

# ***Luximon and Blachand v Minister for Justice - Securing Rule of Law in the Immigration Quicksand***

***Colm O’Cinneide\****

## **Introduction**

*Luximon and Blachand v Minister for Justice*<sup>1</sup> is the latest in a sequence of Supreme Court judgments involving immigration law, constitutional and human rights claims, and the status of Irish-resident families caught in an irregular migration situation. In handing down the judgment of the Court, MacMenamin J. was at pains to emphasise that this particular decision only addressed the specific facts at issue.<sup>2</sup> But the significance of the judgment may be greater than this cautious disclaimer would suggest.

The legal issues in this conjoined appeal concerned a specific sub-set of migrants in Ireland – namely non-European Economic Area (‘EEA’) nationals who had entered the country and established residence here on a long-term basis with their families on the basis of student visas which permitted them to work on a part-time (‘Stamp Two’) basis, but whose entitlement to remain in the state was subsequently called into doubt by the introduction of a new, more restrictive immigration scheme.<sup>3</sup> The applicants, the Luximon and Blachard families, had been informed by Ministerial letter in November 2012 and October 2014 respectively that their permission to remain in the state would not be extended and consequently they were required to leave within a fixed time frame (unless they could regularise their immigration status in some other way). In its judgment, which was the culmination of an extended legal battle lasting several years, the Court held that the ministerial decision to require the families to leave the state was *ultra vires*, on the basis that the Minister had acted beyond the scope of the powers conferred upon him by the relevant statute (s. 4(7) of the Immigration Act 2004) to vary the terms on which the two families had been granted permission to remain in the state. The Court also concluded that the Minister had not complied with the requirements of s. 3 of the European Convention on Human Rights Act 2003 (hereafter the ‘ECHR Act 2003’), by failing to take into account their Convention rights – and in particular their right to private, home and family life as protected under Article 8 ECHR.

The significance of the judgment for the Luximon and Blachard families is obvious: it confirmed that that the ministerial decision to deny them continuing leave to remain was quashed, along with the accompanying demand for them to leave the state within a specified time frame. The judgment has also strengthened the legal position of other individuals and families in a similar position to the Luximons/Blachards, by making it clear that any attempt to vary their current lawful residence status in Ireland will have to circumvent a range of legal hurdles – not least the requirement for the minister to give due consideration to their Article 8 ECHR rights. Indeed, the outcome of *Luximon* may have prompted the recent announcement of a new scheme that will allow up to 5,500 non-EEA

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\* Professor of Constitutional and Human Rights Law, UCL.

<sup>1</sup> [2018] IESC 24 (hereafter cited as ‘*Luximon*’).

<sup>2</sup> *Ibid*, [83].

<sup>3</sup> This new scheme imposed time limits on the time migrants falling into this category could remain in the state: see Irish Naturalisation and Immigration Service, *New Immigration Scheme for Full-time Non-EEA Students: Guidelines for Non-EEA Students Registered in Ireland before 1st January 2011* (Dublin, 2011).

nationals who entered and are resident in Ireland on a similar basis as the Luximons/Blachands to apply for permission to remain in the state.<sup>4</sup>

However, the significance of *Luximon* as a judgment arguably also extends beyond these context-specific outcomes. Its true importance only perhaps comes into full focus when the Supreme Court's judgment is contrasted with the approach taken by Humphreys J. in his decision in the *Blachand* case at first instance in the High Court,<sup>5</sup> and more generally with wider context of immigration-related jurisprudence over the last decade or so.

Humphreys J. at first instance read the relevant legislation as designed to maximise ministerial discretion in the interests of ensuring effective immigration control. He also concluded that families' Article 8 rights were engaged to a 'minimal' degree by the application of such controls, and had little or no relevance to the proceedings at hand. He thus implicitly adopted a 'facilitative' approach to the interpretation of the relevant legislation, reading it as designed to facilitate the smooth exercise of ministerial discretion in dealing with migrants who enjoyed at best a 'precarious' legal status in this state.

In contrast, Barr J. in the High Court in *Luximon*, followed by the Court of Appeal in both cases on appeal, took a very different approach – which was confirmed by the Supreme Court. In essence, its judgment implicitly rejected Humphreys J.'s assumptions that (i) immigration legislation should be viewed as essentially enabling in nature and (ii) the human rights of migrants should be marginal to any decision-making process in this context. While acknowledging the wide discretion enjoyed by the executive in this context, the Supreme Court affirmed that core rule of law principles still constrained the exercise of ministerial discretion in this context, and that Ministers had to take into account the human rights of migrant families when making decisions which would fundamentally alter their legal status.

While its *ratio* may indeed be confined to a specific issue of statutory interpretation, *Luximon* can thus be viewed as having wider constitutional significance: it affirms that state action must comply with fundamental rule of law and human rights principles, even amid the legal and normative messiness of immigration law. Furthermore, there is a hint in MacMenamin J's judgment that the Supreme Court may be open to developing the rather limited Irish constitutional rights jurisprudence that currently exists relating to the rights of the family – which may have interesting ramifications in the immigration context, and elsewhere.

### **Facts and Procedure**

Ms Daniye Luximon and Mr Yaswin Balchand are citizens of Mauritius. They arrived in Ireland in 2006 on an administrative educational scheme set up by the State in 2001, which permitted them to engage in part-time work while undertaking post-secondary level educational courses. They were subsequently joined by additional family members, and at the time of the hearing of the appeal had been lawfully resident in Ireland for some 11 years.

In July 2011, the government promulgated the abovementioned new scheme which for the first time set explicit time limits on how long such students might remain in Ireland.<sup>6</sup> When the applicants' 'Stamp Two' permission to work expired, they sought via their solicitors to change to 'Stamp Four' immigration/employment status on the basis of their and their families' extended period of

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<sup>4</sup> *The Journal.IE*, 'New scheme could allow up to 5,500 non-EEA nationals remain in Ireland to work', 4<sup>th</sup> September 2018, [http://www.thejournal.ie/student-scheme-4219231-Sep2018/?utm\\_source=shortlink](http://www.thejournal.ie/student-scheme-4219231-Sep2018/?utm_source=shortlink).

<sup>5</sup> *Blachand v Minister for Justice* [2016] IEHC 132.

<sup>6</sup> See fn 3 above.

residence in the State (citing the requirements of Article 8 ECHR). This was refused by the Minister of Justice under his discretionary powers set out in s. 4(7) of the Immigration Act 2004 to grant or vary permission to remain in the State: furthermore, in this decision letter, the Minister proceeded to give notice to the applicants that they were required to leave the State within a specified time period, as their leave to remain had expired.

Judicial review of these decisions were sought. At first instance in the *Luximon* proceedings,<sup>7</sup> Barr J. determined that the Minister had erred in failing to consider the Luximon family's Article 8 ECHR privacy and family rights in deciding whether to vary or renew their permission to be in the State, and granted an order of *certiorari* quashing that decision. In contrast, in the subsequent first instance hearing of the *Blachand* case,<sup>8</sup> Humphreys J. declined to grant judicial review of the Minister's decision, on the basis that the Minister was under no duty to consider ECHR rights in making determinations under s. 4(7) of the 2004 Act.

The Court of Appeal upheld the key points of Barr J's judgment in *Luximon*.<sup>9</sup> As such, it also reversed Humphreys J's first instance judgment and granted *certiorari* to the Blachands.<sup>10</sup> In determining the conjoined cases on final appeal, the Supreme Court affirmed the Court of Appeal's reasoning as regards the requirements of s. 3 of the ECHR Act. It also concluded that the Minister had acted *ultra vires* by using the powers granted to him by s. 4(7) of the 2004 Act to issue a decision requiring the Luximon and Blachand families to leave the State.

## Analysis

### ***Background Context - The Rule of Law Challenges Posed by Immigration Law***

To analyse the importance of these set of proceedings and the impact of the Supreme Court's final judgment, it is first necessary to sketch its background context.<sup>11</sup> Immigration law poses unique challenges for courts, as well as for the civil servants charged with administering it, the legal practitioners who work in this area, and the individuals and families directly subject to its requirements. Furthermore, these challenges are not just operational in nature: they also give rise to the type of conceptually challenging legal issues that lie at the core of the *Luximon* judgment.

### *Complexity*

To start with, immigration is a highly complex area of law. Different statutory provisions overlap and intersect, often generating fine legal distinctions between how different groups of migrants are treated. Difficult questions also repeatedly arise as to how these statutory provisions should be applied in light of the requirements of national constitutional and administrative law. Furthermore, Irish law is not the only game in town in this context: EU law and the provisions of the ECHR as incorporated by the ECHR Act 2003 are also relevant, as is the Geneva Convention and other

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<sup>7</sup> [2015] IEHC 227.

<sup>8</sup> [2016] IEHC 132.

<sup>9</sup> [2016] IECA 382.

<sup>10</sup> [2016] IECA 383.

<sup>11</sup> Judges and practitioners working in the area of immigration law broadly defined will be familiar with the content of the next few paragraphs – but it is nevertheless worthwhile providing some detail, if only to foreground the issues at stake in this litigation.

elements of international human rights law.<sup>12</sup> So, there is plenty of immigration law – and it must be interpreted and applied by reference to several different sets of overarching legal norms.<sup>13</sup>

### *Conceptual Uncertainty*

This complexity would, by itself, pose challenges for any legal system. But the difficulty of immigration law is compounded by certain underlying conceptual tensions. These complicate attempts to navigate through its labyrinth, and make immigration law a uniquely difficult and demanding area of legal regulation.

Immigration law involves the application of state power in a way that directly impacts upon individual lives. Decisions to grant or withhold leave to remain, or to grant permission to work, or to bestow or deny residency/refugee/citizenship status, often have huge consequences for individuals and families. And yet, some of the normal constitutional rules that control how state power impacts upon individual lives do not apply to non-nationals subject to the requirements of immigration law.

As a default position, non-national ‘aliens’ have no general right to enter or remain in the state.<sup>14</sup> Their entry is subject to conditions, while their continued residence on Irish soil is subject to a range of restrictions imposed by a combination of legislative provisions and ministerial regulations. If these conditions or restrictions are breached, then they are potentially liable to deportation from the state – and all the life-altering consequences that may flow from such an event. They benefit from the protection of certain constitutional rights – but not to the same extent as citizens. As Keane CJ put it in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999*:<sup>15</sup>

in the sphere of immigration, its restriction or regulation, the non-national or alien constitutes a discrete category of persons whose entry, presence and expulsion from the State may be the subject of legislative and administrative measures which would not, and in many of its aspects, could not, be applied to its citizens.

Furthermore, the decision whether or not to trigger such measures is often left in the hands of the executive. Legislation such as the Immigration Act 1999, coupled together with judgments such as *Laurentiu v Minister for Justice*,<sup>16</sup> have imposed certain limits on the sweeping freedom of action that the executive has historically enjoyed in this context since the days of British rule.<sup>17</sup> However, this is an area where ministers still exercise wide discretionary powers, to an extent arguably unparalleled in any other context where state power directly impacts upon individual lives. In general, non-nationals subject to immigration law are more exposed to the exercise of state power than others: their rights are more limited, and they are at greater risk of being subject to arbitrary and capricious decision-making.

The justification for this lesser level of legal protection was set out by Costello J. in *Pok Sun Shum v Ireland*, in a passage that has been subsequently endorsed by the Supreme Court: ‘[the] State... must

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<sup>12</sup> C. Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP, 2015).

<sup>13</sup> See in general J. Stanley, *Immigration and Citizenship Law* (Round Hall, 2017).

<sup>14</sup> Barrington J. in *Laurentiu v. Minister for Justice* [1999] IESC 47; [1999] 4 IR 26; [67]. Obviously, EU/EFTA nationals are in a special situation in this regard – as presumably UK citizens will be after Brexit.

<sup>15</sup> [2000] IESC 19; [2000] 2 IR 360 (28th August, 2000).

<sup>16</sup> [1999] IESC 47; [1999] 4 IR 26.

<sup>17</sup> In this regard, it is worth noting that the power to control the entry and activity of aliens within the state was originally an element of the royal prerogative: see I. McDonald, ‘Rights of Settlement and the Prerogative in the UK - A Historical Perspective’ (2013) *Journal of Immigration Asylum and Nationality Law* 10.

have very wide powers in the interest of the common good to control aliens, their entry into the state, their departure and their activities within the State'.<sup>18</sup> A similar analysis underpinned the Supreme Court's judgment in *A.O. and O.J.O. v Minister for Justice*, where the majority of the Court concluded that the Minister was entitled to take policy considerations relating to the need to maintain a comprehensive system of immigration control into account when deciding whether to deport the non-Irish parents of a child of Irish nationality.<sup>19</sup>

However, the extent of the immigration control powers wielded by the executive, coupled with the limited rights protection enjoyed by non-nationals, can nevertheless sit uncomfortably with the wider commitment of the Irish constitutional order to rule of law and the protection of fundamental rights.<sup>20</sup> The discretionary powers of Ministers in this context can be difficult to reconcile with the ideal of rule of law - namely that law should be transparent, clear, predictable and accessible.<sup>21</sup> Similarly, the diluted rights protection afforded to non-nationals can be difficult to square with the universalist nature of human rights claims.<sup>22</sup>

This conceptual dissonance can become a real problem when legal standards are not clear, or when open-textured human rights requirements need to be factored into immigration decision-making processes. Courts can struggle in such situations to strike a workable balance between the demands of immigration control and the imperative to protect rights and secure rule of law. In general, immigration law often involves a departure from the standard legal norms applied in Irish constitutional and administrative law to protect individuals against the vagaries of state power – and it is not always clear when such departures can or should be justified in the interests of maintaining an effective system of immigration control.

This conceptual uncertainty is amplified by the relatively underdeveloped state of Irish constitutional jurisprudence relating to the rights of the family as set out in Article 41 of the *Bunreacht*. The importance of such rights has been affirmed in case-law, but at a high level of generality.<sup>23</sup> In *A.O.*, the Supreme Court recognised that the rights protected under Article 41 were 'important and powerful rights, but are not absolute':<sup>24</sup> they can be outweighed by the exigencies of maintaining immigration control, depending upon context. Beyond that, what respect for family rights as protected by Article 41 requires in the immigration context remains uncertain. This is a problem, given that some of the most difficult cases arising in the immigration context concern the rights of family groups whose children have grown up and are deeply embedded within Irish society.

The ECHR jurisprudence in this regard is more developed, reflecting the steady stream of cases involving challenges to immigration control measures based on Article 8 grounds which have reached the Strasbourg Court from a variety of European states. This jurisprudence grants a wide

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<sup>18</sup> [1986] ILRM 593 at 599, quoted with approval by Keane C.J. in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, [50].

<sup>19</sup> [2003] IR 1.

<sup>20</sup> C. Smyth, 'Why is it So Difficult to Promote a Rights-Based Approach to Immigration?' (2010) 1 *Irish Human Rights Law Review* 83.

<sup>21</sup> L. Fuller, *The Morality of Law* (Yale University Press, 1969). For more substantive accounts of what constitutes the rule of law, see T. Bingham, *The Rule of Law* (Penguin, 2011); B. Walsh, 'The Judicial Power, Justice and the Constitution of Ireland', in D. Curtin and D. O'Keefe (eds), *Constitutional Adjudication in European Community and National Law: Essays for the Hon Mr Justice TF O'Higgins* (Butterworths, 1992) 145.

<sup>22</sup> For critical reflection on this conceptual tension, see J. Carens, *The Ethics of Immigration* (OUP, 2013); M.-B. Demour and T. Kelly (eds), *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States* (Routledge, 2011).

<sup>23</sup> See e.g. *MhicMathúna v Ireland* [1995] IR 48.

<sup>24</sup> [2003] IR 1, 96 (McGuinness J.)

margin of discretion to states in the field of immigration control, and has in particular been criticised for failing to give due weight to the rights of children.<sup>25</sup> However, the Strasbourg Court has concluded that a grave interference with the enjoyment of family life may be disproportionate, depending on the context.<sup>26</sup> It has also ruled that the essential object of Article 8 is to protect the individual against arbitrary action by public authorities, and that states may be subject to a positive obligation to grant residence rights to families in situations where a denial of such rights would risk a serious disruption of their family life.<sup>27</sup> These legal standards are relatively vague. However, it at least gives some definition to the balancing exercise that recurs in this context between the desire to maintain immigration control and the need to respect individual/ family rights. As a consequence, the ECHR case-law has come to play an important role in Irish immigration law. The partial clarity it offers can be better than the uncertainty that rules elsewhere.

#### *Time/Resource Pressure*

In addition, just to compound this treacherous terrain, the established legal rules and procedures governing this area of law have struggled to adjust to changing circumstances. Since the end of the Cold War and the socio-economic transformation of Ireland that has unfolded over the last two decades, inward migration into Ireland has greatly increased – and become more complex and variegated in nature. This has put considerable pressure on every element of the system, including the administrative and legal processes that constitute a central element of its functioning.<sup>28</sup>

#### *Consequences*

Given these issues – (i) inherent complexity, (ii) conceptual uncertainty, and (iii) time/resource pressure – it is no exaggeration to describe Irish immigration law as resembling at times a form of quicksand. Its legal terrain can be very difficult to navigate, its conceptual foundations are uncertain, and its functioning is prone to delay and error – all of which can add up to produce a treacherous and unstable legal environment.<sup>29</sup>

It is thus not surprising that the Irish courts have ended up dealing with multiple immigration law claims. Many of these have involved difficult questions of law, which have in the end required resolution by the Supreme Court. Immigration law has thus become a major element of the case-law of both the Supreme Court and the Court of Appeal.

The same has happened elsewhere, including the UK – where the courts have, like their Irish counterparts, to take account of the requirements of EU and ECHR law. This can yield some useful comparative jurisprudence, subject to the usual qualifications that apply in taking account of judgments emanating from the courts of other states applying a related but not identical set of legal standards. But, in the final analysis, the Irish courts must decide what path they will follow through the labyrinth of immigration law – bearing in mind the specific legal issues at stake in the particular

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<sup>25</sup> S. Mullally and L. Thornton, 'The Rights of the Child, Immigration and Article 8 in the Irish Courts', in U. Kilkelly (ed), *ECHR and Irish Law* (Jordan, 2009), 2<sup>nd</sup> ed., 399.

<sup>26</sup> See e.g. *Bensaid v UK* [2001] 33 EHRR 10; *Nnyanzi v. UK* [2008] 47 EHRR 18.

<sup>27</sup> *da Silva v The Netherlands* [2007] 44 EHRR 72.

<sup>28</sup> See in general the reports produced by the Migrant Rights Council of Ireland, available at <https://www.mrci.ie/category/resources/publications/leaflets-reports/> (last accessed 15 October 2018), and the Immigrant Council of Ireland, available at <https://www.immigrantcouncil.ie/publications> (15 October 2018).

<sup>29</sup> It should be noted that similar criticism could be directed at immigration law in any European state: this is an inherently difficult area of legal regulation, especially given its exposure to often-changing political dikats and shifts in the background socio-economic context.

dispute before them, the human impact of their decisions, and how the relevant legal standards at issue fit within the wider normative architecture of Irish law.

### ***Luximon as Exemplar of the 'Quicksand' of Immigration Law***

The *Luximon* and *Balchand* cases serve as graphic examples of these particular challenges posed by immigration law. Both cases involved complex issues relating to the interrelationship of different statutory regimes – in particular the deportation and entry control powers conferred on the Minister for Justice by the Immigration Act 1999 taken together with the 'permission to enter and remain' powers set out in the immigration Act 2004, and the point at which the exercise of either or both sets of powers should take into account the requirements of the ECHR Act 2003 as they relate to the right to family life protected by Article 8 ECHR.

In essence, the Minister had used his powers to vary a permission to reside, granted by s. 4(7) of the 2004 Act, to withdraw leave for the applicants to continue to reside in the state. He had also relied upon this powers in requiring the applicants to leave the state unless they could establish an entitlement to remain on an alternative basis. This demand put both the *Luximons* and the *Blachands* in what MacMenamin J. subsequently described as a 'Catch-22' situation.<sup>30</sup> If the applicants complied with this notice, they would in effect have to leave the state after a prolonged period of residence in Ireland – and launch any challenge to the termination of their right to remain, or apply anew for permission to enter, from Mauritius. If they stayed (as they did), then they would be in breach of the Minister's order – which meant that they would lack permission to work in Ireland, and also could face deportation proceedings under the relevant provisions of the Immigration Act 1999.

But this complexity was only the beginning of the story.

Case-law had established that the families' Article 8 rights would have to be taken into account by the Minister in deciding whether to initiate such deportation proceedings against them, in line with the requirements of s. 3 of the ECHR Act 2003.<sup>31</sup> However, the applicant families argued that their Article 8 rights should also have been taken into account when the Minister was considering whether to vary their permission to remain under s. 4(7) of the 2004 Act, as such a decision could have a direct and substantial impact on their family life in Ireland – especially if it resulted in a legally binding order to leave the jurisdiction, as it did in both these cases. In contrast, the Minister argued that no such consideration had to be given to their Article 8 rights at that stage of the proceedings, as the obligation to take them into account at the final stage of the immigration control process (namely deportation proceedings) was sufficient to ensure respect for any such rights.

The families also argued that the Minister had exceeded the scope of this variation powers set out in s. 4(7) of the 2004 Act by requiring them to leave, on the grounds that only the 1999 Act conferred such powers in the form of its provisions providing for the use of the deportation power. In contrast, the Minister argued that there was nothing in the text of the 2004 Act to preclude the issuing of such an order – and that, read together, the two Acts could be read as grating wide discretion to the executive in this regard.

Thus, the *Luximon* litigation graphically highlights the complexity of immigration law – featuring as it did a dispute as to how a three interconnected statutory schemes should be read together.

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<sup>30</sup> [2018] IESC 24, [43].

<sup>31</sup> See e.g. *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] IESC 25.

Boiling this dispute down to its bare essence, the Minister was in effect arguing that the 1999 and 2004 Acts should be read as a single, integrated scheme of immigration control designed to give wide discretion to the executive – in which human rights considerations needed only to be taken into account at the very end of the process, if and when deportation proceedings had to be initiated. In contrast, the applicants were arguing that the invocation of the s. 4(7) power to vary their permission to remain in Ireland constituted a distinct exercise of ministerial power, which fundamentally changed their legal position – meaning that Article 8 rights should be considered at this specific stage, rather than being left to another stage of immigration control.

So, there was an interpretative choice to be made in *Luximon*, involving a complex issue of statutory construction. In such situations, it helps to have legislation established upon clear conceptual foundations – not least because of how it can assist courts in navigating their way through this complexity. However, as discussed above, the conceptual basis of immigration law is uncertain. Given the absence of clear standards in this regard, the opaque statutory framework at issue in *Luximon* was ripe for different approaches to be taken to its interpretation - as happened in this case as between Humphreys J. in the High Court on the one hand and the Court of Appeal/Supreme Court on the other.

The facts of both cases also show the pressures at play within the system, with the Minister seeking to accelerate the decision-making process via the use of the s. 4(7) of the 2004 Act even as the *Luximon* and *Blachard* families were pitched into an extended period of legal uncertainty. In this regard, it is worth noting that the Minister made a troubling error by directing Mr. Balchand's wife, Shandrika Gopee, to leave the state - even though, in contrast to her husband, her original permission to remain had not expired.<sup>32</sup>

These cases also graphically demonstrate the human impact of immigration law. Both families had been lawfully resident in Ireland for an extended period of time, and had children attending school in Ireland.<sup>33</sup> After the relevant immigration scheme was altered by the Minister, this permission to remain was withdrawn and the families were ordered to leave the state – thereby, as noted above, being forced into a dilemma as to whether to obey that direction and leave, or disobey it and remain in Ireland while challenged the Minister's decision. It is obvious that the stress engendered by this choice, and their loss of a well-established residence status, must have been exceptionally destabilising. Furthermore, the length of time it took their cases to be resolved is also striking: proceedings were commenced in 2013, meaning that the families had to live with the possible shadow of deportation looming over them for the best part of five years before the final judgment of the Supreme Court. The complexity and morass-like quality of immigration law can often serve to conceal the human stories involved – but the facts of *Luximon* serve as a graphic reminder of the human cost of immigration control.

### ***The Judgments Contrasted***

So, how did the Irish courts resolve the difficult issues generated by these two conjoined cases? The simple answer is 'with difficulty'. A sharp difference of approach opened up between the first instance judgments of Barr J in *Luximon* and Humphreys J. in *Blachard*, which required subsequent resolution by the Court of Appeal and Supreme Court. Underlying this disagreement was a

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<sup>32</sup> See [31] of the SC judgment.

<sup>33</sup> Indeed, Ms *Luximon*'s daughter had been present in Ireland since 2006, and at the time proceedings were commenced in 2013 had just started secondary school: see [6]-[7] of the Court of Appeal judgment in *Luximon*, [2016] IECA 382.



fundamental difference in approach as to how courts should interpret immigration legislation, and the role played by constitutional and human rights norms in this context.

At first instance in *Luximon*, Barr J. considered that the Minister's decision under the provisions of s. 4(7) of the 2004 Act to deny the applicant further permission to reside in the state had brought her period of legal residence in Ireland to an end. He went on to find that this situation was analogous to that at issue in the ECHR case of *da Silva v Netherlands*, where the European Court of Human Rights had concluded that Article 8 rights were engaged by a refusal of a residence permit which would make an applicant liable for expulsion of an applicant from the State. As a result, Barr J. concluded as follows:

173. In conclusion, having considered the relevant authorities, and the submissions so ably made by counsel for both sides, the court is satisfied that there is an obligation on the Minister, when considering an application pursuant to s. 4(7) of the Immigration Act 2004, to have regard to any constitutional and/or Convention rights of an applicant that are engaged by the decision. Moreover, the court would observe that once the Minister has taken into account the relevant considerations, the weight to be attached to each of them is properly a matter for the Minister in her discretion, subject to the principle of proportionality.

In stark contrast, Humphries J. concluded that any Article 8 private and family rights claims that could be invoked by the Blachand family were 'minimal to non-existent',<sup>34</sup> and thus did not need to be considered by the Minister. He based this view on an interpretation of a number of Court of Appeal and Supreme Court judgments, as well as certain decisions of the UK courts and the European Court of Human Rights, which he considered had established a general principle that migrants possessing 'precarious' residential status had few if any Article 8 rights that could be asserted against Ministerial decisions affecting that status.<sup>35</sup> Furthermore, he set out a wider conceptual rationale for his decision, asserting that non-nationals subject to immigration control have voluntarily entered into a 'social contract with rights and responsibilities on both sides', based on the principle of 'voluntary assumption of risk': as such, their status was 'inherently...transitional' and precarious, with minimal rights protection accruing.<sup>36</sup> As a consequence, he refused the review application brought by the Blachand family, and upheld the ministerial decision to issue a letter under the provisions of s. 4(7) of the 2004 Act requiring them to leave the state within a certain time frame.

In essence, Humphreys J adopted a strongly 'facilitative' interpretative approach to the provisions of the 2004 Act and immigration law more generally, assuming (i) the desirability of the executive acting with a free hand in exercising immigration control powers and also (ii) that human rights considerations are marginal to any ministerial decision-making in this context. The following passage sets out the essence of his interpretative approach:

57. Visitors such as those on student permission are inherently here on a transitional basis. It would fundamentally subvert the scheme and render an orderly immigration system impossible if they could then assert some form of right which would prevent their removal. House guests staying for the weekend cannot announce that they would like to settle in for a

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<sup>34</sup> [2016] IEHC 132, [35].

<sup>35</sup> Humphreys J cited *inter alia* *C.I. v. Minister for Justice, Equality, and Law Reform* [2015] IECA 192 (30th July, 2015); *P.O. v. Minister for Justice and Equality* [2015] IESC 64 (16th July, 2015); the UK case of *Anjum v. Secretary of State for the Home Department*, 29th January 2014, I.A./00453/2013 (Upper Tribunal, Immigration and Asylum Chamber); and *da Silva v. Netherlands* [2007] E.H.R.R. 72.

<sup>36</sup> [2016] IEHC 132, [55]-[57].

couple of months. Tenants at the end of their lease period cannot decide that they want to simply assert a freehold title. Temporary visitors in the applicants' position cannot simply dig in over a period of years and claim to have thereby acquired some form of private or family life which would impede the non-renewal of their permission. Of course, in a seven-year period, a student will to some extent embed himself or herself in the host country. But that is a very different form of social experience to that engaged in by a settled migrant. The applicants are not settled migrants. Their child may have been born in Ireland but his position is derivative. The notion that a fleeting visitor could convert his or her entitlements into something long-term merely by having a child in this country would subvert the rationality and workability of the immigration system at a fundamental level.

However, there were serious problems with this reasoning. As the Court of Appeal subsequently noted on appeal, it is settled law that the Minister is obliged in certain circumstances to consider the Article 8 rights of migrants and not to act in such a way as would constitute disproportionate interference with such rights – meaning that it was simply incorrect to describe such rights as generally 'minimal to non-existent'.<sup>37</sup> Furthermore, as again noted by the Court of Appeal, little if any the case-law referred to by Humphreys J provides support for his general proposition that 'precarious' migrants on temporary visas had no meaningful ECHR rights claims to assert against the Minister: these cases recognise that the scope of rights protection enjoyed by migrants is limited, but all accept that their rights are potentially engaged by executive action and are capable of grounding a successful claim against the Minister in certain circumstances. So, as a matter of pure legal reasoning, Humphreys J's judgment was flawed – as the Court of Appeal made clear in its judgment on appeal.<sup>38</sup>

Furthermore, Humphreys J's 'social contract' analysis of the situation of the Blachands and others glossed over the grave impact on their lives of the abrupt shift in government policy represented by the Ministerial order to leave the state – while it left the position of the children affected completely out of the picture, even though they could not possibly be understood to have entered into a voluntary 'social contract' to have their lives upended in response to changing political imperatives at Ministerial level. In general, by placing overriding emphasis on facilitating the functioning of an orderly system of immigration control, his approach discounts other competing considerations that must necessarily be also taken into account in interpreting immigration law – namely, the rule of law and fundamental rights principles which existing Irish and ECHR case-law has acknowledged to be relevant. It is true that how these different considerations should be balanced together is not always clear – but, as the Court of Appeal subsequently made clear, Humphreys J's judgment did not adequately engage with the existing case-law relating to this balance, yet alone the wider conceptual issues at stake.

Given all this, it is not surprising that the Court of Appeal followed Barr J's analysis for the most part, and concluded that the Minister was obliged to take the Article 8 rights of the Luximon and Blachand families into account when taking decisions of such gravity as those at issue in these proceedings. In giving the judgment of the Court, Finlay Geoghegan J. drew an analogy between an order to leave the state (as was at issue in these proceedings) and a proposal to deport, and considered that the

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<sup>37</sup> See again e.g. *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] IESC 25.

<sup>38</sup> [2016] IECA 383.

relevant ECHR and domestic case-law clearly indicated that Convention rights had to be taken into account in both situations.<sup>39</sup>

The Supreme Court ultimately agreed with this analysis, after careful analysis of the relevant ECHR jurisprudence.<sup>40</sup> As MacMenamin J noted, '[t]he decision-letters were clear: they placed a demand upon the recipients to leave the State, even if there could be some deferral'.<sup>41</sup> As such, the Minister's powers under s. 4(7) of the 2004 Act 'should have been performed in accordance with the clear tenor of the ECHR jurisprudence' – which required Article 8 rights to be taken into account when making decisions of such gravity.<sup>42</sup> In so concluding, MacMenamin J noted that the Strasbourg Court had held that 'the essential object of Article 8 was to protect the individual against arbitrary action by public authorities', which could justify the imposition of obligations upon public authorities to give due regard to rights considerations when taking decisions which could have a substantial impact on family life.<sup>43</sup> He further considered that '[a] simple determination that the respondents were "timed-out" students could not conclusively determine all the issues which the Minister had to consider in their cases'<sup>44</sup> - a statement which contradicts Humphreys J's assumption that such a 'simple determination' should be conclusive in deciding this type of case.

Furthermore, the Supreme Court also arrived at the conclusion that the Minister had acted *ultra vires* in using s. 4(7) of the 2004 Act to order the applicants to leave the state – responding to arguments made to this effect by counsel for the applicants, as well as by the Irish Human Rights and Equality Commission, who had intervened in their capacity as *amicus curiae*. In so doing, the Court took account of the absence of any express textual basis for the existence of such a power.<sup>45</sup> It also took into account the above-mentioned 'catch-22 situation' in which the applicants found themselves, whereby an alternative interpretation of s. 4(7) risked putting the applicants in the undesirable situation of having to decide whether to (i) leave the country in obedience to the Ministerial order and seek permission to re-enter, or (ii) remain in Ireland in breach of the order and contents any deportation proceedings subsequently brought against them. MacMenamin J. suggested that creating such a dilemma 'would be contrary to public policy', and 'might well necessitate that applicants...be constrained to act in an unlawful manner, or...be forced to conduct themselves in a manner which would violate their Article 8 rights as members of family units'.<sup>46</sup>

In other words, the Supreme Court applied the old common law presumption that clear statutory language was required before ministers could be presumed to exercise wide-ranging authority over the lives of individuals and families. It also affirmed that the Minister was required to take ECHR rights into account before making decisions which would result in the type of radical change of migration status at issue in this litigation. In so doing, the Court effectively rejected the Minister's

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<sup>39</sup> [2016] IECA 382, [40]. The one point where the Court departed from Barr J's line of analysis and favoured that of Humphreys J was its finding that the Minister was not required to have a fixed policy in place for taking account of Article 8 rights when making determinations under s. 4(7) of the 2004 Act, but could rather proceed a discretionary basis.

<sup>40</sup> Reference was also made to UK case-law under the Human Rights Act 1998, which had reached a similar conclusion: see [81] of *Luximon*.

<sup>41</sup> *Ibid*, [67]

<sup>42</sup> *Ibid*, [82].

<sup>43</sup> *Ibid*, [67].

<sup>44</sup> *Ibid*, [71].

<sup>45</sup> See *Luximon*, [57]: '[t]he power to direct removal is a significant power of the State, requiring explicit expression. As a simple matter of statutory interpretation, s.4(7) cannot be interpreted in the manner contended by the Minister.'

<sup>46</sup> *Ibid*., [57].

argument that the immigration control process could be seen as a single, seamless administrative scheme, with the taking of account of rights considerations at the ultimate stage of the process (deportation) being sufficient to satisfy rule of law/fundamental rights concerns. Instead, the Court recognised the gravity of the Minister's specific decision to deny the applicants permission to remain in the state and to require them to depart. It also implicitly rejected the idea that immigration legislation should be read as essentially designed to enable the effective exercise of immigration control powers by the executive: rule of law and fundamental rights considerations also form part of the interpretative context, and must be given due weight when immigration decision of particular gravity are at issue.

### Conclusion

The *Luximon* judgment can thus be viewed as affirming that the old common law principle of legality as refracted through the lens of the Irish Constitution – namely that direct interference by the state with individual lives must be shown to rest on a clear legal basis, and comply with fundamental rights - applies even within the labyrinth of immigration law. Immigration control is an area where such rights protection is diluted in respect of non-nationals, and where the executive enjoys a freedom of action that is unavailable to it in other contexts. But this does not nullify the constitutional orientation towards rights protection and rule of law, and the principle that direct state interference with the private life of individuals and families must have (i) a clear legal basis and (ii) take relevant rights considerations into account.

This judgment could be viewed as difficult to reconcile with other Supreme Court decisions that have emphasised the importance of the executive enjoying wide discretion in the field of immigration control, such as *A.O. and O.J.O. v Minister for Justice*<sup>47</sup> and *Bode v Minister for Justice*.<sup>48</sup> In particular, *Luximon* at first glance seems to involve a significant shift from the position the Supreme Court adopted in *Bode*, when it concluded that ministers did not need to take ECHR rights into account while considering an application by the father of an Irish citizen child to regularise their migration status. However, the judgments are reconcilable. *Luximon* does not break with existing jurisprudence: indeed, MacMenamin J. was at pains to distinguish the facts of this case from those at issue in *Bode*.<sup>49</sup> Instead, *Luximon* is best read as a judgment which affirms that there are discrete situations where the wide discretion generally enjoyed by the executive in immigration matters will be subject to more exacting judicial scrutiny, because of how fundamental rights are directly and immediately impacted by the specific government measures at issue. As such, it could be viewed as reflecting the logic of a number of recent judgments which adopt a similar line of analysis, including *Efe*,<sup>50</sup> *Mallak*<sup>51</sup> and *Sulaimon*.<sup>52</sup>

As such, *Luximon* can be viewed as a welcome development. It affirms core constitutional principles relating to rule of law, as well as applying the provisions of the ECHR Act 2003 with due attention to the requirements of the Convention as interpreted by the Strasbourg Court. Furthermore, it does so in an area of law badly in need of greater conceptual clarity. As with the Supreme Court judgment in

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<sup>47</sup> [2003] IR 1.

<sup>48</sup> *Bode v Minister for Justice, Equality and Law Reform* [2007] IESC 62.

<sup>49</sup> MacMenamin J. differentiated the two cases in part on the basis that the former involved an alteration of a pre-existing lawful residential status while the latter involved an application to benefit from a 'generous' administrative scheme which, if refused, would not alter the pre-existing legal situation of the applicant: see *Luximon*, [47]-[49].

<sup>50</sup> *Efe v Minister for Justice, Equality and Law Reform* [2011] IEHC 214.

<sup>51</sup> *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59.

<sup>52</sup> *Sulaimon v Minister for Justice, Equality and Law Reform* [2012] IESC 63.

*N.H.V.*,<sup>53</sup> it makes it clear that non-nationals caught up in immigration control are not ‘bare subjects’ subject to the unregulated discretionary will of the executive, but instead are entitled to rights protection.<sup>54</sup>

However, perhaps the single most intriguing element of the *Luximon* decision are the indications given by MacMenamin J. that the Court may welcome arguments from counsel in future cases which (i) place more emphasis on the rights of the family as set out in Article 41 of the *Bunreacht* and/or (ii) refer to the ‘best interests of the child’ test as set out in Article 3(1) the UN Convention on the Rights of the Child and increasingly referred to by the European Court of Human Rights in interpreting the ECHR. In his judgment, MacMenamin J. noted in passing that these appeals ‘might, potentially, have been considered by reference to constitutional rights identified under Article 41 of the Constitution, concerning the right to family life’.<sup>55</sup> He also would mentioned that ‘no apparent consideration’ had been given by the Minister to the ‘best interests of the child’ jurisprudence of the Strasbourg Court, while noting that this ‘had not been the main thrust’ of the challenge to the Minister’s decision.<sup>56</sup> In flagging up these points, the Supreme Court may be suggesting that it is developing its case-law in these areas, and by extension in clarifying the circumstances in which fundamental rights considerations may impose constraints on the exercise of Ministerial discretion in the immigration context.<sup>57</sup> As such, this is a space that will be worth watching.

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<sup>53</sup> *N.V.H. v Minister for Justice & Equality* [2017] IESC 35.

<sup>54</sup> For the concept of refugees and other categories of non-nationals being classified as ‘bare life’ and thus lacking the status of a rights-holder, see H. Arendt, Arendt, *Imperialism: Part Two of The Origins of Totalitarianism* (London: Harvester, 1968), 175-6: ‘[t]heir plight is not that they are not equal before the law, but that no law exists for them’.

<sup>55</sup> *Luximon*, [55].

<sup>56</sup> *Ibid*, [71].

<sup>57</sup> The ‘best interests of the child’ test is playing an increasingly large role in UK immigration law: see e.g. *Makhlouf v Secretary of State for the Home Department (Northern Ireland)* [2016] UKSC 59.