# 'A Matter of Humanity'? Emerging Principles Relating to Deportation and Human Rights

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 and is, as Anderson, Gibney and Paoletti observe, 'a particularly sharp and resonant way of asserting state power in the realm of border control'.[1] Speaking in the Supreme Court in *FP v Minister for Justice, Equality and Law Reform*,[2] Hardiman J commented that the inherent nature of states' powers to deport individuals

> is demonstrated by their assertion over a vast period of history, from the very earliest emergence of states as such, and its existence in all contemporary states even though these vary widely in their constitutional, legal and economic regimes, and the extent to which the Rule of Law is recognised.[3]

In Ireland, the volume of judicial review applications in the sphere of deportation in recent years is striking, with the impact of these cases reaching beyond immigration and asylum law to affect more general principles of administrative and constitutional law.[4]

The complex body of jurisprudence on the limits of state power in relation to deportation shows that the extensive state discretion as to who may remain within the national border is tempered by reference to international and European Union (EU) legal obligations, as well as domestic fundamental rights principles.[5] This article examines a number of recent decisions which nonetheless illustrate the enduring sharpness of the power to deport in the Irish context.

1. Anderson, Gibney and Paoletti (eds), *The Social Political and Historical Contours of Deportation* (Springer 2013) 1. See also Kanstroom, *Deportation Nation: Outsiders in American History* (Harvard University Press 2010); Bloch and Schuster 'At the extremes of exclusion: Deportation, detention and dispersal' (2005) 28(3) Ethnic and Racial Studies 491; and De Genova and Peutz, *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (Duke University Press 2010).
2. [2002] 1 IR 164.
3. ibid 168.
4. See, for example, *Laurentiu v Minister for Justice, Equality and Law Reform* [1999] 4 IR 26; *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3.
5. Key decisions in this regard include *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.

It begins by outlining the relevant statutory framework for deportation in Ireland and then briefly sketches the evolution of the jurisprudence, before proceeding to examine the Court of Appeal's decisions in the related cases of *Dos Santos v Minister for Justice and Equality*[6] and *CI v Minister for Justice and Equality*,[7] and the Supreme Court decision in *PO v Minister for Justice and Equality*.[8]

## The Statutory Framework for Deportation and Removal

Deportation is regulated by s 3 of the Immigration Act 1999,[9] with the power of the Minister for Justice to, by order, 'require any non-national ... to leave the State ... and to remain thereafter out of the State' set out in s 3(1). The person concerned must be notified of the Minister's proposal to make a deportation order, giving them the opportunity to make representations in writing to the Minister[10] which must be duly taken into account before the final decision is made.[11]

The Minister's power is qualified by a statutory prohibition on *refoulement*, which prohibits the return of individuals to states where, in the opinion of the Minister, 'the life or freedom of the person would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion, or 'there is a serious risk that the person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'.[12] In addition, the Courts have confirmed that the Minister must consider the European Convention on Human Rights[13] and the constitutional rights of the person concerned. In principle, an expulsion can be opposed on the grounds that it will breach any Convention right, although in practice Articles 3 (the right not to be subjected to torture or inhuman and degrading treatment) and 8 (the right to respect for one's private and family life) are most relevant to expulsion cases.[14] Of these provisions, Article 3 provides the stronger protection, if proven, due to the absolute nature of the Article. Article 8, on the other hand, is qualified and thus the individual rights at stake are balanced with more general considerations including public order and the needs of the immigration system. The question of which constitutional rights can

6. [2015] IECA 210.
7. [2015] IECA 192.
8. [2015] IESC 64.
9. The International Protection Act 2015, when commenced, will govern the deportation of those who have made a protection application.
10. s 3(b)(i).
11. s 3(b)(i) and notification of that decision is provided for in s 3(b)(ii)).
12. s 5 of Refugee Act 1996; s 50 of the International Protection Act 2015 (not yet commenced).
13. In accordance with ss 3(1) and 4 of the European Convention on Human Rights Act 2003.
14. For commentary, see Clayton, *Textbook on Immigration and Asylum Law* (6th edn, Oxford University Press 2014) 573.

form the basis for a challenge to deportation is yet to be fully tested, although Articles 41 and 42 are frequently invoked in cases involving Irish citizens with non-citizen family members.

## Deportation as an Element of the 'Common Good': Executive Discretion and Judicial Deference

Deportation was rarely used and was hardly ever the subject of legal challenge prior to the 1990s, after which point Ireland experienced economic growth, increased immigration, and (to borrow Gibney's phrase) a corresponding 'deportation turn'.[15] The early cases, in particular, set down the marker of the executive power of the State to control the entry and residence of 'aliens'. Giving the decision of the High Court in *Osheku v Ireland*,[16] Gannon J expressly linked the rights of the State to control immigration with the maintenance of social order, opining that:

> The integrity of the State constituted as it is for the collective body of its citizens within the national territory must be defended and vindicated by the organs of the State and by the citizens so that there may be true social order within the territory and concord maintained with other nations in accordance with the objectives declared in the preamble to the Constitution.[17]

The idea of the duty of the State (by way of executive action in most instances) to protect the 'common good' by guarding the polity against the risks posed by non-citizens is a recurring theme of the Irish jurisprudence and is enshrined in the governing legislation.[18] This reflects the place of migration law in the liberal theorising of the national community.[19] The association between deportation and the 'common good' has taken on a renewed currency in the context of the ongoing international securitisation of migration issues, whereby irregular migrants are constructed as threats to the integrity and security of states.[20]

Although the power of deportation and removal is regulated by statute, executive discretion and judicial deference have been the central features

15. Gibney, 'Asylum and the Expansion of Deportation in the United Kingdom' (2008) 43(2) Government and Opposition 146. On these trends, see generally, Gilmartin, *Ireland and Migration in the Twenty-First Century* (Manchester University Press 2015).
16. [1986] IR 733.
17. ibid.
18. See, for example, s 3 of the Immigration Act 1999.
19. Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67(4) MLR 588, referring to *inter alia*, Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 1983) ch 2.
20. See generally Guild, *Security and Migration in the 21st Century* (Polity 2009).

of the deportation regime, in common with many countries worldwide.[21] The system is based on and dominated by ministerial decision-making, with 'exceptions' to the law playing a crucial role.[22] There is no route to appeal a deportation decision other than by way of an application for judicial review in the High Court: a process review only, which does not look at the merits of the decision.[23] Judicial review of immigration and asylum decisions is circumscribed by the Illegal Immigrants (Trafficking) Act 2000.[24] In spite of these restrictions, the judicial review process has become more intensive over time. MacMenamin J's comments in 2015 in the Supreme Court in *PO* (in connection with the decision of the Minister not to revoke a deportation order) show a clear evolution in thinking since cases such as *Osheku*:

> the Minister is obliged to operate within the boundaries of natural and constitutional justice, and also to decide in accordance with the international obligations which have been incorporated into domestic law by the Oireachtas. The Minister is not entitled to act unconstitutionally. She must determine every application on its merits. This includes operating within the boundaries of the 1999 Act itself, and, more broadly, the Constitution, the European Convention on Human Rights, as explained by the ECtHR, and the principle of proportionality, all of which must be applied to the circumstances of the case.[25] ...
>
> What is involved in making decisions of this type is not a policy decision, but rather involves the exercise of a margin of appreciation relating to the facts of individual cases.[26]

Despite this evolution, the Courts continue to emphasise, as foundational principles, the primacy of the executive in establishing policy in respect of immigration matters, as well as the public interest in immigration control.[27] Judicial reasoning invariably starts from the premise that the State is entitled to control

21. See Dauvergne (n 19); Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* (Clarendon Press 1997); Aleinikoff, *Semblances of Sovereignty: The Constitution, The State and American Citizenship* (Harvard University Press 2002).
22. Dauvergne (n 19).
23. s 5(1) of the Immigration Act 1999.
24. An application for leave to apply for judicial review is required in the case of immigration decisions. The application must show that there is a substantive case to be made, and must generally be lodged within 14 days of the date on which the person was notified of the decision. A decision of the High Court to refuse leave to apply may only be appealed to the Supreme Court where the High Court certifies that its decision involves a point of law of exceptional public interest and that it is desirable in the public interest that such an appeal should be taken.
25. *PO v Minister for Justice and Equality* [2015] IESC 64, para 15.
26. ibid at para 16.
27. See, for example, *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3, *per* Hardiman J at para 82; *Okunade* [2012] IESC 49, *per* Clarke J at para 10.2; *PO v Minister for Justice and Equality* [2015] IESC 64, per Charleton J at para 34.

the entry and residence of aliens, with the result that all rights-based claims of those resisting removal are viewed through this framing lens.[28] The consequences of this mode of reasoning can be seen in the narrow application of the best interests of the child principle in the context of deportation proceedings by the Court of Appeal in *Dos Santos v Minister for Justice and Equality*,[29] and the zero-tolerance approach towards private life claims of 'precarious' migrants in *Dos Santos*, *CI v Minister for Justice and Equality*[30] and *PO v Minister for Justice and Equality*.[31]

## Weighing the Best Interests of the Child

The role and weight of the interests of children caught up in deportation proceedings have emerged as key issues in recent years: must the best interests of the child be a primary consideration in a decision to deport? Where a citizen child, or a 'settled migrant' (a person who has been a lawful immigrant for a significant period of time) child, is involved, a rigorous balancing of the specific circumstances of the individual child and their family and private life in Ireland is required, which cannot be easily displaced by the general demands of the immigration system.[32] Nonetheless, the scope of the family rights enjoyed by citizen children under Article 41 of the Constitution has been a contentious issue. In the 2015 decision in *Esmé v Minister for Justice and Law Reform*,[33] a majority of the Supreme Court took a narrow approach to the definition of the family, finding that '[w]hile there is undoubtedly a natural affection and a desire to nurture … between grandparents and their grandchildren, such guarantees as are given in the Constitution are to the mother and father and to their children.'[34] In this case, the majority judgment, delivered by Charleton J, emphasised that the consideration of such rights could not be divorced from the legal and factual context: here, the Court took a dim view of the fact that the children's grandmother 'was never a refugee'[35] but had claimed asylum in order to gain entry to Ireland to be help her daughter with her children.

28. See Dembour's analysis of the similar approach taken by the ECtHR, which she terms the 'Strasbourg reversal'. Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015) 25.
29. [2015] IECA 210.
30. [2015] IECA 192.
31. [2015] IESC 64.
32. See *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] 3 IR 795; *EA and PA v Minister for Justice, Equality and Law Reform* [2012] IEHC 371.
33. [2015] IESC 26.
34. ibid para 35. This approach is in contrast to that of the High Court in *X v Minister for Justice, Equality and Law Reform* [2011] 1 ILRM 444; and *O'Leary v Minister for Justice* [2012] IEHC 80; [2012] IEHC 80.
35. ibid para 35.

Non-citizen children who have no entitlement to be in the State are in a particularly vulnerable position. In *Dos Santos v Minister for Justice and Equality*,[36] both the High Court and the Court of Appeal rejected the argument that s 3 of the Immigration Act 1999 must be read in the light of the best interests principle set out in Article 3 of the UN Convention on the Rights of the Child (UNCRC). This was due to the operation of Article 29.6 of the Constitution, which states: 'No international agreement shall be part of the domestic law of the state save as may be determined by the Oireachtas.' Following previous authority,[37] the High Court was satisfied that Article 3(1) UNCRC 'does not confer any directly enforceable rights on non-national children'.[38] McDermott J rejected the idea that the best interests principle needed to be a labelled as a 'primary consideration', but did not dispute that the best interests of the child must be given due and proper regard and emphasis as part of the Minister's overall analysis (including taking into account constitutional and Convention rights).[39] This finding was upheld by the Court of Appeal, which also found that the trial judge's decision was strengthened by the coming into force of Article 42A of the Constitution on foot of the children's rights referendum, as deportation decisions are not among the types of decision (listed in Article 42A.4.1) in which the best interests of child shall be the 'paramount consideration'.[40] Overall, then, the precise weight of children's interests in the wider balancing exercise undertaken in deportation cases is still somewhat uncertain, and will depend on the individual circumstances.

One of the most significant aspects of the findings in *Dos Santos* is the High Court's conceptualisation of the requirement to take into account the children's welfare or best interests as an element of the guarantee of fair procedures contained in Article 40.3 of the Constitution, which seemed to be implicitly accepted by Finlay Geoghegan J in the Court of Appeal.[41] Given the strength of the fair procedures guarantee in immigration cases and its uncontested application to non-citizens,[42] this could mean that the rights of the child in the deportation context are, in practice, well-protected under the

36. [2014] IEHC 559; [2015] IECA 210.
37. *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97; *N.S. v Anderson* [2008] 3 IR 417; *Minister for State for Immigration and Ethnic Affairs v Teoh* (1994–1995) 183 CLR 273.
38. [2014] IEHC 559, para 55. This was in contrast to the position in the UK, where the Convention has been implemented by domestic legislation.
39. See also *OI and OPI v RAT and others* [2015] IEHC 408.
40. Article 42A.4.1 states: 'Provision shall be made by law that in the resolution of all proceedings (i) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or (ii) concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.'
41. ibid paras 40 and 60.
42. As confirmed by the Supreme Court in *Re Article 26 and ss 5 and 10 of the Illegal Immigrants (Trafficking) Bill, 1999* [2002] 2 IR 360, at 385 per Keane CJ; and *Mallak v Minister for Justice Equality & Law Reform* [2012] IESC 59.

Irish domestic framework. In *Dos Santos*, however, the Courts were satisfied that that the interests of the five non-citizen children involved (who were in settled in the education system in Ireland and the younger of whom could not understand written Portuguese) 'were to the forefront of the decision maker's mind in accordance with the principles of fair procedures under Article 40.3 and section 3(6)'.[43]

It remains to be seen whether and how the relevant principles will be developed in line with the State's international treaty obligations. In 2016, the UN Committee on the Rights of the Child urged the State to 'ensure that the rights enshrined in the Convention are guaranteed for all children under the State party's jurisdiction, regardless of their migration status or that of their parents',[44] and, in particular, to 'expeditiously adopt a comprehensive legal framework that is in accordance with international human rights standards to address the needs of migrant children in the State party.'[45] The Irish approach to date is also at odds with the decision of the Court of Justice of the European Union (CJEU) in *The Queen on the application of MA, BT, DA v Secretary of State for the Home Department*,[46] in which the CJEU found that the best interests of the child needed to be a primary consideration in all decisions adopted by the Member States under Article 6 of the Dublin II Regulation[47] (concerning the Member State responsible for processing the asylum claim of an unaccompanied minor).[48] This was the first time that the CJEU had interpreted a provision of EU law expressly in light of Article 24 of the EU Charter, which provides that '[i]n all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration'. In *Dos Santos*, Finlay Geoghegan J in the Court of Appeal clarified that the Charter did not apply to the deportation decisions taken by the Minister in

43. [2014] IEHC 559, para 60.
44. UN Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Ireland* (29 January 2016; CRC/C/IRL/CO/3–4) para 67.
45. ibid paras 67 and 68.
46. C–648/11 *The Queen on the application of MA, BT, DA v Secretary of State for the Home Department* (4th Chamber, 6 June 2013).
47. Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national; superseded by the "Dublin III Regulation": Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-Country national or a stateless person.
48. See also *In the Matter of an Application for Judicial Review by ALJ and A, B and C* [2013] NIQB 88 (14 August 2013), in which a transfer under the Dublin system to the Republic of Ireland was blocked as the direct provision system was found to be contrary to the best interests of the child.

these cases,[49] thus opening up a divergence between the approach to the best interests of the child in the Irish law governing deportation and EU law.

## Private Life and Participation in Community Life within the State

A second issue which has been recently explored in the Irish context is the impact of the private life dimensions of Article 8 ECHR on the expulsion of migrants who have developed social ties in the country of residence. While the European Court of Human Rights (ECtHR) has long emphasised integration as an important part of its consideration of the disruption of private and family life in deportation cases,[50] the Irish cases generally focus on family rights rather than private life. The impact of private life considerations in the Irish courts' analysis of constitutional and convention rights and on the actual outcomes of these cases has been weak to date.[51] In a clear illustration of the limits of legal claims to the protection of private life within the State, the Supreme Court and the Court of Appeal have recently followed a restrictive approach when the applicant's private life in the State was developed in circumstances where their legal status was 'precarious'.[52] In such cases, it will be very difficult for applicants to show that Article 8 is potentially engaged in such a way as to require justification and a proportionality analysis under Article 8(2).[53] Even where Article 8 is found to be potentially engaged, it will require exceptional circumstances to dislodge the presumption in favour of the State's entitlement to control immigration such that expulsion would be disproportionate and unlawful.

In *PO*, the Supreme Court refused to restrain the deportation to Nigeria of a woman and her nine-year old son, who was born, raised and educated in the State (although was not an Irish citizen), on foot of its finding that the trial judge was correct in finding that the refusal of the Minister to revoke the deportation order should stand. The Court considered Article 8 issues, among other issues raised by the revocation application. The judgments of MacMenamin J and

49. [2015] IECA 210, para 19.
50. See, for example, *Uner v The Netherlands* (2007) 45 EHRR 14, *Slivenko v Latvia* App no 48321/99, (ECtHR, 9 October 2009); *Balogun v United Kingdom* App no 60286/09 (ECtHR, 10 April 2012).
51. See generally, Murphy, 'Challenging Deportation on the Basis of "Private Life": The Evolving Impact of Article 8 on Irish Immigration Law', in Suzanne Egan, Liam Thornton and Judy Walsh (eds), *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Bloomsbury 2014).
52. Citing the language used in *Nunez v Norway* App no 55597/09 (ECtHR, 28 June 2011) and *Nnyanzi v United Kingdom* (2008) 47 EHRR 18.
53. Article 8(2) provides: 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, the protection of health or morals, or for the protection of the rights and freedoms of others.'

Charleton J (with whom Laffoy J concurred on the substantive issues) focussed on the entitlement of the State to control immigration, the precarious legal status of the applicants, their extensive ties to Nigeria, the absence of any family life issues, and the wide margin of appreciation of decision-making in all the circumstances. MacMenamin J suggested that the extent of the ties to Ireland would need to be 'overwhelming' to outweigh the entitlement of the State to control entry into its territory, in the circumstances where the applicants had had no right to be in the State since 2010. In respect of the child, he stated: 'The fact that an applicant may derive benefits from continuing residence in the State, whether they be social or education, did not amount to exceptional circumstances, as would give rise to an entitlement to remain in Ireland'.[54] Charleton J discerned a number of legal principles from the ECHR case law, including that 'those who create uncertainty as to their status within the country to which they migrate, by claiming asylum rights that are unfounded, cannot rely on mere presence to invoke Article 8 rights'.[55] He gave the idea of the best interests of the child short shrift, stating: "The often-claimed separate rights of children are, save for extraordinary circumstances, dependent upon the approach of the parent'.[56] He could not find any evidence that the Minister's findings were adverse to any of these principles.

Given its finding that 'no legal rights' were involved, the Supreme Court could not disturb the Minister's decision. However, an interesting and most unusual feature of the case was the Supreme Court's appeal to the Minister to exercise his discretion in a humane way, given 'that real issues of ministerial discretion may arise in this case, which involve an 8 year old child, and his mother, both of whom have now resided in this State for well nigh on 9 years'.[57] Charleton J remarked: 'As a matter of humanity, but not as a matter of law, it is for the respondent Minister to ask herself how she feels it appropriate to consider this matter in the exercise of her discretion.'[58] In putting the determination of this claim into the non-justiciable 'policy' category of ministerial decisions, the Supreme Court drew a bright line as to the limits of rights claims of precarious migrants in the deportation setting.

The Court of Appeal followed a similar rationale – if a somewhat different line of reasoning – in *CI* and *Dos Santos*, both cases in which the elements of private life had been created during a period of 'precarious' residence in the State (the applicants in *CI* were unsuccessful Nigerian asylum applicants; and those in *Dos Santos* were a Brazilian man with an expired work permit and his wife and five children). The constitutional private life arguments put forward by the applicants in *Dos Santos* were rejected with little discussion, as Finlay

54. para 25.
55. para 35.
56. para 36.
57. Laffoy J agreed with these observations.
58. para 47.

Geoghegan J found that non-citizen children do not have a personal right under Article 40.3 to a private life within the State or to participate in community life established in the State. She appeared to confine the rights of irregular non-citizen children to their rights as a member of a family under Articles 41 and 42, and 'certain personal rights' under Article 40.3, including fair procedures rights and the rights set out in *G v An Bord Uchtála*.[59] The wide-ranging unenumerated right of children 'to be fed and to live, to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being', as set out in *G*,[60] could provide a fruitful line of argument in future cases. However, she also found that the children in question did not have a right under Article 40.3 to the community ties which they had made in the State, and it is doubtful that the reference to the unenumerated rights of children was intended to confer any additional protection against expulsion on non-national children.

On the Convention arguments made by the applicants in both cases, Finlay Geoghegan J drew a distinction between the nature of the consideration of the private life rights of settled migrants and those in the State unlawfully, focussing on the nature of the private life rights protected by Article 8 in each case. She noted that there was no ECtHR decision directly on the question of whether asylum seekers or irregular migrants can enjoy the type of private life experienced by settled migrants, in terms of integration into the State and specific social ties formed. Drawing on the ECtHR's decisions in *Nnaynzi v UK*,[61] *Bensaid v UK*,[62] and *Balogun v UK*,[63] as well as applying the five-step test laid down in the House of Lords decision in *R (Razgar) v Home Secretary*,[64] she found that in the case of residents without a legal right to reside, while the Court could take into account private life in the sense of ties established within the State, this would carry little weight in the overall balancing exercise. The most important question was whether the applicants' broader private life right to physical and moral integrity, and ability to form relationships, would be disproportionately interfered with by the deportation, such as to engage the operation of Article 8. In this case, a proportionality analysis was not required as the Court of Appeal found that the decision of the Minister that the consequences of deportation were not of sufficient gravity to potentially engage Article 8 was fair.

It will be almost impossible for Article 8 private life claims to reach the high threshold set out in these cases. Following *Dos Santos* and *CI*, applicants appear to face two obstacles. First, they must show that deportation will have consequences of sufficient gravity to potentially engage A8. Following

59. *Dos Santos*, at para 10, referring in turn to the rights identified in *G v An Bord Uchtala* [1980] IR 32, 55–56.
60. *Ibid.*
61. (2008) 47 EHRR 18.
62. (2001) 33 EHRR 10.
63. App no 60286/09 (ECtHR, 10 April 2012).
64. [2004] 2 AC 368.

*Bensaid* and *Nnyanzi*, the Court of Appeal found that this would require 'wholly exceptional circumstances' in the case of persons who were never lawfully allowed to reside in the State except for the purposes of pursuing an asylum claim. This effectively reversed the approach of the High Court, where the trial judge had noted: 'It is difficult to discern why the removal of the children from their school would not constitute a grave consequence sufficient to engage Article 8.'[65] Deportation, by its nature, impacts on the physical and moral integrity of an individual, as acknowledged by Finlay Geoghegan J in *Dos Santos*. Indeed, Anderson notes that this is an aspect of deportation which sits uneasily with liberal values.[66] This impact is not however, of itself, enough to bring the circumstances within the scope of Article 8. While 'settled migrants' can argue that their private life within the State is ruptured by the expulsion, more short-term migrants, asylum seekers, or those who are undocumented are essentially confined to claims based on how their broad right to private life in the country of expulsion will be affected. Indeed, in the subsequent High Court decision in *Balchand & anor v Minister for Justice and Equality*,[67] Humphreys J interpreted the Court of Appeal's approach in *CI* as meaning that "in general, persons whose situation was '*precarious*' did not enjoy private and family rights of sufficient weight to engage art. 8".[68] Moreover, even where an applicant can show that the minimum gravity requirement is satisfied, it will be almost impossible to show that that the consequences in question outweigh the State's entitlement to control immigration such that a violation of Article 8 actually occurs.[69]

## Insiders and Outsiders: Deportation as a 'Membership-Defining' Tool of the State

The decisions discussed above, particularly *Dos Santos* and *CI*, raise doctrinal questions in respect of the correct approach to private life claims in deportation cases, as well as the application of the best interests of the child principle. What would constitute the exceptional circumstances necessary to give rise to

65. *CI v Minister for Justice and Equality* [2014] IEHC 447, at para 29. For commentary on the High Court decision, see Patricia Brazil, 'Asylum and Immigration Law', Annual Review of Irish Law 2014, 12, at 14.
66. Anderson, *Us and Them: The Dangerous Politics of Immigration Control* (Oxford University Press 2013).
67. [2016] IEHC 132.
68. [2016] IEHC 132, at para. 18. See also *O.O.A. & anor v Minister for Justice and Equality* [2016] IEHC 468. *Cf* High Court decision in *Luximon v Minister for Justice and Equality* [2015] IEHC 227. *Luximon* and *Balchand* are under appeal.
69. See *PO v Minister for Justice and Equality* at para 39, citing *Agbonlahor v Minister for Justice, Equality and Law Reform* [2007] 4 IR 309; and *CN v United Kingdom* [2005] 2 AC 296.

an entitlement to reside in Ireland on the basis of private life established here by persons with precarious legal status? Is it appropriate to effectively classify an asylum seeker whose claim is unsuccessful as an 'unlawful' migrant (as was done repeatedly in *Dos Santos*)? What is the impact of Article 42A of the Irish Constitution on the rights of migrant children? Moreover, McMahon correctly identifies important issues relating to the Irish courts' interpretation of the ECHR case law, the role of the 'minimum gravity' requirement, and the correct weight to be accorded to the precariousness of an individual's migration status.[70]

Aside from these questions, these cases tell us much about the symbolic power of deportation in modern liberal democracies. In *PO*, the Supreme Court classes the expulsion of a nine-year-old boy who had spent his whole life in the State as a 'matter of humanity' rather than of legal principle, whilst recognising the potential injustice of the proposed deportation. In *Dos Santos* the Court of Appeal clearly establishes that non-citizens do not have a constitutionally protected right to participate in community life in the State. In draining the private life within Ireland of 'precarious' residents of any real weight, legal recognition of community membership is denied to people who have resided in Ireland for considerable periods of time. In these cases, border rules operated to efface the lived experiences of those involved, all of whom had argued to the Minister that they had integrated into Irish society. Deportation is, in this way, revealed as a powerful, 'membership-defining'[71] tool of the state. It is a tool which Dembour argues 'verges on being inhumane, by relegating those which the law characterises as "aliens" outside the society to which, like it or not, they belong'.[72] This view has particular resonance in light of the cases explored in this article.

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70. Aoife McMahon, 'The right to respect for private life under article 8 ECHR – the Irish cases of *Dos Santos* and *CI*' (European Database of Asylum Law, 18 March 2016) <http://www.asylumlawdatabase.eu/en/journal/right-respect-private-life-under-article-8-echr-%E2%80%93-irish-cases-dos-santos-and-ci> accessed 23 March 2016.
71. Anderson, Gibney and Paoletti (eds), *The Social Political and Historical Contours of Deportation* (n1) 2.
72. Dembour (n 28) 190.

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