



HUMAN RIGHTS COMMISSION

HUMAN RIGHTS COMMISSION

Position of Non-National Parents and their Irish-Born Children

21st October 2003

HUMAN RIGHTS COMMISSION

Position of Non-National Parents and their Irish-Born Children

The Human Rights Commission is seriously concerned about the issue of letters warning of deportation to up to 700 non-national parents of children born in Ireland and the effect this is having on asylum-seekers and other immigrants currently in the State. We are also concerned at the lack of readily accessible legal advice to such parents.

The issue of deportation letters and the resulting uncertainty about their future has caused alarm and distress not only to the actual recipients but also among the wider community of non-national parents in similar situations. The people who received letters have been given only fifteen days to make representations as to why they should not be deported and have been given no clear indication of the considerations that the Minister for Justice, Equality and Law Reform will take into account in dealing with their representations.

The issue of the deportation letters follows the decision of the Supreme Court last January in the *L.* and *O.* cases which involved a Czech and Nigerian family, each with a child born in Ireland, and who wished to remain in this country. The Supreme Court held that while children born within the State are entitled to Irish citizenship, there was no automatic right of residency here for non-national parents of such children and that it was open to the Minister to deport such persons if the circumstances warranted it.

The Court did not say that all such parents should be deported, but the Government decided that from then on residency would not be granted on the sole basis of parentage of an Irish-born child and that a separate procedure for making such applications would be brought to an end. That left outstanding the questions of

what should happen to non-national parents of children born within the State prior to the Supreme Court decision, and what should happen to children born to non-national parents in the future.

Prior to the Supreme Court decision, it was the accepted practice that parents of children born within the State were granted residency on that basis. The Department of Justice, Equality and Law Reform had even established a separate procedure for dealing with such applications. Statutory agencies, lawyers and NGOs in the area had all advised non-national parents on that basis and a number of asylum-seekers had abandoned their application to rely only on their status as parents of Irish citizen children.

Many asylum-seekers and other non-nationals had made decisions about their future based on the advice they received and their understanding of the position before the Supreme Court decision in the *L.* and *O.* cases. They are now confused and frightened and may have cut all links with their homeland in the meantime.

We feel that it would be only fair to such people that Government policy following the Supreme Court decision should be prospective rather than retrospective, and that people who had applied for residency before January/February last be based on the pre-*L.* and *O.* position and therefore should be allowed to remain here on the same basis as before. This is a limited group of people whose number is closed and such a decision would not affect future policy on asylum or residency.

The other major issue outstanding concerns the fate of children born within the State to non-national parents after the Supreme Court decision. These children are, by that fact, Irish citizens¹ and the Supreme Court re-affirmed that position. Accordingly, the State owes them a duty of care and attention to their welfare. As citizens they cannot be deported, but where the parents of infant or young children are deported, the children will almost certainly go with them.

Article 3.1 of the UN Convention on the Rights of the Child, which Ireland has ratified, states that ‘[I]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration’. Irish domestic law is based on similar principles.² As a result, where the Minister is considering the position of non-national parents of Irish Citizen children, we would suggest that he must treat ‘the best interests of [those children] .. as a primary consideration’.

Irish citizen children must not be put in a position where they could be in any significant danger of treatment that might contravene Article 3 of the European Convention on Human Rights (prohibition of torture, inhuman or degrading treatment or punishment), or where they might be subjected to harmful or traditional practices such as female genital mutilation, or to forced marriages or child labour.

In considering the position of such citizen children, the Minister should also have regard to whether they might be sent to situations of armed conflict or famine, or where they would be unable to access their basic rights to education or healthcare. Consideration should also be given to the social, cultural and educational links that the citizen child may have developed with this State, as opposed to the state or region to which s/he is likely to be removed if her/his parents are deported. The child involved may not speak the language of her/his parent’s country – or countries, if they are from different countries – and there may no longer be any family members living there.

But if a citizen child should not be sent or allowed to be brought to his parents’ home country because of risks to its life, health or welfare, what should happen to it? This question was not really addressed by the Supreme Court decision in *L.* and *O.*, cases, which were focused instead on the position of the parents.

The child could be left in Ireland – and presumably taken into care – while its parents are deported, but Articles 41.1 and 42.1 of the Constitution recognise the family as ‘the natural primary and fundamental unit group of Society’ and guarantee to respect ‘the right and duty of parents’ to provide for the education and upbringing of their children. The Supreme Court in the *Fajujonu* case in 1990³ held that children had ‘a constitutional right to the company, care and parentage of their parents within a family unit’, though it also said that that right was not an absolute one and did not in all circumstances have to be enjoyed within the State.

Where, however, there is a significant danger to the rights or welfare of an Irish citizen child if its non-national parents are deported, this would put the parents in the intolerable position of having to decide whether to leave their child behind them in Ireland for its own safety and physical welfare, or to take the child and preserve the family unit.

No parents should be in this position. We would suggest that where it is established that there is a significant danger to life, health or welfare of an Irish-born child, of non-national parents, or that deportation would cause real and substantial hardship or distress, the Minister should allow the parents to remain in this country with their child or children until the risk of hardship or danger has passed or until the child is old enough to make his/her own decision where to live. And each case should be examined carefully on its own merits to decide whether it fits into this category.

Where it is decided that non-national parents should be deported and they take their Irish citizen child or children with them, the government has a continuing responsibility to such children as particularly vulnerable Irish citizens. We would urge that arrangements should be made so that consular representation and protection is available to these children on at least the same basis as other Irish citizens living abroad and that consideration be given for providing for voluntary registration of such citizen children and periodic monitoring of their situation.

They should be enabled to readily obtain Irish passports and to return to the State whenever they wish.

Finally, because of the alarm and distress which the issue of the deportation letters has given rise to among asylum-seekers and other immigrants, we feel the Minister should publicly reassure members of that community that there will be no mass deportations, that the Irish citizenship of children born here will be honoured if regardless of their parents' countries of origin, and that those families that wish to remain here will have their applications considered humanely and on an individual basis, taking account of each family's particular circumstances and in accordance with clear and transparent criteria.

Summary of Recommendations

1. Given the major change in policy and practice resulting from the Supreme Court decision in the *L.* and *O.* cases and the Government's subsequent decisions, the Minister for Justice, Equality and Law Reform should set out clearly and publicly the criteria that will be used to decide on the applications to remain in the State from non-national parents of Irish-born children. Because of the widespread confusion and alarm among people in this situation, made worse in many cases by language difficulties, the fifteen day time limit for making representations to the Minister should be extended and provision should be made for free legal assistance and advice to people faced with possible deportation.
2. The government should reconsider its position in relation to non-national parents of Irish born children who had applied on that basis for permission to remain in the State prior to the Supreme Court Decision and under the separate procedure in operation up to then. When these people made their original applications, it was generally accepted that they would be entitled to remain and many were so advised by statutory agencies, lawyers and

NGOs on the basis of the state of the law at the time. This was accepted as well by the Department of Justice, Equality and Law Reform through its establishment of a separate procedure for such applications. This is a limited and now closed category of persons and a decision to allow them to remain would not affect the overall asylum process.

3. The UN Convention on the Rights of the child requires that ‘the best interests of the child shall be a primary consideration’ in all decisions affecting children and Irish domestic law operates on the same principle. This principle that the best interests of the Irish citizen child should be a primary consideration should apply to all decisions concerning Irish-born children and their non-national parents and especially where the children have been born after the Supreme Court’s *L.* and *O.* decisions.
4. The decisions concerning non-national parents should not expose Irish citizen children to any significant risk of treatment contrary to Article 3 of the European Convention on Human Rights (torture, inhuman or degrading treatment); harmful traditional practices such as female genital mutilation; forced marriage; or child labour. The Minister, in making decisions should also have regard to whether citizen children would be sent with their parents to situations of armed conflict or famine, or where their welfare or rights to education and healthcare would be in jeopardy.
5. The Constitution guarantees to protect the family and respect the right of parents to provide for the education and upbringing of their children. The courts have also upheld the right of children to ‘the company, care and parentage of their parents’ (the *Fajujonu* case). Non-national parents of Irish citizen children should not be forced to choose between leaving their Irish-born child or children behind in the State ‘for their own good’ or taking them to a situation where their lives, health or welfare may be threatened, in order to prevent the break up of their family. Where

deportation of such parents is likely to put their children at risk, we would suggest that the parents should be allowed to remain in the State until the risk has passed or the children are old enough to decide for themselves where they want to live.

6. Where the lives or physical integrity of citizen children are not an immediate risk, consideration should nonetheless be given to how disruptive or traumatic removal from the State would be for the children concerned, e.g. whether they have other family members living here, whether they have developed educational, social or cultural links with this country and how much connection they have with the country it is proposed to deport their parents to. All cases should be considered on the basis of their individual circumstances, not just general policy considerations.
7. In the cases where Irish citizen children are effectively required to leave the State with their non-national parents, steps should be taken to ensure that they will have ready access to consular representation and protection on at least the same basis as other Irish citizens living abroad and that they will be able easily to obtain Irish passports and to return to this State whenever they wish. Consideration should be given to compiling a voluntary register of such citizen children and periodically monitoring their situation so that assistance may be given to them if necessary.
8. The government should publicly reassure the asylum-seeker and immigrant community in the State that there will be no mass deportations, that the Irish citizenship of children born here will be honoured and that each case will be dealt with humanely and on an individual basis using clear and transparent criteria.

Notes

¹ **Article 2** of the *Constitution*: ‘It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation ...’

Section 6(1)(a) of the *Irish Nationality and Citizenship Act, 1956* states: ‘Every person born in Ireland is an Irish citizen as from birth’.

² **Section 3** of the *Guardianship of Infants Act, 1964* says: ‘Where any proceedings before any Court the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration’.

Section 24 of the *Child Care Act, 1991* says: ‘In any proceedings before a court under this Act in relation to the care and protection of the child, the court, having regard to the rights and duties of parents, whether under the Constitution or otherwise, shall –

(a) regard the welfare of the child as the first and paramount consideration,

and

(b) in so far as is practicable, give due consideration, having regard to his age and understanding, to the wishes of the child’.

³ *Fajjonu -v- The Minister for Justice* [1990] 2 IR