

**ALBA LECTURE 18 NOVEMBER 2009**

**WOMEN AND CHILDREN LAST?**

**GENDER, CHILDHOOD AND MIGRATION**

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Faith was a little girl of two. She was a citizen of the country where these events took place. Her parents were not. Her mother was abroad. Her father was her primary carer. He was a doctor who had worked in the country for more than four years, employed by the Ministry of Health, but they had been refused a further work permit for him to stay (probably because he had been confused with another person of the same name who had been engaged in some dubious activities elsewhere). One day, when Faith was in the car with her father, he was arrested with a view to deportation and taken into custody. Faith was taken into care as there was no-one else to look after her. As it turned out, Faith was a great deal luckier than many children in this situation. Her father launched all sorts of legal proceedings, was released from custody within a few weeks, and legal proceedings being what they are in that country, was able to put down roots and eventually succeeded in being allowed to stay.<sup>1</sup>

What shocked me about the case was that no-one seemed to think that it mattered that the child whose father was to be deported was a citizen of the country concerned. She would thus be faced either with leaving the country of her birth, the only place where she had ever lived, and the only country in the world where she had an undoubted right to live, or with being separated from the father with whom she had lived all her

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\* Rt Hon Lady Hale, DBE PC. Justice of the Supreme Court of the United Kingdom.  
<sup>1</sup> *Naidike v Attorney General for Trinidad and Tobago* [2004] UKPC 49.

life. We know that in this country, and many others, citizen children are still being placed in that position. But they are not being counted. Andrew Smith MP<sup>2</sup> has asked a series of Parliamentary questions aiming to find out how many citizen children are deported with their non-citizen parents. The stock answer is that the UK Borders Agency does not expel, remove or deport people who hold British citizenship. However, arrangements can be made for a child with British citizenship to accompany a foreign national parent who is to be removed. 'This is strictly voluntary and depends upon the consent of all involved'.<sup>3</sup> All involved do not, of course, include the children. So the Agency do not count and they do not do a race impact study. And there is nothing in their *Enforcement Instructions and Guidance* to suggest that the Agency should distinguish between citizen and non-citizen children. On the contrary, it suggests that children of parents who have been refused leave to enter, who have had leave cancelled, and illegal entrants can be removed along with their parents.<sup>4</sup>

There are, of course, many rights of citizenship which children cannot claim – the right to vote, to serve on juries, to fight for their country or even to earn their own living – but one might have thought that they had at least a claim to the one fundamental attribute of citizenship, the right not to be expelled from their own country. The assumption seems to be that it does not matter to them because they are so young. But of course it affects every aspect of their lives – their education, their

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<sup>2</sup> With the assistance of Caroline Sawyer, then Reader in Law at Oxford Brookes University, to whom I am indebted for alerting me to this issue. I am also indebted to my legal assistant, Sophie Farthing, for her researches on this point.

<sup>3</sup> See most recently, Phil Woolas, WA 15 June 2009; see also Liam Byrne, WA 11 June 2008, WA 21 July 2008, 22 July 2008, Phil Woolas, WA 9 October 2008, WA 6 May 2009.

<sup>4</sup> UKBA, *Enforcement Instructions and Guidance*, Chapter 45, para 45.2.9.

health, their opportunities, their language, their socialisation, and their chances of reintegrating in their own country later in life. As Jacqueline Bhabha puts it:<sup>5</sup>

‘In short, the fact of belonging to a country fundamentally affects the manner of exercise of a child’s family and private life, during childhood and well beyond. Yet children, particularly young children, are often considered parcels that are easily removable across borders with their parents and without particular cost to the children.’

Why should this be? Could it be that migration law is still clinging to the old assumption of a unitary family – where all its members share the same nationality, live in the same country, organise their lives around traditional gender roles, and move together or at least follow the male breadwinner if he moves to find work? Could it be that the present position of children mirrors the former position of wives - that they are seen as appendages of their parents rather than people in their own right? It certainly used to be the case that the wife was assumed to be an appendage of her husband, with her citizenship and immigration rights depending upon his. ‘Home’ was where the husband was.

My namesake, but not so far as I know ancestor, Matthew Hale is once again given the blame. He held in 1664 that ‘if an English woman go beyond the seas and marry an alien and have issue born beyond the seas the issue are aliens for the wife was *sub*

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<sup>5</sup> ‘The “Mere Fortuity of Birth”? Children, Mothers, Borders and the Meaning of Citizenship’, in *Migrations and Mobilities, Citizenship, Borders and Gender*, edited by Seyla Benhabib and Judith Resnik, 2009, at p 193.

*potestate viri*'.<sup>6</sup> As with the children, so presumably with the wife.<sup>7</sup> The principle was certainly reflected in the 19<sup>th</sup> century legislation. The Naturalisation Act 1844 gave any foreign woman married to a British subject automatic British nationality, while the Naturalisation Act 1870 deemed all married women to be subjects of the state of which their husband was a subject. It then kindly provided that natural born British women who had thus been deprived of their nationality could obtain a certificate of readmission once they were widowed. Thus, for example, British-born Jewesses who married Jewish immigrants lost their nationality. The British Nationality and Status of Aliens Act 1933 allowed a married woman to retain her British nationality if she would otherwise become stateless. But the basic rule was not changed until the British Nationality Act 1948. Even then a married woman's domicile was automatically that of her husband until the Domicile and Matrimonial Proceedings Act 1973.

We were not alone in this. In the USA, a foreign woman who married a US citizen was automatically a US citizen. She did not have to be naturalised. But a US woman who married a foreigner automatically lost her citizenship: the daughter of President Ulysses S Grant lost her citizenship when she married an Englishman in 1874 and a special Act of Congress had to be passed to restore it to her when she was widowed. When the USA entered the First World War, many American born women who had married citizens of countries with which the USA was now at war had to register as enemy aliens. The risk was, of course, that their husband's country would not grant them automatic citizenship and they would become stateless at least for a time. Legislation after the war allowed a woman who married a foreigner to retain her citizenship unless she married a foreigner who was himself ineligible for US

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<sup>6</sup> *Collingwood v Pace* (1664), cited in J Bhabha and S Shutter, *Women's Movement: Women under Immigration, Nationality, and Refugee Law*, 1994, pp 16 – 17.

<sup>7</sup> See C Parry, *Nationality and Citizenship Laws of the Commonwealth and Ireland*, 1957, p 71.

citizenship (of which there were many in those days).<sup>8</sup> But ‘a citizenship that married women could take with them wherever they went was not fully achieved until the 1960s’.<sup>9</sup>

This also meant that until a married woman could keep her own citizenship she could not confer it upon her children by descent. Indeed, under British Nationality Act 1948, only a father could confer his nationality on his children by descent and only upon his legitimate children.<sup>10</sup> ‘Father’ in those days did not include the father of a child born out of wedlock, any more than ‘child’ included an illegitimate child, unless the statute or other instrument expressly said so.<sup>11</sup> Mothers could not confer their citizenship upon their children at all. Thus to become a UK citizen a child of unmarried parents had to be born here.<sup>12</sup>

This had to change when the United Kingdom abandoned the *ius soli* in 1981.

Henceforth a child born here would only become a UK citizen if his father or mother was a citizen (and not always even then). But whereas a mother could confer citizenship on any child born to her, in or out of wedlock, originally a father could only confer citizenship on his legitimate children.<sup>13</sup> This may look like a discrimination against the father but in fact it is in keeping with all those laws which allowed a man to choose which of his children he would assume responsibility for.

US laws, for example, granted citizenship to foreign born children of US fathers only

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<sup>8</sup> See the ‘Cable Act’, An Act relative to the naturalization and citizenship of married women, 1922, amended by the Naturalization Act 1930.

<sup>9</sup> See Linda Kerber, ‘The Stateless as the Citizen’s Other: A View from the United States’, in Benhabib and Resnik, above, p 100, citing C L Bredbenner, *A Nationality of Her Own: Women, Marriage and the Law of Citizenship*, 1998, pp 174 - 183.

<sup>10</sup> See ss 5 and 32(2).

<sup>11</sup> Cf s 1(1), Family Law Reform Act 1987.

<sup>12</sup> Unless the Home Secretary could be persuaded to register the child as a British citizen under s 7, 1948 Act.

<sup>13</sup> See ss 1, 2, 50(9).

if they had acknowledged parenthood before a certain age.<sup>14</sup> In the UK, only in 2003 did it become possible for a child born to unmarried parents to claim citizenship by descent from either his father or his mother.<sup>15</sup>

This is all in keeping with the assumption in immigration law that husbands were in charge. They were the breadwinners. This led to the rules making it much easier for wives and female fiancées to join their husbands settled here than for husbands and male fiancés to join their wives who were settled here. These were the rules under attack in the classic case of *Abdulaziz v United Kingdom*.<sup>16</sup> There was no breach of article 8 itself. The interference with their family lives was justified, because the state was under no obligation to enable them to set up home wherever they chose; nor had it been shown that they could not do so in the wives' or the husbands' home countries. But it fell within the ambit of article 8 and the sex-based discrimination in the enjoyment of that right could not be justified. The Government argued that the object was to limit primary immigration so as to protect the domestic labour market at a time of high unemployment and also to contribute to public tranquillity and good community relations through firm and fair immigration control. The Court accepted that these were legitimate aims. But it did not accept that the difference in impact between men and women on the domestic labour market was sufficient to justify the sex discrimination involved. Nor did it accept that distinguishing between husband and wives had any impact upon public tranquillity.

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<sup>14</sup> Kerber, *loc cit*, asks the interesting question, to what passport would the children of Madam Butterfly and Miss Saigon be entitled?

<sup>15</sup> But only if he satisfies the requirements prescribed by the Secretary of State: see Nationality, Immigration and Asylum Act 2002, s 9, inserting a new s 50(9), (9A) and (9B) in the 1981 Act.

<sup>16</sup> (1985) 7 EHRR 471.

This attitude, that men are the prime movers and the women and children follow with the luggage, is also seen in asylum law and practice. Among refugees as a whole, adults are divided roughly evenly between men and women. In other words, there are as many women refugees as men. But the women are much more likely to be accompanied by children. More importantly, the women who have fled from developing countries go to the neighbouring developing countries and stay there: they constitute nearly 80% of the refugees in receiving countries which neighbour their countries of origin. As we know, their conditions there are often appalling. I received just yesterday a charity appeal headed: 'Darfur's desert is a vicious, lawless no man's land. Just as well it's only women and children who have to come here.'<sup>17</sup> In developed receiving countries, on the other hand, male asylum seekers far outnumber the female. Women have had less access to the formal and informal agencies which enable them to travel to the developed world – agents, smugglers, family funding and the like. Their lack of status, dependency and history also, in Jacqueline Bhabha's view, 'militate against a self-perception as an autonomous asylum seeker'.<sup>18</sup>

Added to these obstacles, of course, are the barriers erected by asylum law itself. During the Second World War, the Intergovernmental Committee on Refugees expanded its mandate to cover 'all persons wherever they may be who, as a result of events in Europe, have had to leave their countries of residence because of danger to their lives or liberties on account of their race, religion or political beliefs'. When the Geneva Convention was debated in 1951, some countries (including the UK) wanted a wide inclusive definition – the internationally homeless and destitute. Others wanted to limit it in time and place, to the victims of the recent conflict, but also in the

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<sup>17</sup> Practical Action, Darfur Stoves Appeal: see [www.practicalaction.org.uk](http://www.practicalaction.org.uk).

<sup>18</sup> 'Demography and Rights: Women, Children, and Access to Asylum (2004) 16 Int J Refugee Law, 232, 235.

reasons why they had had to leave their home countries. Membership of a particular social group was added to race, nationality, religion and political beliefs, but sex was not proposed or debated as an additional reason (it was also left out of the non-discrimination obligation in article 3, but that was deliberate). The time and place restrictions were eventually removed in 1967, but the original five grounds remained and have not been expanded. There is much debate about whether they should now be enlarged to include gender.

In discussing gender and asylum, we should distinguish between the *forms* of persecution which women may fear and the *reasons* why women are persecuted. The former is referred to as *gender-specific* persecution and the latter as *gender-based* persecution. Women are often persecuted for the same reasons as men – because of their politics or their religion or their ethnicity. But they may be persecuted in particular, gender-specific ways: obvious examples are rape (although of course men may also be raped but the social meaning is often different), other forms of sexual violence, female genital cutting, forced pregnancy, forced abortion and forced sterilisation. On the whole, these are now internationally recognised as sufficiently serious ill treatment to amount to persecution. Other forms of ill-treatment may be more problematic: what about beating up women who show too much flesh or insist on going to school? Mere discrimination against women is not enough. Their treatment has to amount to serious harm. In principle, sufficiently severe ill-treatment, if meted out for a Convention reason, can amount to persecution. But being a woman who wants to dress as she pleases or to be properly educated is not necessarily a Convention reason.

Women face other problems. The first is that the persecutor must either be a state agent or, if a non state agent, it must be shown that her Government is unable or unwilling to protect her. Whereas persecution of men is often as a result of their activities in public, and may even take place in public, persecution of women is often the result of their activities in private and mainly takes place in private. Her tormentor is often acting as a private individual rather than a government agent. I blush now to recall a case I saw early in my days in the Court of Appeal, where a woman had been raped by a prison commandant. The argument was that he was doing it simply because he fancied her and not because she belonged to an ethnic group which opposed the government. Maybe he was, but that should not have been the end of the story.

This is a particular problem in the serious domestic abuse cases – if the abuser is a husband or other family member, acting in a private rather than a public capacity, she will have to show that the state explicitly or implicitly sanctioned this. The Pakistani wives were able to do this in *R v Immigration Appeal Tribunal, ex parte Shah; Islam v SSHD (UNHCR intervening)*.<sup>19</sup> Lord Steyn explained that the prevalence of domestic abuse was not enough to make it persecution; the ‘distinctive feature in this case is that in Pakistan women are unprotected by the state: discrimination against women in Pakistan is partly tolerated by the state and partly sanctioned by the state’.<sup>20</sup> Or, as Lord Hoffmann put it, the violence and threats of violence from their husbands were ‘a personal affair’; but there was nothing personal about the inability or unwillingness of the state to do anything about it.<sup>21</sup> But other women around the world do not necessarily find their appeal courts as considerate as the House of Lords was in that

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<sup>19</sup> [1999] 2 AC 629, [1999] 2 All ER 545.

<sup>20</sup> p 635, p 548.

<sup>21</sup> p 653, p 564.

case. It may not be easy to prove that private acts of serious domestic abuse are government sanctioned.

Even if that hurdle can be surmounted, the main issue in domestic violence cases is whether the victim can claim that her persecution is for a Convention reason – either her political beliefs or her membership of a particular social group. The UNHCR is helpful in stressing that if the non state agent is persecuting the victim for a Convention reason, it does not matter that the state’s failure to protect is unrelated to a Convention reason. And on the other hand, it does not matter that the non state agent is acting for other reasons, if the state is failing to give protection for a Convention reason.<sup>22</sup> The problem is still to identify a Convention reason.

There is a long running saga in the USA concerning Rodi Pena-Alvarado, a Guatemalan woman who suffered ten years of serious abuse at the hands of her former soldier husband and who fled to the USA after fruitless attempts to obtain protection from the authorities in her own country. The immigration judge granted her asylum claim, but in 1999 the Immigration Appeals Board overturned this. They accepted that the level of abuse was enough to amount to persecution: ‘we struggle to describe how deplorable we find the husband’s conduct to have been’. They accepted that the authorities had been unable or unwilling to protect her. But they did not accept that she had been persecuted because she was a member of a particular social group. The group proposed was ‘Guatemalan women who have been involved intimately with Guatemalan male companions who believe that women are to live under male domination’. This was not a group within the meaning of the Convention

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<sup>22</sup> UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002, para 21.

and she could not show that her husband had treated her badly because he believed that she belonged to it. Outrage resulted and the Attorney General remitted the case to be decided after regulations on gender based violence had been issued. No such regulations have been issued and more recently that limitation has been removed so the case has been revived. Briefs are currently being exchanged. The argument now is that she belongs to a group defined as ‘married women in Guatemala who are unable to leave their relationship’.<sup>23</sup>

Whether the persecution was for a Convention reason was the main point of *Shah and Islam*. The majority held that women in Pakistan constituted a particular social group. This was also the main point of *K v SSHD; Fornah v SSHD*.<sup>24</sup> Mrs K was raped by the Iranian revolutionary guard, not because of her own political beliefs, but because of her family relationship with her husband. The Court of Appeal in *Quijano v SSHD*<sup>25</sup> had held that where the ‘primary’ member of a family is not persecuted for a Convention reason then the ‘secondary’ members of the family are not persecuted for a Convention reason if they are persecuted simply for being members of his family. This notion of ‘primary’ and ‘secondary’ members of the family is relevant to the obligation (not stemming from the Convention but recommended by the Conference which adopted it) to protect members of a refugee’s family. It is not relevant to the definition of a refugee itself. But the fact that the courts should have confused the two is just another illustration of the assumption that wives’ claims are dependent upon their husbands’. The House of Lords held that Mrs K did fear persecution because of her membership of a particular social group, namely her husband’s family.

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<sup>23</sup> See <http://cgrs.uchastings.edu/campaigns/alvarado.psg>.

<sup>24</sup> [2006] UKHL 46, [2007] 1 AC 92, [2007] 1 All ER 671.

<sup>25</sup> [1997] Imm AR 227.

It was much more difficult to explain why the *Fornah* case had to get to the House of Lords. Of course the social group has to be defined by a shared characteristic which is different from the fear of persecution.<sup>26</sup> The argument seems to have been that FGM is a once and for all act. Once cut, a woman is no longer at risk of cutting. So does that mean that the group has to be the uncut? If so, that looks as if they are defined by the persecution they fear rather than by some the unifying characteristic. But of course these women were defined by their membership of an indigenous tribe within Sierra Leone which practised FGM. That was quite independent of the persecution they feared although it was the reason for it. But though we all held that she did fear persecution because of her membership of a particular social group, we differed in our definitions of the group: three of the Law Lords agreed with Arden LJ that it was uncut females in Sierra Leone; I thought that it was females from those indigenous tribes which practised FGM; and Lord Bingham thought that it was all women in Sierra Leone who shared the common characteristic of social inferiority in comparison to men.

The general view among asylum theorists seems to be that membership of a particular social group is the best way to accommodate gender-based persecution within the existing grounds. An Australian immigration judge, for example, has argued that although women are a broad group, they have both immutable characteristics and common social characteristics which make them cognisable as a group – one is a fear of male violence and another is the way in which they are dealt with by society as a whole. On the other hand, it has been argued that categorising women as a social

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<sup>26</sup> UNHCR, *Guidelines on International Protection: "Membership of a particular social group" with the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002, para 11: "The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights".

group creates a false sense of cohesiveness which women as a whole do not possess. Although there are cases where gender alone is the reason for the persecution, mostly the persecution is not applied equally to all women.<sup>27</sup> Although it was held in *Shah* that cohesiveness is not a requirement, nor need every member of the group be persecuted, this does rather suggest that a narrower group than women as a whole is being targeted, as the different definitions in *Fornah* showed.

The *K* case illustrated another problem which women asylum seekers may face which men probably do not. Because of their inferior status within the societies from which they come, women are despised and abused, and thought to dishonour their families, because of the ill-treatment which they have suffered from others. So they may have emotional and cultural difficulties in describing what has happened to them when they are first interviewed, especially if their interviewer or adjudicator is a man. The adjudicator in Mrs K's case was able to accept that the fact that she had not been able to reveal the rape at first interview did not undermine her credibility on the point. Her first statement was as near as she could bring herself to go. This is admirable but of course it does not reduce the difficulty for the first instance judge in finding where the truth lies, especially when inconsistencies are one of our main tools for determining credibility.

The problems which women have faced under the existing grounds lead some to argue for the addition of gender as a separate sixth Convention ground. Instead of having to tell their stories in a way which fits them into the existing categories, women could tell them in a way which reveals rather than side-steps the real reason

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<sup>27</sup> See T Inlender, 'Status Quo or Sixth Ground? Adjudicating Gender Asylum Claims' in Benhabib and Resnik, *op cit*; cf H Crawley, *Refugees and Gender: Law and Process*, 2001.

for their persecution, that they are women. The judges would not have to contort themselves wondering how to define the particular social group into which Ms Fornah fell. Further, by acknowledging that women may be persecuted just because they are women, it could recognise the differences between them, rather than trying to say that they are all the same. People who are persecuted for their political opinions do not share the same opinions; people who are persecuted for their religious beliefs do not share the same beliefs; women who are persecuted for their gender do not share the same characteristics or experiences. Also, just as with political opinion or religious belief, it would be irrelevant whether or not we agreed with the woman's stance on clothing, cutting or being beaten up. All that would matter is whether she had a well founded fear of being subject to serious ill-treatment by the state or from which the state would be unable or unwilling to protect her.

The UNHCR has so far concluded that it is not necessary to include gender in the list of grounds because, properly understood, the Convention is already capable of recognising gender-based harms.<sup>28</sup> For the reasons given earlier, this may be true of gender-specific harms but may be less true of gender-inspired ill-treatment. But it may also be realistic. It is difficult to imagine an international consensus on including gender as a separate ground – partly because of a reluctance to accept that women have to be protected from serious harms perpetrated within their families and communities and partly because of a fear of ‘opening the refugee floodgates to half the world’s population’.<sup>29</sup> (My guess, however, is that the public would rather we offered our protection to the raped and mutilated women of the world than to the

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<sup>28</sup> San Remo Expert Roundtable on Gender-related Persecution, September 2001.

<sup>29</sup> Inlender, *loc cit*, p 366.

dissident and dangerous men, but of course their chances of getting here are so much less.)

Children seeking asylum do, of course, face many of the same problems and there are many complaints that their interests are not properly safeguarded by the UK Borders Agency. That is one of the main issues which will emerge in the Children's Rights Alliance Report later this week.<sup>30</sup> But I am concerned about something more fundamental, which is whether children are treated as appendages of their parents or as people having personalities and rights of their own. The 14<sup>th</sup> Amendment to the US Constitution states that "All persons, born or naturalised in the United States, are citizens of the United States and of the State wherein they reside." But in the United States, child citizens do not enjoy the right to live in their own country with their non-citizen parents, and can effectively be deported unless they will suffer exceptionally severe hardship. Article 2 of the Irish Constitution provides that '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 of the Nationality and Citizenship Act 1956 used to provide that every person born in Ireland was an Irish citizen from birth. Articles 41 and 42 of the Constitution give special protection to the family and to the right and duty of parents to provide for the education (in the broadest sense) of their children. But look what happened when someone took that seriously.

Man Chen and her husband were prosperous Chinese nationals with a controlling interest in a successful Chinese company which had a significant presence in the UK.

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<sup>30</sup> CRAE, *State of Children's Rights in England*, "Special Protection Measures" (2009); see also, 11Million, *The Arrest and Detention of Children subject to Immigration Control, A Report following the Children's Commissioner for England's visit to Yarl's Wood Immigration Removal Centre* (2009), Refugee and Migrant Justice, *Does every child matter? Children seeking asylum in Britain* (2009).

They had one child and wanted another. So to avoid the ‘one-child’ policy in China they decided to have their second child elsewhere. Their daughter Catherine was born in Belfast. Because the United Kingdom has abandoned the *ius soli* she did not acquire UK citizenship. But because of Ireland’s historic claim to the whole island of Ireland, she did acquire Irish citizenship. Relying on this and on her free movement rights under European Community law, Mrs Chen applied for residence permits for herself and her daughter. She had private health insurance and ample resources, so the other conditions of entitlement were met.

The UK government, with the support of the Irish, argued that it was an abuse of EC law. In *Chen v Secretary of State for the Home Department*,<sup>31</sup> however, the ECJ resoundingly disagreed. Nationality was determined by Irish law and residence entitlement by EC law. A very young minor who was an EC national, and fulfilled the EC requirements for insurance and resources, was entitled to live for an indefinite period within the European Union. It was not for the court to look behind the reasons why the family had arranged their affairs in this way. Furthermore, Catherine needed the presence of her mother, her primary care-giver, in order to enjoy her rights; ‘refusal to allow her mother to live in the UK would deprive the child’s right of residence of any useful effect’. This was a refreshingly child-centred way of looking at the issue.<sup>32</sup>

Of course, as we have seen in relation to the USA, citizenship rights and residence rights are two different things. In *Fajujuno v Minister Justice*<sup>33</sup> the Irish Supreme

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<sup>31</sup> (2004) CMLR 48, [2005] QB 325.

<sup>32</sup> Consistent with an earlier decision of the ECJ in *Baumbast and R v Secretary of State for the Home Department* 2002 ECR I-7091.

<sup>33</sup> [1990] 2 IR 151.

Court recognised that Irish born children of foreign parents had the right to live in Ireland and that they also had the constitutional right to ‘the company, care and parentage of their parents within a family unit’. Prime facie, this was a right which they were entitled to exercise within Ireland. Only if there was a ‘grave and substantive reason associated with the common good’ could their parents be deported. Thus the citizenship right of the child, not to be expelled from her own country, meant that she was entitled to enjoy her right to family life with her parents, also within her own country.

But things changed in Ireland, especially after their accession to the European Union. Ireland became a country of immigration rather than emigration. Attitudes also changed. In *Lobe v Minister for Justice, Equality and Law Reform*,<sup>34</sup> the majority of the Supreme Court distinguished *Fajujonu*. The Court reaffirmed the constitutional right of Irish-born children to citizenship, but the majority held that they had no absolute constitutional right to enjoy their right to family life within Ireland. Their right was qualified by the Government’s right to control immigration. So the Government could take a broad range of factors into account when deciding whether or not to deport their parents. Keane CJ with the majority held that the rights of child citizens were not the same as the rights of adults:<sup>35</sup>

‘In the case of adult citizens, it is of course a corollary of the right of citizenship that they are also entitled to . . . reside in Ireland. The position of children of the age of the minor applicants in the present case is, however, significantly weaker . . . the children have never been capable in law of

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<sup>34</sup> [2003] IESC 3.  
<sup>35</sup> Paras 34-35.

exercising the right . . . it may reasonably be regarded as a right which does not vest in them until they reach an age at which they are capable of exercising it.’

McGuinness and Fennelly JJ, however, disagreed. They understood the life-long significance for the child of being obliged to leave his country of origin. Fennelly J rejected a test of length of parental residence:<sup>36</sup>

‘The fact that the parents have resided in the State for a longer or shorter period may be relevant to the consideration of *their* rights and interests. It seems to me that the State has throughout the conduct of the appeals approached the matter on the assumption that they are concerned with the rights of the parents. It has always been clear that they are not. I do not accept that the State has shown, in any respect, that there exists sufficiently powerful reason for the State’s rights to prevail over those of the child.’

So the majority substituted a test of capacity for a test of what was best for the Irish child.

But by then public opposition to immigrants claiming a right to remain based on the birth of an Irish child had reached fever pitch. On 11 June 2004, shortly after the ECJ decision in the Chen case, there was a referendum on a constitutional amendment to remove the automatic right of Irish born children to citizenship. 79% voted in favour of the 27<sup>th</sup> amendment to the Irish Constitution. Article 9.2(1) now reads,

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<sup>36</sup> Para 596.

‘ . . . a person born in the island of Ireland, which includes its islands and seas, who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless provided for by law’.

This enables the Irish Parliament, by ordinary legislation, to define the citizenship rights of children born in Ireland by reference to their parents’ claims rather than their own. Of course, the UK had already done this, in the 1981 Act. Thus, faced with what is commonly seen as an ‘abuse’ by their parents, states have adopted two techniques to deprive children of their birthrights: one, as in *Lobe*, and in the USA, is to uncouple the right of citizenship from the right of residence; the other is to deprive them of their automatic citizenship right. Ireland has done both.

Both techniques may be thought questionable. They certainly visit the sins of the parents upon the innocent child. Article 7(1) of the United Nations Convention on the Rights of the Child requires that ‘The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents’. Article 2(1) demands that States respect and secure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind, irrespective of, *inter alia*, his or his parent’s national origin. And article 3(1) provides that ‘in all actions concerning children, the best interests of the child shall be a primary consideration’. Taken together, these constitute an argument for giving far more priority to the interests of the child in this debate than they have hitherto had.

So where does the UK stand in all of this? We have abandoned birthright citizenship but on the other hand we do have article 8. In *Edore v SSHD*,<sup>37</sup> the Court of Appeal thought that there was only one way in which the balance of interests between the family rights of the children, their mother and their father and the interests of immigration control could be struck and that was by allowing the children and their mother to stay here (although I doubt whether the children born here to a foreign mother and a British father were in fact citizens). In *R (M) v Islington LBC*,<sup>38</sup> it was held that a local authority could not simply buy air tickets for a non-citizen mother and her citizen child until the immigration appellate authorities had decided the impact upon the article 8 rights of father, mother and child.

A series of House of Lords cases has recently held that the article 8 claims of all close family members must be taken into account when considering the case of one: they are not relevant simply for the impact upon the person under consideration but for their own sake. The whole point about family life is that the whole is greater than the sum of its individual parts. In *Beoku-Betts*, a young man could not be expelled without considering the impact upon his elderly and dependent mother here.<sup>39</sup> In *Chikwamba*, a wife and mother could not be sent back to Zimbabwe to take her place in the entry clearance queue without considering the impact upon her four year old daughter, who would either have to leave the home and country she had always known or be separated from the mother who had looked after her all her life.<sup>40</sup>

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<sup>37</sup> [2003] EWCA Civ 716 [2003] 3 All ER 1265.

<sup>38</sup> [2004] EWCA Civ 235, [2004] 4 All ER 709.

<sup>39</sup> *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, [2009] 1 AC 115.

<sup>40</sup> *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40, [2008] 1 WLR 1420.

Most startlingly of all, in *EM (Lebanon)* a mother and son could not be sent back to the Lebanon where they would inevitably be separated; in my view, the most powerful reason for this was that it would deprive the child of the only family life he had ever known; less emphasis was placed on the fact that the reason for this was the sex discrimination inherent in Lebanese law.<sup>41</sup> The decision has been criticised for not going further and recognising that sending them back would be a flagrant breach, not only of article 8 but also of article 14.<sup>42</sup> Apparently I ‘came closest to the truth’ by pointing out that it was the arbitrary and discriminatory nature of the law which both created the risk of violation and meant that the interference could never be justified.

But does all this mean that women and children can now be seen as people with their own citizenship and family rights rather than simply as members of the male breadwinner’s family? I hope so, but the Parliamentary answers quoted earlier make me wonder.

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<sup>41</sup> *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, [2008] 3 WLR 931.

<sup>42</sup> A Pickup and A Gask, *Case Comment* [2009] EHRLR 84-90.