AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2021:000064

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

Between/

MK (ALBANIA)

Appellant

-and-

MINISTER FOR JUSTICE & EQUALITY

Respondent

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Razgar

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Constitution

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

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

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

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

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

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

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

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

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

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

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

37. I would, accordingly, dismiss the appeal.