



Cúirt Uachtarach na hÉireann  
Supreme Court of Ireland  
**MK (Albania) v. Minister for Justice**  
**On appeal from: [2021] IEHC 275**

**Judgment delivered on 24<sup>th</sup> November 2022**

**[2022] IESC 48**

**Headline**

1. The Supreme Court, by a majority of 3-2 (O'Donnell C.J., O'Malley, and Hogan JJ.; MacMenamin and Baker JJ. dissenting), dismissed the appellant's appeal against the High Court judgment refusing to quash the Minister's refusal to grant permission to remain and subsequent deportation order.
2. The Court was unanimous in ruling that the Minister's assessment of Article 8 rights, by following the Court of Appeal in *CI*, was incorrect. The High Court erred by applying this same approach.
3. However, the Court held by a majority (O'Donnell C.J., O'Malley, and Hogan JJ.) that this did not mean that the decision was a breach of the appellant's rights and invalid. The minority (MacMenamin and Baker JJ.) held that the decision was invalid and accordingly would have granted *certiorari*.
4. The Court also considered the appellant's constitutional rights but agreed that a full examination should be reserved to an appropriate case. In any event, a proportionality assessment under Constitution would not lead to a different outcome than by reference to the Convention in this appeal.

**Composition of Court**

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

**Judgments**

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

**Background to the Appeal**

The issues in this appeal relate to the rights of "unsettled" migrants under the Convention and Constitution when the Minister is considering deportation under the International Protection Act 2015. The appellant is an unsettled migrant who applied unsuccessfully for international protection. Subsequently, he was refused permission to remain. In her decision, the Minister applied the 'Razgar' test from the UK House of Lords decision which sets out five questions to address when considering deportation:

- 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?"*

The decision concluded that "it is not accepted that such potential interference will have consequences of such gravity as potentially to engage the operation of Article 8(1)". The appellant was refused leave to remain, and a deportation order was issued.

The appellant issued judicial review proceedings, arguing that unsettled migrants had a right to a proportionality assessment when considering the effect deportation may have on their Article 8 ECHR and constitutional rights. The High Court, following the Court of Appeal in *CI*, held that exceptional circumstances were required before the appellant's Article 8 rights were engaged, and that he had not acquired a procedural right under the Constitution to have a proportionality test conducted.

### **Reasons for the Judgment**

**Article 8 Issue:** The Court agreed that the Minister had erred in her approach to the appellant's application when considering his Article 8 rights. The Court of Appeal's 2015 judgment in *CI* had interpreted question (ii) of the *Razgar* test to require wholly exceptional circumstances before Article 8 was engaged in the case of deportation orders for unsettled migrants. In this decision, the Minister addressed only *Razgar* questions (i) and (ii) (in the reverse sequence), found that Article 8 was not engaged and did not proceed to carry out a proportionality assessment under *Razgar* question (v).

The Court found that this approach did not represent consistent Strasbourg jurisprudence in the field of the right to respect for private and family life for unsettled migrants. The ECtHR applied a relatively low threshold as to Article 8 engagement; "exceptional circumstances" did not arise when considering engagement, but were considered when weighing factors for and against deportation.

As a result, the High Court judgment, in following *CI*, was incorrect; the Minister ought to have conducted a proportionality assessment at stage (v) of the *Razgar* test.

**Constitutional Issue:** The Court agreed, in principle, that the appellant's constitutional rights to a private life should have been weighed by the Minister when considering deportation.

However, Chief Justice O'Donnell found that it was not necessary to address the question of the relationship between the rights protected by Article 8 ECHR and the Constitution. If there was a violation of the appellant's Article 8 ECHR rights, Article 8 would provide a complete remedy.

Mr Justice MacMenamin also would reserve full consideration of the constitutional issue to an appropriate case. While not excluding a consideration of an Article 40.6 analysis, he held that the rights at issue should be largely derived from Article 40.3 which would involve a proportionality assessment, balancing the rights of the individual against considerations of the common good, public order and morality. In principle, a constitutional consideration would lead to the same outcome as a consideration under the Convention.

Ms Justice O'Malley and Ms Justice Baker agreed that a full consideration of the constitutional issue ought to be reserved to an appropriate case and did not comment on the inter-relationship between the Constitution and Convention in this case.

Mr Justice Hogan held that the right to private life at issue found principal expression in Article 40.3.1 and 40.3.2 of the Constitution and in case law relating to freedom of association contained in Article 40.6.1(iii), though it was diffused throughout the Constitution and could not be expressed in a single

clause. However, he held that it was unnecessary to determine the limits of such rights, as this would depend on the precise facts of each case.

Mr Justice Hogan held that the Minister ought to have conducted a proportionality assessment in respect of the appellant's constitutional privacy rights, though it was unlikely that there would ever be a difference in result when conducting such an assessment under the Convention or the Constitution, save in an unusual or special case.

**Remedial Issue:** Chief Justice O'Donnell found that the Minister's error in conducting a proportionality assessment at question (ii) of the *Razgar* test rather than at question (v) was an error of sequence rather than an error of substance. Hence, this did not amount to an unlawful breach of the appellant's Article 8 rights and the Minister's decision should not be quashed.

Ms Justice O'Malley agreed that an order of *certiorari* was not necessary or appropriate.

Mr Justice Hogan agreed with Chief Justice O'Donnell that the Minister did, in substance, conduct a proportionality assessment required by Article 8(2). He also found that the decision conducted a proportionality test as required under the Constitution. Hence, the Minister's overall decision could not be faulted, and no order of *certiorari* should be granted.

Mr Justice MacMenamin disagreed with the majority and held that *certiorari* ought to be granted, finding that the primary purpose of judicial review was to prevent the abuse of power rather than the final determination of rights. He considered that the Minister and courts have legal duties under the ECHR Act 2003, and that in this case the Minister's decision was incompatible with the Convention and Strasbourg case law. An effective remedy as required under Article 13 ECHR should follow if the Court was to be consistent with the rule of law and legal certainty.

Ms Justice Baker agreed with Mr Justice MacMenamin that an order of *certiorari* was the appropriate resolution in this case. The decision-making process was flawed and therefore ought to be quashed. She held that it was not the function of a court in an application for judicial review to deduce what the correct answer would have been, but to ensure that the rules and methodology by which decision makers are to act are properly applied.

### **Note**

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

### **Case history**

22-23 February 2022	Oral submissions made before the Court
[2021] IESCDT 116	Supreme Court Determination granting leave
[2021] IEHC 275	Judgment of the High Court