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Deportation and human rights: the right to respect for private life in *MK (Albania) v Minister for Justice and Equality*

MK (Albania) v Minister for Justice & Equality [2022] IESC 148

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Introduction

The sovereign power to control the entry and residence of persons in the state, and the corollary power to deport, has long been considered to be a defining feature of statehood.[1] State discretion as to who may remain within the national border is, however, tempered by international and regional human rights obligations, as well as domestic constitutional principles.[2] In this context, it is well established that a deportation will violate Article 8 of the European Convention on Human Rights (ECHR) if it constitutes a disproportionate interference with family and/or private life in the host country.

This case comment examines a landmark decision of the Irish Supreme Court relating to the right to respect for private life – in the sense of social ties within the state – in the context of deportation and removal. In *MK (Albania) v Minister for Justice & Equality*,[3] the Supreme Court considered how private life issues should be analysed in cases of expulsion.[4] In the UK, this issue has been much debated in the context of the deportation of 'foreign criminals' and has resulted in a series of legislative amendments and high-profile judgments.[5] Likewise, the European Court of Human Rights has developed a complex body of jurisprudence in this field.[6] In contrast, it has received scant attention in Ireland; this was the first time that Ireland's apex court had engaged in any detail with the right to respect for private life in a deportation case.[7]

The first part of this comment outlines the legal background to *MK (Albania)*. The second part examines the case in detail and analyses the Supreme Court judgments under three headings: the

[1]B Anderson et al (eds) *The Social Political and Historical Contours of Deportation* (Springer, 2013) p 1.

[2]See for example *Lobe and Osayande v Minister for Justice* [2003] 1 IR 1; *Baby O v Minister for Justice* [2002] 2 IR 169, [2008] IESC 25; *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3.

[3][2022] IESC 148.

[4]Ibid, O'Donnell CJ, para 6.

[5]See, among many others, *Hesham Ali (Iraq) v SSHD* [2016] UKSC 60; *Makhlouf v SSHD* [2016] UKSC 59; and *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22. For commentary, see M Griffiths 'Foreign, criminal: a doubly damned modern British folk-devil' (2017) 21(5) Citizenship Studies 527.

[6]See for example *Boultif v Switzerland* (2001) 33 EHRR 50; *Üner v The Netherlands* (2006) 45 EHRR 14; *Butt v Norway* Application No 47017/09, 4 October 2013. For commentary, see C Murphy 'Membership without naturalisation? The limits of European Court of Human Rights case law on residence security and equal treatment' in D Thym (ed) *Questioning EU Citizenship* (Oxford: Hart Publishing, 2017).

[7]There had been a brief discussion of the relevant issues in *PO v Minister for Justice, Equality and Law Reform* [2015] IESC 64.

process for assessing Article 8 ECHR rights; the requirements of the proportionality analysis; and the relevance of constitutional rights.

1. Legal background

Although the private life aspect of Article 8 ECHR is underdeveloped in comparison to family life, in the case of the expulsion of an adult who does not have a 'family life' in the host state within the meaning of Article 8 ECHR, private life assumes a critical importance. More broadly, such cases involve attaching legal weight to the lived experiences of migrants as participants in the society in which they are based. From a human rights perspective, this recognises migrants as rights bearers and community members, rather than primarily as 'non-citizens' or 'aliens' subject to the sovereign power of the state to control its borders.[8]

Prior to *MK (Albania)*, the key authority on Article 8 ECHR private life and deportation was the Court of Appeal's decision in *CI v Minister for Justice, Equality & Law Reform*,[9] in which the Court imposed a 'minimum gravity' test for the engagement of Article 8 ECHR.[10] It found that in the case of migrants without a permission to reside in the state (other than pending an asylum determination), 'wholly exceptional circumstances' would be required to establish that the private life consequences of deportation were of sufficient gravity to engage Article 8 ECHR. Finlay Geoghegan J, delivering the judgment of the Court, came to this conclusion by applying the five-step test laid down in the House of Lords decision in *R (Razgar) v Secretary of State for the Home Department*,[11] together with the ECtHR's decisions in *Nnaynzi v UK*[12] and *Bensaid v UK*.[13] The *Razgar* test for determining whether a breach of Article 8 arises in immigration cases is set out in Bingham LJ's judgment as follows:

> In a case where removal is resisted in reliance on article 8, these questions are likely to be:
>
> (1) 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?
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
> (3) If so, is such interference in accordance with the law?
> (4) If so, is such interference necessary in a democratic society … ?
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?[14]

The Supreme Court's treatment of this test and its application in *CI* is discussed at section 2 below.

The decision in *CI* appeared to make it almost impossible for 'precarious' or 'non-settled migrants' to show, solely on the basis of their private life within the state, that Article 8 was engaged by their deportation in such a way as to require justification and a proportionality analysis under Article 8 (2). The *CI* appeal was heard with that in *Dos Santos v Minister for Justice and Equality*[15] – also a case in which the applicants' private life ties to the state had been created during a period of precarious residence (it concerned a Brazilian man with an expired work permit and his wife and five children). The Article 8 ECHR analysis was the same in both cases, and the additional constitutional private life arguments put forward in *Dos Santos* to resist deportation were rejected with little discussion. Finlay Geoghegan J found that non-citizen children did not have a personal right under Article 40.3 of the

[8]See generally M-B Dembour *When Humans Become Migrants* (Oxford: Oxford University Press, 2015).
[9][2015] IECA 192.
[10]Citing *Nunez v Norway* Application No 55597/09, 28 June 2011 and *Nnyanzi v United Kingdom* (2008) 47 EHRR 18.
[11][2004] 2 AC 368.
[12](2008) 47 EHRR 18.
[13](2001) 33 EHRR 10.
[14][2004] UKHL 27, at para. 17.
[15][2015] IECA 210.

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Constitution to a private life within the state or to participate in community life established in the State.[16]

The thrust of these decisions was that the social and community ties formed in Ireland during a period of precarious residence did not generally give rise to enforceable Convention or constitutional rights. This approach was overturned in relation to Article 8 ECHR by the Supreme Court in *MK (Albania)*. Moreover, the question of the constitutional protection of private life in the context of expulsion is addressed in several of the judgments of the Court.

2. *MK (Albania) v Minister for Justice & Equality*

The appellant in *MK (Albania*) had arrived in Ireland from Albania as an unaccompanied child in 2016, whereupon he was placed with a foster family, attended school, worked, made friends, and generally developed social ties. In 2018, he was refused permission for leave to remain, meaning that he would have to leave Ireland, and a deportation order was subsequently issued. His application for judicial review of the Minister's decision to refuse permission to remain and the consequent deportation order was dismissed by the High Court and a leapfrog appeal to the Supreme Court was granted. By a majority of 3:2, the Supreme Court dismissed the appeal.

(a) Process for assessing Article 8 ECHR claims

The basis of the first instance decision to refuse permission to remain had been the *Razgar* test, as adopted and interpreted in *CI*. The case failed at the second hurdle of the *Razgar* test when the decision-maker followed *CI* and determined that the applicant's case did not exhibit any exceptional feature, such that Article 8 was engaged by the decision to refuse leave to remain. Following a detailed exposition of the ECtHR case law, endorsed by each of the other judges, MacMenamin J holds that this approach was incorrect; the judgment in *CI* 'cannot now be said to reflect clear and consistent ECtHR jurisprudence',[17] particularly given that the relevant ECtHR case law does not contain a minimum gravity test.

This finding of the Supreme Court reverses the position under *CI* that precarious migrants' private life rights will not be engaged in the absence of exceptional circumstances. Under the revised approach, it seems that Article 8 private life rights *will usually* be engaged.[18] The practical implications are highly significant: the Minister (via his or her officials) will be required to accept that private life rights exist in the case of most proposed deportees and to carefully and explicitly balance those rights with other factors.

(b) Proportionality analysis

Having unanimously agreed on the correct procedure for the consideration of Article 8 rights, the Court diverged on the question of what to do next. The majority (O'Donnell CJ, Hogan and O'Malley JJ) determined that the flaw in the Minister's decision-making process did not have the effect of rendering the decision invalid. For this reason, they dismissed the appeal. O'Donnell CJ and Hogan J, in their judgments, effectively focused on what the outcome of a proportionality analysis *would have been*. Drawing on the extensive jurisprudence of the ECtHR, they emphasised that it would be an exceptional case in which state interests in controlling immigration and maintaining an orderly immigration system would be outweighed by the interference with private life in the case of a precarious migrant who had no right to remain in the state other than to pursue an asylum claim.[19] In the words of O'Donnell J, 'something more' would need to be present; for example, circumstances relating to the health of the individual, or their sexual identity, or the depth or intensity of the relationships

[16]Ibid, at para 10, referring in turn to the rights identified in *G v An Bord Uchtála* [1980] IR 32, at 55–56.
[17]Ibid.
[18]O'Donnell CJ, at para 8.
[19]O'Donnell CJ, at para 30 and Hogan J, at paras 6–8.

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they have established.[20] This was not such an exceptional case. The majority held that the decision-maker's analysis was *in substance* what was required to satisfy the requirement of a proportionality analysis, even though it was conducted to determine whether Article 8 ECHR rights were engaged at all.[21]

The judgments raise the important question of whether the proportionality analysis within administrative law is substantive or procedural in nature (ie must there be proportionality *in* administrative decision-making, on the one hand, or proportionate outcomes *from* administrative decision-making, on the other). This issue has been present in the immigration case law for some time.[22] This case involves a procedural error on the part of the decision-maker and yet, because that decision was acceptable in substance, the decision is considered to be valid and allowed to stand. It is hard to escape the conclusion that the Court is engaged in a substantive proportionality assessment of the merits of the decision in question. The dissenting judges (McMenamin and Baker JJ) are forthright in their opinion that the decision-making procedure was flawed and not in accordance with law and, therefore, that the decision should be quashed.[23] However, the approach of the Supreme Court in its subsequent decision in *Middelkamp v Minister for Justice and Equality*,[24] in the context of family rights, is identical to that taken by the majority.

Ultimately, it remains to be seen if the right to respect for private life is, in practical terms, any more strongly protected under this rubric than it was under the *CI* framework. This may depend on how the 'something more' identified by O'Donnell J is interpreted by decision-makers and further articulated and developed in the case law. So, does this take the right to private life seriously enough? The Court's approach to the balancing of rights in the case of the proposed removal of a precarious migrant brings the position in Ireland in line with the ECtHR case law. However, it should be recognised that the ECtHR case law has itself been the subject of critique by human rights scholars such as Dembour and Desmond, who have sharply criticised its general emphasis on the interests of states at the expense of migrants' rights. Dembour uses the term 'the Strasbourg reversal' to describe the ECtHR's general approach in migration cases to first emphasise the interests of the state in respect of immigration control and only then move to examine the rights in question in light of the principle of state sovereignty.[25] She argues that this results in the odds being stacked against the individual applicant's chance of success.[26] On reading the judgments in *MK* (and indeed, much of the previous immigration case law),[27] it seems that this 'reversal' is replicated at the national level. It is reflected clearly in the statement of O'Donnell CJ that:

> 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.[28]

The interests of ensuring an efficient and orderly immigration system easily outweighed the applicant's rights in the instant case, according to the Court. The approach of the majority in refusing to

[20]O'Donnell CJ, at para 22.

[21]O'Donnell CJ, at para 4 and Hogan J at para 38.

[22]These points were discussed by Dr Alan Brady in his paper on *Middelkamp v Minister for Justice and Equality* delivered at the Irish Supreme Court Review conference at Trinity College Dublin (November 2023) and forthcoming in that journal.

[23]MacMenamin J at para 178; Baker J at para 23.

[24][2023] IESC 2.

[25]M-B Dembour *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford: Oxford University Press, 2015) p 9.

[26]Ibid.

[27]For analysis see C Murphy and D Ryan 'Work, dignity and non-citizens: reflections from the Irish constitutional order' (2020) 1 Public Law 30.

[28]O'Donnell CJ at para 13.

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quash the decision despite its flawed basis meant that MK, who had arrived in Ireland as an unaccompanied child and who provided 13 letters attesting to his integration into the community, would never actually have his rights fully assessed on the merits and balanced by a decision-maker.[29] Moreover, while it is significant that Article 8 private life rights are *engaged* for those in situations analogous to that of MK, it seems that these rights will almost never be found to be *breached* following a proportionality assessment. It is arguable that the Court is thereby effectively re-introducing an exceptionality test at the stage of the proportionality analysis, further cementing the 'reversal'.[30]

(c) Constitutional rights

The applicant had also argued that he had a right to private life under the Constitution which was infringed by the refusal to grant permission to remain and the deportation order. Each of O'Donnell CJ, Hogan J and MacMenamin J considered the question of constitutional interpretation. Hogan J discusses it in some detail, finding that non-nationals enjoy in principle 'a combination of privacy, associational and autonomy-style constitutional rights which correspond to the omnibus description of the right to a private life contained in Article 8 ECHR'[31] and that they would be engaged by the deportation of the applicant, especially given his lengthy stay in the state. He locates this constitutional protection within the right to privacy contained in Article 40.3, as well as the right to form associations protected by 40.6.1.iii. However, Hogan J goes on to state that there is no difference in substance between the relevant constitutional and Convention rights – unlike family rights, which are more strongly protected under the Constitution.[32]

These obiter comments on the role of constitutional rights in this context open the discussion for the future. The move away from the *Dos Santos* approach that no constitutional private life rights arise for precarious or irregular migrants is welcome. Indeed, this approach was difficult to reconcile with the subsequent finding of the Supreme Court in *NHV v Minister for Justice and Equality*[33] that a non-citizen (irrespective of their immigration status) may be entitled in principle to invoke a constitutional right if that right 'protects something that goes to the essence of human personality so that to deny it to persons would be to fail to recognise their essential equality as human persons'.[34] However, it remains to be seen how these aspects of the right to private life under Article 40.3 and/or Article 40.6.1 are more fully articulated. The assumption that the relevant constitutional protection would 'correspond in substance'[35] and impact[36] to its Article 8 cousin is surprising, given that the Court has generally emphasised the need to maintain the distinction between the two legal frameworks.[37] In addition, the conceptualisation of the right to community participation for non-citizens as an aspect of the right to freedom of association by Hogan J is interesting and distinctive, given that most scholarly discussions of migrant integration focus on the individual's right to privacy.[38] In the final analysis, however, there does not seem to be an appetite within the Court for developing a constitutional protection that would constitute a higher barrier to deportation than the existing Convention rubric.

[29]Baker J at para 20.

[30]See also *Middelkamp v Minister for Justice* [2023] IESC 2; *Odum v Minister for Justice and Equality (No 2)* [2023] IESC 26.

[31]Hogan J at para 26.

[32]Ibid, at para 28.

[33][2017] IESC 35.

[34]Ibid, at para 14.

[35]Hogan J at para 37.

[36]O'Donnell CJ at para 35.

[37]As noted by O'Donnell CJ at para 35. See, for example, *Clare County Council v McDonagh* [2022] IESC 2, per Hogan J; *Fox v The Minister for Justice and Equality & others* [2021] IESC 61. See generally D O'Donnell 'The ECHR Act: Ireland and the post-war human rights project' (2022) 6(2) Irish Judicial Studies Journal 1.

[38]M Bottero 'Integration (of immigrants) in the European Courts' jurisprudence: supporting a pluralist and rights-based paradigm?' (2023) 24 Journal of International Migration and Integration 1719.

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Conclusion

MK (Albania) brings some much-needed clarity to Irish law in this area. The findings of the Court in respect of the threshold for the engagement of Article 8 rights were confirmed and reinforced in the subsequent case of *Middelkamp v Minister for Justice & Equality*.[39] The minimum gravity test has been rejected and it now seems that Article 8 will usually be engaged where there is disruption to private (and/or family) life. The confirmation that even precarious migrants' private lives within the country must be taken into account in immigration cases is welcome. However, *MK (Albania)* represents a somewhat muted victory for the private life rights of migrants. The Supreme Court judgments demonstrate that these rights have relatively little weight in the face of the interests of the state in maintaining an orderly immigration system. The outcome of this case was that the deportation order was allowed to stand. Nonetheless, the confirmation that private life rights are engaged should trigger a more detailed and systematic consideration of issues relating to an individuals' network of social, cultural, educational ties to Ireland in deportation cases in the future.

[39][2023] IESC 2.

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