living with authorisation in a state for a certain period of time to regularise their status. Some states have recurrent regularisations, particularly so in Southern Europe where Portugal, Spain, Italy and Greece have had several regularisations.

4.2 Reasons for regularisation

Regularisations may be permanent, i.e. the beneficiaries may receive a permanent status in the host state or they may be temporary resulting in the beneficiaries being granted a temporary status for a limited period, usually for one to two years, at the end of which they may be required to apply for a renewal or may be required to leave the host state..

The rationale underlying the regularisation can vary from State to State but it is usually economic. One commentator noted that regularisation has represented a ‘subtle compromise between the economic necessity for readily available cheap labour for certain types of work, and a political desire to combat illegal immigration, which was seen as an obstacle to the integration of those who has come legally’.⁶⁶ Regularisations have also been introduced in response to the high levels of unauthorised residence in some states.⁶⁷

⁶⁶ Vaillant, Emmanuel. ‘Making them legal’. *Le Monde Diplomatique*, November 1997.

⁶⁷ Danese, Gaia. ‘Transnational collective action in Europe: the case of migrants in Italy and Spain’. *Journal of Ethnic and Migration Studies* No 4, Vol.24, October 1, 1998, citing two studies carried out in the 1990’s which showed illegal residence at 25% of the total immigrant population and as high as 25% in Spain.

In general certain conditions must be met by migrants who wish to regularise their status in the host state. Usually they will be required to demonstrate that they have resided in the host state for a specified period of time.

4.3 States that have implemented regularisation programmes.

The following is a brief outline of the regularisation processes, which have taken place in some states:

USA

Between 1986 and 2000, the United States has granted regularisation of status to several million undocumented immigrants under 7 separate ‘amnesties’ or regulations. The first of these ‘amnesties’ provided for the regularisations of over 2.7million immigrants under the Immigration Reform and Control Act. It provided for the regularisation of persons who had been living in the US since 1982 and persons who had worked as agricultural labourers for more than 90 days within a given period. The US Government has recently announced plans to introduce another regularisation process aimed primarily at persons of Latin American origin.

In general the reasons for regularising immigrants has been economic. In some circumstances they have related to the nationals of certain countries only, for example the Nicaraguan Adjustment and Central American Relief Act (NACARA) of 1997 and the Haitian Refugee Immigration Fairness Act (HRIFA) of 1998.

NEW ZEALAND

In 2000, the New Zealand Government put in place a mechanism whereby ‘well-settled overstayers’ to apply for a two year work permit, at the end of which time, they would be permitted to apply for residence. Certain categories of overstayer were entitled to benefit from the regularisation: persons living in New Zealand for more than five years; parents of one or more children born in New Zealand and persons living in a stable marriage to a New Zealand national or resident. Over 6,000 immigrants applied for regularisation.⁶⁸

GREECE

⁶⁸ Christchurch Press. 18 April 2001. ‘Amnesty ‘may hurt’ NZ Aust relations’.

Greece has two regulations in recent years, the first being in 1997 and the most recent of which was finalised in August 2001. The first regularisation was a very complicated and bureaucratic and meant that many of the intended beneficiaries either did not have sufficient information about the process, were unable to complete the requisite application forms due to a lack of knowledge of Greek or were unable to produce the documentation required. This was also the case with regard to the second regularisation and by the completion date the number of applications reached over 350,000 which is believed to be less than half of the total number of undocumented immigrants residing in Greece.⁶⁹

BELGIUM

In December 1999, the Belgian Parliament passed a law permitting the regularisation of the status of non-nationals residing in Belgium. Four categories of non-nationals were eligible to apply for regularisation:

1. Those who were suffering from a severe illness, which meant that they could not return to their country of origin without risking their life.
2. Persons who cannot return to their country of origin because of the current situation there. Such persons include those fall outside the Refugee Convention definition could still face serious harm if returned to their country.
3. Persons who had applied for refugee status but had not received a decision in over three years and.
4. Those who have been in Belgium for a considerable period of time and have developed strong ties.⁷⁰

The applications would be screened by a specially established Commission for Regularisation and a final decision would be taken by the Interior Ministry. Those whose applications are turned down are liable for deportation.

⁶⁹ Siadima, Maria. *Immigration in Greece during the 1990's, an overview*. Available at <http://users.hol.gr/~dikto/maria.siadima.pdf>

⁷⁰ Fischer, Mathieu. 'The Regularisation of Illegal Immigrants in Belgium, its specific character in a European context'. Lecture in the Cicero Foundation Great Debate Seminar European Migration Refugee Policy: New Developments, Paris, 15 Feb 2001. Available www.cicerofoundation.org/lectures/p4fischer.html

FRANCE

The events of Summer 1996 led to the regularisation of 11 categories of non-French nationals including children under 16 born in France. In July 1996 a group of immigrants who has sought refuge in St Bernard's Church in Paris, known as '*sans papiers*' or people without papers, went on hunger strike. Some of the immigrants were in a situation where under strict immigration laws introduced in 1993, they could not be granted any type of status in France, nor could they be deported because their children were entitled to French citizenship. In 1998, a group of immigrants occupied the Office of the Vatican's Representative in France to draw attention to the plight of over 7000 immigrants who were denied residence permits.⁷¹

The *sans papiers* destroyed the simplified perceptions of immigrants in France, i.e. legal immigrants with a duty to integrate into French society and illegal immigrants who are obliged to leave. Instead 'with regular work, a home and family, knowledge of France and its society and culture etc, these illegals turned out to be human beings, who apart from administrative formalities, play a full part in French society'.⁷²

Eventually thirteen categories of immigrants had their status in France regularised. The categories were in accordance with the proposals of the Consultative Committee on Human Rights,⁷³ and included spouses of French citizens, parents of children under 16 born in France, people suffering from severe illnesses and people who had integrated into French society.

LUXEMBOURG

In March 2001 the Luxembourg government sought to regularise the status of illegal immigrants through a work permit scheme. Only persons possessing a valid passport and belonging to certain categories would qualify: People who had lived continuously in Luxembourg since July 1998; people who had lived and worked in Luxembourg since January 2000 in stable employment and earning the minimum wage, whether or not they had registered with social security; people suffering from a serious illness and those with family members with residence in Luxembourg. Luxembourg previously had two other regularisations: for Portuguese and Spanish workers in 1985 and for Bosnians in 1995.

⁷¹ Panafrican News Agency (PANA) Daily Newswire. 'France's illegal immigrants back in the news'. October 8, 1999.

⁷² Le Monde Diplomatique. 'Making them legal' November 1997. Available at: <http://mondediplo.com/1997/11/imm3>

⁷³ *Ibid.*

A special unit was established to examine the files of applicants for regularisation headed by a civil servant in the Ministry of Labour. The regularisation in Luxembourg was based primarily on labour market needs and was only partially successful in that the regularised migrants did not meet employer's needs.⁷⁴

PORTUGAL

In 1992-3, Portugal's first regularisation of illegal immigrants took place. It sought to integrate non-nationals living in Portugal without authorisation since the mid-1980's. Approximately 39,000 people had their status regularised at this time. A second regularisation took place in 1996 in order to regularise the status of those who missed out the first time, those who no longer had a legal status and those who arrived in Portugal since 1993.⁷⁵

SPAIN

Spain has had four periods of regularisation,,: 1985, 1991, 1996 and 2000, all with the aim of fighting illegal immigration.⁷⁶ The first three were ineffective in this respect, and were widely criticised for other reasons. For example the 1991 regularisation was regarded as lacking sufficient publicity, requiring too much documentation, which in many cases immigrants found impossible to provide and lacking sufficient resources to take place in an efficient manner. In addition many immigrants did not wish to come forward with their details, as they did not wish to run the risk of being located and deported if their application for regularised status unsuccessful⁷⁷

Approximately 133,000 persons applied in 1991 and successful applicants would be granted residence in Spain and a work permit. The eligibility criteria depended on whether an immigrant arrived in Spain before or after 24 July 1985, the former were required only to have lived in Spain prior to that date to be eligible for consideration. However, the latter had to fulfil several criteria including being required to live in Spain for a specified period,

⁷⁴ Eironline. Country: Luxembourg. 'Regularisation of illegal immigrants make slow progress'. Available at: www.eurofound.eu.int/2001/12/feature/LU0112140F.html

⁷⁵ Peisoto, Joao. 'Strong market, weak state: the case of recent foreign immigration in Portugal'. *Journal of Ethnic and Migration Studies*. July 1, 2003. No 3, Vol 3.

⁷⁶ Sole, Carlota and Parella, Sonia. 'The labour market and racial discrimination in Spain'. 1 January 2003. No. 1 Vol 29.

⁷⁷ The Guardian. 'When life is illegal'. 22 May, 1992.

previously holding a work permit and residency and proof that the applicants can support themselves or have the offer of work.⁷⁸

UNITED KINGDOM

The UK introduced a regularisation of overstayers scheme in 2000. People who had overstayed, i.e. came to Britain legally for example on a student visa and remained in the UK without authorisation when their visa expired, were given a period of 8 months within which to contact the authorities.⁷⁹ They would then be permitted to appeal against any decision to deport them. The British Government stressed that the scheme was not an ‘amnesty’ for overstayers, rather it would enable persons who had overstayed ‘a limited and final chance to make their case’ prior to the introduction of legislation, the Immigration and Asylum Act, which would abolish the right of appeal in these cases.⁸⁰

In October 2003, the Home Office announced that up to 15,000 asylum-seeker families could be permitted to remain in the UK. All the families had applied for refugee status before October 2, 2000, had children before that date and suffered from ‘historical delays in the system’. The families did not have the right to work while they were in the asylum process and one of the principle reasons for introducing the regularisation was that it would prove to be cost effective. According to Home Office figures regularising 1,000 of those eligible would save the Government 15 million pounds in social welfare and legal fees. The families would be granted the immigration status of ‘indefinite leave to remain’.⁸¹

The UK Government denied opposition claims that the regularisation would make Britain a ‘magnet for asylum seekers’ and it stressed that regularisation would be the most cost effective way of dealing with these families. In November a further regularisation scheme was introduced, this time for persons living and working in the UK without authorisation. It is intended that the scheme will benefit those working in the catering and hospitality industries and make a significant contribution to the economy. In addition the UK

⁷⁸ The Guardian. ‘When life is illegal’. 22 May, 1992.

⁷⁹ JCWI *op cit* p766.

⁸⁰ Press Association. ‘Rights of Appeal Deadline for Over-Stayers’. 8 February 2000.

⁸¹ BBC News World Edition. ‘15,000 asylum families can stay’. 24 October 2003 available at: http://news.bbc.co.uk/2/hi/uk_news/politics/3210605.stm. The Guardian. ‘15,000 families granted asylum’. October 24, 2003 available at www.guardian.co.uk/refugees_in_Britain/story/0,2763,1070434.co.html

Government wish to account for all foreign nationals living in the UK before the introduction of compulsory identity cards for foreign nationals in four years time.⁸²

IRELAND

Ireland is rare among EU states in that, to date it has not had any type of regularisation. When a regularisation or amnesty was proposed in 2000 by Catholic Bishops in respect of asylum seekers who were in the asylum process at a time when little progress was being made in clearing the back log, it was rejected by the then Minister for Justice, Equality and Law Reform Mr O'Donoghue. He explained the Governments position as follows: 'The reality of the situation is that if you introduce an amnesty people will expect that there will be further amnesties. An amnesty does, in fact reward people who seek to abuse the asylum process'.

Further calls for an 'amnesty' or regularisation were made after the Supreme court judgment, however, these were rejected by the Minister, who rejected 'mass decisions' in favour of examining each case individually.⁸³

4.4 Advantages and disadvantages of regularisations.

States are often concerned that regularisations in particular mass regularisations could act a 'pull-factor', leading to further the arrival of additional immigrants in the hope of further regularisations. On the other hand states including Britain consider that 'some means of regularising the status of those who do not qualify to stay but whom there is no prospect of removing is unavoidable'.⁸⁴ It has also been regarded by certain states as a fair means of dealing with groups who may not be deported, such as the parents of citizens or residents.

However, some states including the UK, have tried to 'balance' the amnesty with measures to curtail the rights of other immigrants, often in an attempt to appease perceived anti-immigrant sentiments in society. It is essential that any regularisations must not be used to pave the way for negative measures against other groups of non-nationals.

⁸² The Guardian. 'Illegal workers may be allowed to stay in UK'. November 14, 2003 available at: www.guardian.co.uk/refugees_in_Britain/story/0,2763,1084945.co.html

⁸³ The Irish Times. July 18, 2003. 'Immigrants offered fares home by Govt'.

⁸⁴ House of Lords Select Committee on the European Union: A Common Policy on Illegal Immigration. Nov 2002.

4.5 Best practice in implementing regularisations.

States have put in place various regulations governing the regularisation process. In many cases, such processes have not been fair or transparent and in some cases the intended beneficiaries are not in a position to benefit from it. However, no State to date has put in place a recognised code of practice relating to regularisations. Drawing from the mistakes made by states while attempting to regularise the status of non-nationals, some suggestions can be put forward. In order that all the intended beneficiaries of a regularisation can take advantage of it, certain minimum conditions must be met:

- The conditions attaching to the regularisation must be clear. This includes how long immigrants must have spent in the state before they can benefit.
- The application process must be straightforward. Information and applications forms should be available in languages, which the immigrants understand.
- Legal information and advice should be available to all those who wish to apply for the regularisation.
- Adequate time must be allocated so that immigrants have sufficient opportunity to seek legal advice and to make an application.
- An independent body should be established to carry out the regularisation process.

Conclusions and Recommendations

While accepting that the situation in each country is never exactly the same, Ireland is among the few European Union states which has not introduced a comprehensive regularisation scheme. Most other common law countries have also had one or more regularisation programmes. While the Government would appear to have rejected a regularisation for the non-national parents of Irish children affected by the Supreme Court judgment, there are advantages in reconsidering this position.

The Irish Government is anxious not to introduce measures that will act as a ‘pull-factor’ for future immigrants. However as the Human Rights Commission have noted in relation to these parents and siblings; ‘This is a limited group of people whose number is closed and such a decision would not affect future policy on asylum or residency’. Regularising the status of these parents and siblings would not impact on future migration policy, legislation could be introduced to deal with future cases of immigrants and asylum seekers giving birth to Irish citizens. It would allow the families to remain here in safety and dignity and permit them to integrate into Irish society.

Not least from the Government perspective, it would eliminate the costs of social welfare and legal costs, by permitting parents to reside here and seek employment, as the British Government has recognised in its recent decision to regularise 15,000 asylum seeker families.

There are also considerable logistical pressures on the Department of Justice Equality and Law Reform to everyone on a case-by-case basis. Considerable resources would be saved and could be reinvested in integration supports if a fast track regularisation process was introduced.

In the absence of such a regularisation programme, the NCCRI calls on the Government to reverse its decision not to provide legal aid to those making representation against deportation. There is increasing evidence that the non-availability of free legal aid is causing particular hardship for many families and may result in miscarriages of justice. The natural response of anyone facing deportation is to seek legal advice no matter what the cost might be and the hardship that results. Some of those threatened with deportation are now turning to moneylenders. While most legal advice is of good quality and some solicitors organise payment plans, there is increasing evidence from Migrant rights and advice centres that in

some cases very dubious or limited advice is being provided in return for relatively large sums of money.

Additional resources to be given to migrant organisations and advice centres to provide advice and support to such families. Many are attempting to provide this service but are because of the size of the task and limited numbers of staff.

In respect of the issue of citizenship, the discussion in this report on the difference between citizenship based on *jus soli* (citizenship by birth) and *jus sanguinis* (citizenship by descent) is directly relevant to the forthcoming referendum on citizenship in Ireland as well as the focus of this report.

The majority of states grant citizenship by descent, if a child is to become a national of the state she or he was born in, one or both parents must also be citizens. However, most common law States, including the United States, still retain the system of citizenship based on birth.

All States that grant citizenship on birth to children of non-nationals or those which permit the children to acquire nationality during their childhood, such as Australia permit the deportation of non-national parents. *However, in most states, such cases are distinguished from deportations of persons who do not have a child who has citizenship.* In the United States, if it can be demonstrated that the child or children will face 'extreme hardship' on the deportation of their parents. While, proving extreme hardship is often a very onerous requirement for immigrant parents, there is a mechanism in place, whereby those families facing very difficult circumstances if the parents were to be deported, may be permitted to remain in the United States.

In other countries, particularly Canada, particular attention must be given to the rights of the child in deportation cases involving the non-national parents of Canadian citizens. Decision makers are required to be 'attentive and sensitive' to the rights of children and their best interests. Courts are generally sympathetic to families where the rights of the child has not been considered adequately and will generally grant leave to judicially review such decisions.

Ireland should at a minimum adopt a policy similar to that in the United States, where families that can show the children would face particular hardship if the parents are deported, may be permitted to remain here. In addition the rights of Irish children should be carefully

assessed and the best interests of the child given serious consideration in decisions on whether to deport the parents.

In respect of international law, it is clear that there are a number of important standards that Ireland must abide, which provide a ‘floor’ for the development of policy, for example Ireland cannot engage in the collective expulsion of non nationals, (which, its has not sought to do). There is also extensive protection against refoulement, where the return of a person would jeopardise life or liberty or would result in torture or degrading treatment.

Recommendations

- 1. Regularisation:** The Government should consider bringing in a ‘fast track’ regularisation process for Irish born children and their non-national parents who were here before the Supreme Court Judgement *Lobe & Osayande*. There could be many options that could be considered under in this context. For example reversing the burden of proof, whereby the Department would have to provide clear reasons why families should be deported, rather than families having to argue why they should remain.
- 2. Deportations:** Most countries with citizenship laws similar to Ireland allow for the deportation of non-national parents and families of citizen children. However in countries such as the United States such families are allowed to remain if their deportation will result in ‘extreme hardship’ and in Canada the rights of children must also be given serious consideration in deportation cases. These provisions could be incorporated into Irish legislation including in respect of children born in Ireland since the *Lobe and Osayande* judgement.
- 3. Legal aid:** The NCCRI calls for an urgent review and reversal of the decision not to provide legal aid to be provided to those families affected by the Lobe and Osayande judgement. There is growing evidence that those with limited means are resorting to moneylenders and in some cases dubious and expensive advisors in order to assist with their representations against deportation. This is clearly unjust and needs to be redressed by Government by providing legal aid to those seeking to make representations against deportation.

4. Complementary Advice and Support (support for migrant rights bodies):

Additional resources should be provided to migrant and advice organisations to allow them to provide an adequate level of complementary advice and support services.

5. Legal Status:

‘Leave to remain’ is an ambiguous and discretionary status and is only really appropriate in an emergency situation/for a short period of time. It militates against integration and continues uncertainty. Those granted leave to remain as a consequence of the Supreme Court Judgement, should be granted residency and the option of citizenship as soon as possible.

6. Integration:

Targeted and mainstreamed measures should be introduced to assist families granted leave to remain to integrate into Irish society in a way that respects cultural and ethnic diversity. The forthcoming National Action Plan Against Racism has an important role to play in this respect. A holistic approach is needed to develop integration strategies involving key statutory agencies and local agencies and groups working on the ground. A needs assessment should be commissioned to investigate the optimum approach.

Annex 1 – Bibliography.

Agence France Presse. 'African migrants start new hunger strike'. August 12, 1996.

Agence France Presse. 'Immigrant hunger strikers in deadlock with French Government'. August 13, 1996.

Agence France Presse. 'Belgium rejects call to allow illegal immigrants to stay'. November 06, 1998.

Austin, Anna. 'The Implications of the Bill for the European Court of Human Rights'. Paper Presented at Law Society of Ireland Conference. 19 October 2002. The European Convention on Human Rights Bill 2001.

Australian Lawyers for Human Rights. 'Teoh opinion'. Available at: www.alhr.asn.au/html/documents/teoh_opinion.html

BBC News World Edition. '15,000 asylum families can stay'. 24 October 2003 available at: http://news.bbc.co.uk/2/hi/uk_news/politics/3210605.stm

Binchy, William. 'The Bill, the Advantages and Disadvantages of the Approach Taken and Possible Alternatives'. Paper Presented at Law Society of Ireland Conference. 19 October 2002. The European Convention on Human Rights Bill 2001.

Burchill, Richard. 'The Right to live wherever you want? The Rights to Family Life following the UN Human Rights Committee's Decision in Winata'. Netherlands Institute of Human Rights Vol 21/22, 2003.

Danese, Gaia. 'Transnational collective action in Europe: the case of migrants in Italy and Spain'. Journal of Ethnic and Migration Studies No 4, Vol.24, October 1, 1998.

Department of Justice, Equality and Law Reform. 'notice to Non-National Parents of Irish Born Children'. 18 July 2003.

Eironline (European Industrial Relations Observatory on line). Country: Belgium. 'Trade Union recruits illegal immigrants in campaign to regularise status'. Available at: www.eiro.eurofound.eu.int/1999/04/inbrief/BE9904171N.html

Eironline (European Industrial Relations Observatory on line). Country: Spain. 'Law on Foreign Persons to be reformed'. Available at: www.eiro.eurofound.eu.int/2000/03/Inbrief/EC0008104N.html

Fischer, Mathieu. 'The Regularisation of Illegal Immigrants in Belgium, its specific character in a European context'. Lecture in the Cicero Foundation Great Debate Seminar European Migration Refugee Policy: New Developments, Paris, 15 Feb 2001. Available www.cicerofoundation.org/lectures/p4fischer.html

Fraser, Ursula. 'Two-tier citizenship – the Lobe and Osayande case'. Paper Presented at conference Women's Movement: Migrant Women Transforming Ireland held at Trinity

college Dublin 20-1 March 2003. Available at:
www.tcd.ie/sociology/mphil/dwnl/migrantwomenpapers.PDF

Freeman, Gary P. & Birrell, Bob. 'Divergent paths on immigration politics in the United States and Australia'. *Population and Development Review*. NO 3, Vol. 27, Sept 1 2001.

Hardiman, Mr Justice. 'Incorporating the European Convention: Modified Rapture'. Paper Presented at Law Society of Ireland Conference. 19 October 2002. The European Convention on Human Rights Bill 2001.

House of Lords Select Committee on the European Union: A Common Policy on Illegal Immigration. Nov 2002.

Hsieh, Christine J. 'American Born Legal Permanent Residents? A Constitutional Amendment Proposal'. *12 Geo. Immigr. L. J.* 511 Spring 1998.

Human Rights Commission. 'Position on Non-National Parents and their Irish Born Children'. 21st October 2003.

Irish Council for Civil Liberties 'Submission to Joint Oireactas Committee on Justice, Equality, Defence and Women's Rights. Supreme Court Decision in the case of *DL, AO & Others v. Minister for Justice, Equality and Law Reform*. (23 January 2003). Tuesday 13 May 2003. available at: www.iccl.ie/minorities/race/o3-ibcsub.html

IRR (Independent Race and Refugee News Network) News. 'New deterrent measures for asylum seekers condemned'. 30 October 2003. Available at
www.irr.org.uk/2003/october/ha000010.html

Lambert, Helene. *The European Court of Human Rights International Journal of Refugee Law* Oxford University Press. Vol. 11 No 3 1999.

Lowry, Anthony. 'Practice and Procedure under the European Convention on Human Rights Act 2003'. *Bar Review*, November 2003.

Murphy, Ray. 'The Incorporation of the ECHR into Irish Domestic Law. [2001] EHRLR Issue 6.

Panafrican News Agency (PANA) Daily Newswire. 'France's illegal immigrants back in the news'. October 8, 1999.

Peisoto, Joao. 'Strong market, weak state: the case of recent foreign immigration in Portugal'. *Journal of Ethnic and Migration Studies*. July 1, 2003. No 3, Vol. 3.

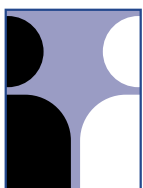
Press Association. 'Rights of Appeal Deadline for Over-Stayers'. 8 February 2000.

Salt, John. 'European Population Papers Series No. 5. European International Migration: Evolution of the Current Situation. Council of Europe. March 2002.

Schiratzhi, Johanna. 'The best Interests of the Child in the Swedish Aliens Act'. *International Journal of Law, Policy and the Family*. Vol 14, December 2000.

Shah, Remick. 'Estoppel and Legitimate Expectation'. *New Law Journal* Vol 145, No 6718, 3 November 1995.

- Siadima, Maria. *Immigration in Greece during the 1990's, an overview*. Available at <http://users.hol.gr/~dikto/maria.siadima.pdf>
- Sole, Carlota and Parella, Sonia. 'The labour market and racial discrimination in Spain'. 1 January 2003 No 1 Vol 29.
- Spiro, Peter J. 'Dual nationality and the meaning of Citizenship'. Fall 1997. 46 Emory Law Journal 1411.
- Starr, Sonja & Brilmayer, Lea. 'Family Separation as a Violation of International Law'. 21 Berkeley J. Int'l L. 213, 2003.
- Statewatch News Online 'Belgium found guilty of mass expulsion of Roma'. Available at: www.statewatch.org/news/2002/feb/05belgium.htm
- Sunday Business Post. 'State Bids to close baby loophole'. December 02, 2001.
- The Guardian. 'When life is illegal'. 22 May, 1992.
- The Guardian. 'Asylum in France'. September 7, 2001.
- The Guardian. '15,000 families granted asylum'. October 24, 2003 available at www.guardian.co.uk/refugees_in_Britain/story/0,2763,1070434,co.html
- The Guardian. 'Illegal workers may be allowed to stay in UK'. November 14, 2003 available at: www.guardian.co.uk/refugees_in_Britain/story/0,2763,1084945,co.html
- The Independent (London) 'Belgium offers brief amnesty for immigrants'. January 11, 2000.
- The Irish Times. 'Minister rebuffs ishops over refugees'. April 27, 2000.
- The Irish Times. Opinion: Garret Fitzgerald. 'Once-off amnesty for asylum-seekers the only solution'. May 6, 2000.
- The Irish Times. 'McDowell rules out large-scale deportations'. 3 November 2003.
- The Times (London). 'No legitimate expectation was raised in asylum seekers case'. February 12, 2002.
- Todres, Jonathan. 'Emerging Limitations on the Rights of the Child. The UN Convention on the Rights of the Child and its Early Case Law'. 30 Colum. Human Rights L. Rev. 159, Fall 1998.
- Vaillant, Emmanuel. 'Making them legal'. Le Monde Diplomatique, November 1997.
- Wignall, Gordon. 'Legitimate expectation and the abuse of power'. New Law Journal Vol 144, No 6658, 29 July 1994.
- Wolf, Giovanna I. 'Preserving Family Unity: The Rights of Children to Maintain the Companionship of their Parents and Remain in their Country of Birth'. 4 Ind. J. Global Leg. Stud. 207, Fall 1996.



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