Neutral Citation Number: [2006] IEHC 162

THE HIGH COURT
JUDICIAL REVIEW

[2006 No 423 J.R.]

IN THE MATTER OF THE IMMIGRATION ACT 1999

BETWEEN

BLESSING OBENDE

APPLICANT

AND
THE MINSTER FOR JUSTICE, EQUALITY AND LAW REFORM AND
THE GOVERNOR OF DOCHAS CENTRE, MOUNTJOY PRISON

RESPONDENTS

Judgment of Mr. Justice Herbert delivered the 24th day of May 2006

1. The Applicant is a Nigerian National. Her date of birth is given as 1st August, 1987. On 11th December, 2003, she arrived in this State as an unaccompanied minor seeking refugee status. She claimed a well founded fear of persecution in her country of origin because of her religion, - Christian, - and because of her membership of a particular social group, - young women in danger of being subjected to female genital circumcision. She stated that she feared attack by Muslims who, she claimed, were engaged in conflict with Christians in Benin City in Edo State. She claimed that her father had died before she was born and that her mother was insisting that she be subjected to female genital circumcision.

2. Her application for refugee status was unsuccessful. On 20th September, 2004, she was advised by the Refugee Applications Commissioner that her application was refused. On 31st January, 2005, she was advised by the Refugee Appeals Tribunal that her appeal was unsuccessful. On 15th September, 2005, the first named Respondent made a deportation order in respect of the Applicant and this was notified to her by a letter dated 27th September 2005.

3. At paragraph 3 of her affidavit sworn on 3rd April, 2006, the Applicant avers that at the end of summer 2005 she became re-united with her sister Katie Ezomo, who lives in Limerick and, who with her husband has been granted residency in this State. She states, on affidavit, that she was not aware prior to this that her sister was living in this State.

4. In an affidavit sworn on 21st April, 2006, Katie Ezomo states that she lives at 58 Kilteragh, Dooradoyle, Limerick and, confirms that she and her husband are lawfully resident in this State. She deposes that the Applicant is her natural sister of the full blood and, that she was unaware that the Applicant was in this State and seeking asylum here, until the end of summer 2005. She states that she and her husband are anxious that the Applicant live with them and she states that they will look after and support the Applicant because if returned to Nigeria the Applicant would have no proper family or support.

5. Mr Sean McNamara, an Assistant Principal Officer in the Department of Justice, Equality and Law Reform, swore a replying affidavit on behalf of the Respondents on 21st April, 2006. At paragraphs 13 – 20 inclusive of that affidavit, he avers as follows:-

> "13. A deportation order was made on 15th September, 2005, and notice of its making was given by letter dated 27th September, 2005, to both the Applicant and her legal advisers. No challenge to the deportation order has ever been made.
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> 14. At no stage prior to the making of the Deportation Order did the Applicant ever inform the First Named Respondent of the identity, place or residence and immigration status of her sister. The Applicant never made any reference to her sister, Katie, who apparently lives in Limerick. In fact, in her Questionnaire, the Applicant states that she has only one sister, whose given named was Osas, born in 1999 and living in Nigeria.
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> 15. The Applicant now seeks to restrain her deportation on three bases; the threat of female genital mutilation, her application for "residency" in Ireland based on her sister's presence in Ireland, and the alleged threat to failed asylum seekers who are returned to Nigeria.
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> 16. In relation to the threat of female genital mutilation, this has been considered in the course of the Applicant's asylum application and the Minister prior to the making of the Deportation Order. No challenge to the lawfulness of these decisions has ever been made.
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> 17. As regards the application for "residency", the fact that the Applicant never mentioned a sister by the name of Katie until she was served with the deportation order is a matter of grave concern to the First Named Respondent. The Applicant has given every impression to date that she has no sister of this name. The First Named Respondent does not concede that the Applicant has a sister of this name and it should be noted that the Applicant never gave any address in Limerick, notwithstanding the fact that she updated her address as required by s. 9 of the Refugee Act, 1996, as amended.
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> 18. In any event, this application will be considered by the First Named Respondent in due course. However, it is not necessary that the Applicant should be in the State while the application is pending. If the application is granted, then the Applicant will not be granted "residency" but is more likely to be granted permission to enter and remain in the State for a limited period, and any renewal of permission would require a fresh application for permission and fresh consideration of the up-to-date circumstances of the Applicant.
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> 19. Finally, the Applicant has submitted country of origin information which purportedly shows a threat to human rights of failed asylum seekers who are returned to Nigeria. The Respondents do not concede that there is any such threat, and it should be noted that most of the country of origin information submitted in support of this allegation predates the making of the deportation order. In any event, the First Named Respondent has taken specific steps to ensure that persons deported to Nigeria are not the subject of human rights abuses on their return, and in this regard, I beg to refer to the affidavit of Detective Inspector Philip Ryan, when produced.
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> 20. Furthermore, the Applicant has delayed in bringing the within proceedings, which effectively seek injunctive relief to restrain deportation. Virtually all of the information on which the Applicant now seeks to rely was available to the Applicant and her legal advisers prior to the making of the deportation order. Notwithstanding this, the Applicant did not apply for interim relief until 5th April, 2006, which was the day before her proposed deportation to Nigeria."

6. At paragraph 6 of a Replying Affidavit sworn by the Applicant on 2nd May, 2006, she explains how she came to be re-united with the person she now claims is her older sister Katie, stating that they were both daughters of the full blood of Patience and Patrick Obende. She states that this reunion with her sister Katie occurred at the end of August or at the beginning of September, 2005, about three or four weeks before she became aware of the Deportation Order. Both the Applicant and Mrs. Katie Ezomo, told this court on affidavit, and Mrs. Ezomo gave similar sworn oral testimony, that they are both willing to undergo D.N.A. testing to confirm their relationship.

7. At paragraph 7 of this affidavit, the Applicant avers that the First Named Respondent has been aware of her application to reside in this State since shortly after she and her alleged sister went to the office of John Cooke, Solicitors, 12 Glentworth Street, Limerick in October, 2005. This firm had not handled the Applicant's application for refugee status. She states that she has now been legally advised that the outstanding deportation order should be revoked by the First Named Respondent and her application for residency based upon family circumstances should be determined by the First Named Respondent prior to reaching a decision whether or not to deport her.

8. In an affidavit sworn on 2nd May, 2006, Audrey Browne, Solicitor in the firm of John Cooke, Solicitors, who confirms that she is the Solicitor acting for the Applicant in this application, states at paragraph 4 that the Applicant has not challenged and does not now seek to challenge the validity of the deportation order made by the First Named Respondent in respect of her.

9. At paragraph 5 of her affidavit, Audrey Browne states that by a letter dated 12th October, 2005, her firm wrote to the Garda National Immigration Bureau advising them that the Applicant wished to advance a claim to be entitled to reside in this State on a family reunification basis. She states that by a letter dated 9th November, 2005, addressed to "The Family Reunification Unit, Department of Justice, Equality and Law Reform," the same claim was made at greater length. She states that by a further letter dated 3rd April, 2006, addressed by her firm to the First Named Respondent, her firm sought a revocation of the deportation order of 15th September, 2005, made by the First Named Respondent in respect of the Applicant. All of these letters are exhibited in this affidavit.

10. At paragraph 6 of the same affidavit, Audrey Browne claims that the First Named Respondent had been aware of the Applicant's claim for permission to reside in this State, on a family reunification basis, for six months prior to the date of attempted deportation and, in that time had taken no steps whatsoever in relation to the processing or determination of her application. Audrey Browne claims that it is unreasonable in the First Named Respondent and, in breach of the Applicant's right to fair procedures that the First Named Respondent, having failed to process her application with reasonable expedition, should now seek to deport the Applicant from this State and to process her application thereafter.

11. At paragraph 8 of the same affidavit the deponent states that she was advised by Counsel that,

> "At an absolute minimum there is also an obligation on the First Named Respondent to consider the outstanding applications in accordance with law prior to taking the step of deportation."

12. By consent of this court a replying affidavit, sworn by Mr. Dan Kelleher, an Assistant Principal Officer of the Repatriation Unit of the Department of Justice, Equality and Law Reform on 5th May, 2006, was delivered on behalf of the Respondents.

13. At paragraphs 3 – 6 inclusive of this affidavit, Mr. Kelleher avers as follows:-

> "3. A search has been conducted of the First Named Respondent's records and no record can be found of any application made for leave to remain on the basis of the Applicant's alleged relationship with Ms. Ezomo. The First Named Respondent does not ever appear to have received the letter from the Applicant's solicitors of 26th November, 2005. The first time that I or my colleagues in the Family Reunification Unit became aware of the alleged application for residency was when we saw the grounding affidavit in the within proceedings.
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> 4. The Family Reunification Unit of the Department of Justice, Equality and Law Reform deals with applications for reunification of family members of persons declared to be refugees. Section 18 of the Refugee Act 1996, as amended confers a rights of residence on certain family members of persons declared to be refugees. The Applicant's alleged sister has not been declared to be a refugee and therefore, even if the letter of 26th November, 2005, was sent to the Family Reunification Unit of the Department, that was not the appropriate course for the Applicant or her solicitors to take. If the letter were located it would have been transferred to the appropriate unit for attention.
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> 5. Furthermore, I am advised that there are approximately 1,770 applications for family reunification outstanding with the Family Reunification Unit at the moment, and it is anticipated that, having regard to the resources of the Unit there is a backlog of approximately 18 – 24 months in dealing with the applications. The Respondent does not afford any priority to Applicants who are unlawfully in the State in breach of a Deportation Order. Each application is processed in turn. I say and believe that to do otherwise would be to confer an advantage on persons who remain in the State unlawfully over and above those persons who comply with the procedures set out by the First Named Respondent for applications for permission to enter and remain in the State.
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> 6. In all the circumstances, even if the alleged application of 26th November, 2005, has in fact been sent, I say and believe that the Respondent has not been guilty of any undue delay. Furthermore, I am advised and believe that any alleged delay would not confer any right on the Applicant to remain in the State while her application for residency is pending."

14. Serious issue is joined on affidavit between Detective Inspector Philip Ryan of the Garda National Immigration Bureau, (affidavit sworn on 21st April, 2006) and, Audrey Browne Solicitor for the Applicant at paragraphs 19 – 26 inclusive of her affidavit sworn, as earlier indicated, on 2nd May, 2006, as to whether the Applicant would suffer unlawful and prolonged detention, extortion, torture or cruel, inhuman or degrading treatment should she be returned to Nigeria as a failed asylum seeker. At paragraph 13 of her grounding affidavit, sworn on 3rd April, 2006, the Applicant avers as follows:-

> "13. I say I am very frightened of being returned to Nigeria I am frightened because I have no proper family there and I am afraid of my mother and what she will try to do to me. My sister is ready, willing and able to have me live with her and her husband and children in this State. I regard her as a mother to me and in my culture it often happens that an elder sister will take on the role of mother to a junior sister. I am also absolutely petrified about what will happen to me on repatriation and that I will be imprisoned and subject to abuse and mistreatment. I refer with regard to this matter to the content of a letter submitted with my leave to remain application by Jessica Wanzenbock of the Separated Children

Education Service (C.D.V.E.C) where she has referred to my fear of being imprisoned and subject to abuse and mistreatment if deported. I say the fresh information submitted by my legal advisors in support of the application for revocation of the Deportation Order corroborates and supports my fears in this regard. I say that I also fear that like other girls I will have no way to survive if I am deported and will be forced onto the street as a prostitute."

15. In a supplemental affidavit sworn by her on 3rd May, 2006, Mrs. Katie Ezomo, having stated at paragraph 1 that she is the sister of the Applicant, deposes as follows:-

"3. I say that I did not grow up in the same household as the Applicant. She lived with and was brought up by our mother, whereas I was brought up by and lived with an aunt and had minimal contact with Blessing during her childhood and I did not see her very often and when I did see her it was a long time ago and she would have been too young to remember it.

4. I say that when I came to this State I applied for asylum and I subsequently withdrew my application and applied for residency on the basis of being the parent of an Irish born child. I have not retained the questionnaire I completed in respect of my asylum application, however I believe a copy will be in the possession of the first named Respondent of the Office of the Refugee Applications Commissioner (O.R.A.C.). I say that in my application I referred to the Applicant as part of my family and also listed our parents as Patience and Patrick Obende.

5. I say that I became aware that Blessing was in Ireland through a woman called Joy. I knew Joy because she had previously lived in the same hostel namely Knocklisheen, Meelick, Co. Clare where I was accommodated in, near Limerick prior to her moving to Dublin and we had become friends and I had told her about my family background and that I had sister with whom I had not grown up. In or about the end of August or beginning of September, 2005, Joy contacted me to tell me that she had met and struck up an acquaintance with a girl who she believed was my sister. Joy explained to me that from the information she had gathered about the girl she had met she was convinced that she was my sister. I subsequently went to Dublin to meet Blessing and we were reunited.

6. I say that I am willing as is my sister to undergo D.N.A. testing to confirm the validity of our relationship as sisters. It is my understanding that doubts about the validity of our relationship have been raised by the first named Respondent in the course of these proceedings.

7. I say that shortly after I met and was reunited with Blessing she subsequently got a Deportation Order notified to her and with my assistance she retained the services of our current solicitor and they subsequently made the application for residency and family reunification for her based on her family circumstances in this State. This application has been outstanding with the first named Respondent for a period of in or about six months. I say that since I have been reunited with her, Blessing has come to stay with myself, my husband and our child in Limerick on a regular basis. She did not seek to officially transfer her accommodation because we were concerned given her immigration situation that this was not permitted and thought that she would have to reside at the hostel accommodation allocated to her pending the conclusion of the residency and family reunification application and I was also concerned that if she came to live with us full time that her immigration status might somehow adversely affect my situation and that of my husband in the State."

16. By Order made ex-parte on 4th day of April, 2006, this Court (Dunne, J.) ordered that the First Named Respondent, his servants or agents be restrained until after Monday 24th day of April, 2006, or until further Order in the meantime, from deporting the Applicant. The Court further ordered that the Applicant's Solicitor be at liberty to serve a Notice of Motion for an interlocutory Injunction and, for leave to apply for judicial review returnable on Monday the 24th day of April, 2006, in the Asylum List. This Order was made, as is recited therein, on foot of the affidavit of the Applicant sworn on 3rd April, 2006, to which I have already referred, and the submissions by Mr. Woolfson counsel for the Applicant.

17. I must accept that Dunne, J. in making this Order was satisfied that the applicant's claim was not frivolous or vexatious and, that she had established that there was a serious question to be tried on an application for leave to seek judicial review. The learned Judge must also have been satisfied that the balance of convenience lay in restraining the deportation of the applicant, at least until this Court had an opportunity of hearing both sides on an application by the Applicant for an interlocutory injunction staying her deportation pending the making of an application for leave to seek judicial review.

18. In the case of *Oleg Margine v. Minister for Justice, Equality and Law Reform, Ireland, the Attorney General and the Governor of Cloverhill Prison* (Unreported, 14th February, 2004, Finlay Geoghegan, J.), the learned Judge in an extempore judgment held as follows:-

"In all cases where interlocutory relief is sought and in the absence of various special circumstances, it appears to me undesirable in the interests of the efficient administration of justice and the saving of legal costs expenses and the saving of judicial time, that there be a separate hearing of the application for such interlocutory relief and the application for leave. I form this view for two reasons: Firstly, by reason of the similarity of issues which a Court must consider on such an application for interlocutory relief and an application for leave. On the application for interlocutory relief in accordance with the decision of the Supreme Court in *Campus Oil v. The Minister for Industry and Commerce* [1983] I.R. 88, the first issue to be considered by the Court is whether the Applicant has established that there is a fair question to be tried. On an application for leave where the relief sought is subject to the provisions of s. 5 of the Act of 2000 the Applicant must establish that there are substantial grounds which the Supreme Court has determined would mean arguable or weighty grounds and grounds which are not trivial or tenuous. In other applications for leave which are subject only to Order 84 of the Superior Court Rules in accordance with the decision of the Supreme Court in *G v. The Director of Public Prosecutions* [1994] I.R. 374, the Applicant must establish that he has a stateable ground or arguable case for the relief sought.

The second reason for which I have formed the view is that where the interlocutory relief is sought pending the hearing of the application for leave, applying the above principles, what the Court has to be satisfied of in accordance with *Campus Oil* is that there is a fair question to be tried. That must be interpreted as being a fair question to be tried as to whether in turn the Applicant can establish at a hearing of an application for leave that he has either a stateable ground or arguable case or substantial grounds in the case of an application to which s. 5 of the 2000 Act applies which is a difficult theoretical concept. Therefore, it appears to me that in general it is desirable, and the parties should follow the procedure whereby if an application for interlocutory relief restraining deportation pending a determination by the Court is necessary, that the interlocutory application and the application for leave is dealt with at the one hearing and simultaneously."

19. When this application was made there was a case already at hearing before me and the parties in several other cases listed for

hearing on that day, were ready and anxious to commence their cases. No other court was available or was likely to become available to deal with this application or with any of the other listed cases. Counsel for the Applicant urged that the Court grant priority to this application because the Applicant, who was just over the legal age for detention under the provisions of s. 5(4) of the Immigration Act 1999, had been in custody for five weeks and, Counsel for the Respondents was anxious that the matter proceed as soon as possible because of the imminent expiration of the limitation period of eight weeks in aggregate on such detention imposed by s. 5(6) of the Act 1999. On these facts, I concluded, that there were "special circumstances" why I should immediately hear the application for interlocutory relief and for the release of the Applicant from detention and, direct that the application for leave to seek judicial review should be listed with such priority as it could command in the next available asylum list to fix dates for hearing.

20. Having read the several affidavits to which I have already adverted and the exhibits therein and, having considered the various issues arising from them, and having further read the Originating Notice of Motion dated 5th day of the April, 2006, returnable for 24th April, 2006, and the Statement Grounding Application for Judicial Review and, having heard what was offered by Mr. Woolfson, Counsel for the Applicant and Ms. Stack, Counsel for the Respondents I am satisfied that the Applicant has established a serious question to be tried on the application for leave to seek judicial review. In *Agbonlahor v. The Minister for Justice, Equality and Law Reform and the Attorney General* (Unreported, 3rd March, 2006, High Court), I held that the provision of s. 5(1)(c) of the Illegal Immigrants (Trafficking) Act, 2000, did not apply to a challenge to a decision of the First Named Respondent in the exercise of the discretion vested in him by the provisions of s. 3(11) of the Immigration Act, 1999, not to revoke a deportation order made by him and, that consequently the standard of proof in an application for leave to seek judicial review relating to s. 3(11) of the Act of 1999, was that of an arguable case, (see *G v. The Director of Public Prosecutions and Anor.* [1994] (above cited).

21. Despite the conflict on facts between the Affidavit of Audrey Browne, Solicitor, sworn on 2nd May, 2006, together with the affidavit of the Applicant sworn on 3rd April, 2006, and the affidavit of Mr. Dan Kelleher, Assistant Principal Officer of the Repatriation Unit of the Department of Justice, Equality and Law Reform, sworn of 5th May, 2005, - an issue which I cannot determine on this application which is not in any way a trial on the merits, - I am satisfied that there is a serious question to be tried as to whether or not the Applicant had placed the "new" material and her application for residency on family reunification grounds, before the First Named Respondent in October or November, 2005. It is clear from paragraph 3 of the affidavit of Mr. Kelleher, which I have already set out in full, that this "new" material was not considered at all by the First Named Respondent.

22. In the case of "*Baby O*" [2002] 2 I.R. 169 at 184, it was held by the Supreme Court, that neither that this Court nor the Supreme Court had any jurisdiction to interfere with a determination of the First Named Respondent made under s. 3(11) of the Immigration Act 1999. However, in my judgement there is a serious question to be tried as to whether having regard to the right to apply to the First Named Respondent to revoke a deportation order, clearly implicit in the terms of s. 3(11) of the Act of 1999, it was in accordance with fair procedures for the First Named Respondent to seek to enforce the deportation order of 15th September, 2005, regardless of the Applicant's claim, - even though a disputed claim, - that allegedly important "new" material had been submitted for his consideration and in respect of which he had not yet made a decision under s. 3(11) of the Act 1999. I am satisfied that if the affidavit evidence of the Applicant and Audrey Browne, Solicitor, were to be accepted there is a serious question to be tried that this case is distinguishable on its facts from cases such as *Margine v. The Minister for Justice, Equality and Law Reform, Ireland, the Attorney General and the Governor of Mountjoy Prison* (Unreported, High Court, 14th July, 2004, Peart, J.), as urged by Counsel for the Applicant.

23. It was submitted by Counsel for the Respondents that what is stated by Mr. Sean McNamara at paragraph 18 of his replying affidavit sworn on 21st April, 2006, (which I have already cited), is correct and just. Ms. Stack submitted that having regard to the fact that the Applicant was not challenging the validity of the deportation order of 15th September, 2005, and, having regard to the decision of the Supreme Court in *G. A. G. v. The Minister for Justice, Equality and Law Reform and Ors.* [2003] 3 I.R. 422 at 473 et. seq, that the applicant had no entitlement to remain in this State and having regard to the duty of the First Named Respondent to maintain and enforce the National Policy with regard to asylum seekers and persons seeking residence in the State, the balance of convenience or, the "risk of doing an injustice" (per., May L.J., in *Cayne v. Global Natural Resources plc* [1984] 1 A.E.R. 225 at 257), lay in refusing to stay the deportation of this Applicant.

24. I think not. The evidence so far uncontradicted and probably uncontradictable, is that the Applicant is a young woman just nine months beyond the statutory age of majority in this State, who came here as an unaccompanied minor seeking asylum on 11th December, 2003. There is a considerable conflict of affidavit evidence as to the circumstances she would face if returned to Nigeria, even in the short term. While taking full account of her failure to establish a future fear of persecution for one of the reasons specified in s. 2 of the Refugee Act, 1996, and, having full regard to what is deposed by Detective Inspector Philip Ryan in his affidavit sworn on 21st April, 2006, regarding repatriation agreements between the Garda National Immigration Bureau and the Nigerian Authorities, I am still satisfied that the Applicant has established a serious question to be tried that if she were to be returned to Nigeria her circumstances might become such that she would be unable, for economic or other reasons, to continue to prosecute her application for residence in this State. A claim of right to remain in this State pending the hearing of an application to the High Court for leave to seek judicial review, is something altogether different from and, not to be conflated with a claim to remain in this State while an application for leave to reside here is being processed and considered by the First Named Respondent. It is now trite law that non-citizens enjoy a protected right by virtue of Article 34 of the Constitution, of access to these Courts to enforce legal rights. This right, in my view, should not be inhibited or frustrated in any way, particularly where this Court, on an application for an interlocutory injunction, is satisfied that the claimant has raised a serious question to be tried on an application claiming leave to seek judicial review.

25. Having regard to what is deposed at paragraph 4 of the affidavit of Mrs. Ezomo, sworn on 21st April, 2006, the Applicant is unlikely to be a burden on this State pending the hearing of her application for leave to seek judicial review. Mrs. Ezomo confirms that she and her husband are anxious that the Applicant should live with them as part of the family and they are willing to look after and support her. Despite what is averred by Mr. Sean McNamara at paragraph 20 of his affidavit sworn on 21st April, 2006, I have already held that there is a serious issue to be tried on whether the delay in advancing the Applicant's claim for residency on family

26. re-unification grounds was due to the Applicant or the First Named Respondent. In my judgment, on the particular facts of this case, there is a greater risk of doing a serious injustice by refusing to grant the injunctive relief sought than by granting it, even though the First Named Respondent may eventually refuse to grant the Applicant permission to remain in this State even for the limited period referred to at paragraph 18 of Mr. McNamara's affidavit. The Court will therefore continue the order restraining the First Named Respondent, his servants or agents, from deporting the Applicant until the hearing of the application for leave to seek judicial review or until further order in the meantime.

27. Mr. Woolfson, Counsel for the Applicant, argued that even though the Applicant had not challenged and was not challenging the validity of the deportation order of 15th September, 2005 and, had been an evader prior to her arrest and detention pursuant to the provisions of s. 5 of the Immigration Act, 1999, (as amended), this Court still had an inherent jurisdiction at common law or pursuant

to the provisions of Article 34 of the Constitution to admit the Applicant to bail. He argued that the exercise of this power could only be prevented or restricted by clear and express provisions to that effect in the Immigration Act, 1999, (as amended). It was agreed on all sides that such a provision was not to be found in that Act or in any other part of the Asylum or Immigration Code. Mr. Woolfson contended that the court should exercise this power in favour of the Applicant because, he claimed, that her continued detention in custody was unlawful, unnecessary, unjust and disproportionate.

28. Mr. Woolfson referred to the decision of the Court of Appeal (Civil Division), (Sir John Donaldson, M.R., Croome-Johnson and Bingham L.J.J.), in *Regina v. Secretary of State for the Home Department Ex parte Turkoglu* [1998] 1 Q.B. 398, (an application for bail pending appeal to that court from a decision of the High Court in an immigration context). He also referred to the judgment of the European Court of Human Rights in the case of *Dougoz v. Greece* – 6th March, 2001. At page 401 of the report, Sir John Donaldson, M..R., delivering the judgment of the Court of Appeal, stated as follows:

> "It now seems to me that where you have a pending application for leave to apply for judicial review in the High Court and the judge either grants or refuses bail, he is making an order in proceedings of which he is properly seised. It follows that unless the right of appeal against the order is excluded either by statute (which almost certainly would be under section 18 of the Supreme Court Act, 1981) or by judicial precedent binding on us (as in the *Lane v. Esdaile* type of case), there would be a right of appeal. So I think that we were wrong, and that where you have an adjourned application for leave to apply and the judge has refused bail pending the resumption of that application for leave, an application for bail can be made direct to this Court by way of appeal from the judge's order refusing bail.
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> I will now try and look at the problem overall, taking, first, the High Court. In my judgment you cannot apply to the High Court for bail unless the High Court is seised of some sort of proceeding. It may be seised of an application for leave to apply for judicial review or it may be seised of the substantive application. So long as it is seised of either of those applications, you can apply to the High Court and the court can grant or refuse bail. From the order granting or refusing bail and appeal will lie to this Court."

29. At paragraphs. 54, 55 and 61 of its judgment in *Dougoz v. Greece*, the European Court of Human Rights held as follows:

> "54. The Court recalls that it is not in dispute that the applicant was detained 'with a view to deportation' within the meaning of Article 5(1)(f). However, it falls to the Court to examine whether the applicant's detention was 'lawful' for the purposes of Article 5(1)(f), with particular reference to the safeguards provided by the national system. Where the 'lawfulness' of detention is in issue, including whether 'a procedure prescribed by law' has been followed, the Convention refers essentially to the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness (see *Chahal v. the United Kingdom*, Judgment of 15th November, 1996, Reports of Judgments and Decisions 1996 – Vp.1864, at 118).
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> 55. In this connection the Court recalls that in laying down that any deprivation of liberty must be effected 'in accordance with a procedure prescribed by law', Article 5(1) primarily requires that any arrest or detention have a legal basis in domestic law. However, these words do not merely refer back to domestic law; they also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention. Quality in this sense implies that where a national law authorises deprivation of liberty, it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness (see *Amuur v. France*, judgment of 25th June, 1996, Reports 1996-III, pp. 850-51, 50)
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> 61. The Court recalls that the notion of 'lawfulness' under paragraph 4 of Article 5 has the same meaning as under paragraph 1, so that the detained person is entitled to a review of his detention in the light not only of the requirements of domestic law but also of those in the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5(1). Article 5(4) does not guarantee a right to a judicial review of such breadth as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the 'lawful' detention of a person according to Article 5(1) (see *Chahal*, cited above, pp. 1865-66 at 127)."

30. Mr. Woolfson argued that if this Court did not have an inherent jurisdiction to enquire into the Applicant's detention and, if the circumstances merited it, to order her conditional or unconditional release, s. 5 of the Immigration Act, 1999 would be in breach of Article 5 of Schedule 1 of the European Convention on Human Rights Act, 2003.

31. Ms. Stack, Counsel for the Respondents, submitted that the Applicant was an evader and, that her continued detention was necessary in order to enforce the deportation order made by the First Named Respondent in respect of her on 15th December, 2005 and notified to her by letter dated 27th September, 2005. She argued that even if this Court had an inherent jurisdiction at common law or pursuant to the provisions of Article 34 of the Constitution, to grant bail or conditional release from detention in civil cases, it could not exercise that power in favour of the Applicant because, her continued detention formed an essential part of the process of enforcing compliance by her with the deportation order, the validity of which had not been challenged by her. Ms. Stack relied in support of this argument on the much cited judgment of Walsh, J., in *The People (Attorney General) v. O'Callaghan* [1966] I.R. where at page 511 the learned judge said:

> "The jurisdiction of the High Court to grant bail is an original jurisdiction and is in no sense a form of appeal from the District Court or from any other Court which may have dealt with the question of the bail of the applicant. The jurisdiction of the Courts to grant bail to accused persons has existed from the earliest times and has been stated to be 'as old as the law of England itself' (see Stephen's History of the Criminal Law, Vol. 1 at p. 233). In *Regina V. Spilsbury* [1989] 2 Q.B. 615 the Chief Justice, Lord Russell of Killowen, in dealing with the question, at p. 620 cited with approval the following passage from 1. Chitty's Criminal Law, 2nd. ed. At page 97:-
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> > 'The Court of King's Bench, or any judge thereof in vacation …… in the plenitude of that power which they enjoy at common law, may, in their discretion, admit persons to bail in all cases whatsoever, though committed by justices of the peace or others, for crimes in which inferior jurisdictions would not venture to interfere, and the only exception to their discretionary authority is, where the commitment is for a contempt or in execution. Thus they may bail for high treason, murder, manslaughter, forgery, rapes, horse-stealing, libels, and for all felonies and offences whatever.'

> That the High Court has this jurisdiction in full cannot be doubted. Not only has it had transferred to it the jurisdiction which at the commencement of the State was vested in or capable of being exercised by the then High Court or the Supreme Court of Judicature in Ireland or in any division or judge thereof but is, by the very words of the Constitution itself in Article 34, invested with full original jurisdiction in all matters whether of law or fact, civil or criminal."

32. While acknowledging that the learned judge was addressing solely the power of the High Court to grant bail in criminal proceedings, Ms. Stack argued that the exception of cases of "contempt" and "execution", to which Walsh, J., adverted, clearly signify that this Court will not exercise its power to admit to bail or grant conditional release where the detention is necessary for enforcing an order of the Court. She submitted that the same is also true of an executive order made *intra vires* by the First Named Respondent, the validity of which has not in any way been challenged by the Applicant.

33. I am satisfied that the Court of Chancery and the Common Law Courts exercised a jurisdiction from at least the 13th century, to admit defendants to bail in civil matters (see "A Practical Treatise on the Law of Bail in Civil and Criminal Proceedings, - Charles Petersdoff, [1824], J. Butterworth & Son, London and, J. Cooke, Ormond Quay, Dublin). No case was cited to this Court in which the courts established by the Courts of Justice Act, 1924, have exercised this power. I am, however, satisfied that the power was exercised by the pre-Judicature Act courts in Ireland, (*opus* cited), and that this power is now vested in the High Court by Article 34.3.1., of the Constitution. However, I find that it is not necessary for this Court to consider further the origins and use of this inherent jurisdiction in the instant case.

34. In giving the decision of the Supreme Court on the Matter of the Reference to it by the President of Ireland of ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill, 1999 [2000] 2 I.R. 360, Keane C.J., at pp. 409-412, held as follows:

> "The context of the detention under the proposed new s. 5(1) of the Act of 1999 is that the detainee has availed of, or has had the opportunity to avail of, all the elaborate procedures, whether they be in connection with an application for asylum, an application for refugee status or an application to remain in the country on humanitarian grounds and the stage has been reached where a deportation order has been finally made. That deportation order itself will have been preceded by the statutory notification of the intention to make the order and the due consideration by the Minister of any representations put forward by the detainee as to why he should not make it.
>
> At that stage, the detainee is a person not entitled to be in the country at all. But this does not mean that he is without rights. The detention must be for the necessary statutory purposes. As is made clear at a later stage in this judgment, there are in fact a number of safeguards. There would, of course, be nothing wrong in the Oireachtas in its wisdom expressly providing for periodic review of the detention by a court or of some supervisory role by higher officers in the Gardaí or the Minister's department, but the absence of specific provisions of that kind does not necessarily render the legislation unconstitutional. The court considers that in all the circumstances the safeguards which do in fact exist and which will be outlined further in this judgment are perfectly adequate to meet the requirements of the Constitution in the context of the particular form of detention relevant to this reference.
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> … As already pointed out, the principles set out by this Court in *East Donegal Co-operative v. Attorney General* [1970] I.R. 317, must be applied to the statutory powers of detention. It does not follow that because the section permits of detention for up to eight weeks in the aggregate, the proposed deportee may necessarily be detained for that period if circumstances change or new facts come to light which indicate that such detention is unnecessary.
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> Counsel for the Attorney General has cited *R. v. Durham Prison Ex, p. Hardial Singh* [1984] 1 W.L.R. 704. In that case, Woolf J. (as he then was) considered a power of detention conferred by the English Immigration Act, 1971 which was not subject to any express time limit at p. 706:
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> > 'Since 20th July, 1983, the applicant has been detained under the power contained in paragraph 2(3) of Schedule 3 to the Immigration Act, 1971. Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detentions if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Secondly, where the power is given to enable the machinery of deportation to be carried out, or regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend on the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State, that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention.'
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> Even though the Irish legislation contains an express time limit of eight weeks in the aggregate subject to certain extensions where proceedings are brought etc., it would still be the case that it would be an abuse of the power to detain if it was quite clear that deportation could not be carried out within the eight weeks.
>
> There are therefore a number of safeguards available to a person who is detained under the extended grounds. They can be summarised as follows:-
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> > (1) Under the principles of *East Donegal Co-operative v. Attorney General* [1970] I.R. 317, and indeed in the light of modern jurisprudence at common law, an executive power of detention must not be unnecessarily exercised. Even if the power is properly exercised in the first instance, the relevant executive authority must be vigilant to ensure that the detention be brought to an end if, having regard to new circumstances or discovery of new facts or for some other reason, it is no longer necessary. This should be done independently of any application in that regard by the person concerned. …"

35. In my judgment, therefore, this Court has a plenitude of powers which it may use and, which it must use if, it finds on the facts of any particular case that a person is being detained where it is quite clear that the deportation of that person cannot be effected within the aggregated period of eight weeks allowed for that purpose by the Statute. In the instant case, unlike the situation which pertained in *Ojo v. The Governor of Dochas Centre* (Unreported – High Court – 8th May, 2003 – Finlay-Geoghegan J.,). I am satisfied, on the affidavit evidence, that there is a concluded and present intention on the part of the First Named Respondent to deport this

Applicant and, only thereafter to consider her application for leave to reside here when reached in its proper sequence with the other 1,770 similar applications already pending, as referred to at paragraph 5 of the affidavit of Mr. Dan Kelleher, sworn on 5th May, 2006. However, having regard to the stay now imposed by this Court on her deportation, and the minimum period of time likely to elapse before her application for leave to seek judicial review can be heard and determined in its proper place in the Court List, I find that the only lawful basis for her continued detention for the remaining three weeks of the permitted statutory period of eight week in aggregate, has effectively disappeared. In the words of Keane C.J., at p. 411 of the decision in the *Reference of the Illegal Immigrants (Trafficking) Bill, 1999* (above cited): "It would be an abuse of the power to detain if it was quite clear that deportation could not be carried out within the eight weeks".

36. Because the Applicant was an evader, in my judgment, this Court should not grant her an unconditional release from detention. In any event, such an unconditional release was not sought on behalf of the Applicant.

37. Mrs. Katie Ezomo gave oral evidence on oath at the hearing of this application, that the Applicant was her natural sister of the full blood. She further confirmed her affidavit evidence that she and her husband were anxious that the Applicant should go to reside with them at their residence in Limerick pending the hearing of her application for leave to seek judicial review. Mr. & Mrs. Ezomo have two children and Mrs. Ezomo is presently pregnant with and hopes shortly to be delivered of her third child. Mr. Ezomo is at present unemployed and Mrs. Ezomo is unable to work outside the home because of her condition. She gave evidence of the family means. Mrs. Katie Ezomo offered herself as a surety in the full amount of her bank account, of which full particulars were given to the court, for the due observance by the Applicant of whatever terms this Court might see fit to impose as a condition of releasing her from Custody including conditions in relation to place of residence, reporting to An Garda Siochána, delivery up of all travel documents, non-application for travel documents and, surrender within a specified time to the Garda National Immigration Bureau at a specified address for the purpose of being deported should her application for leave to seek judicial review be unsuccessful or should the stay on her deportation be otherwise lifted in the meantime by this Court or by the Supreme Court.

38. The Court will therefore order that the Applicant be forthwith released from detention on the terms to be specified in the Court Order and upon Mrs. Katie Ezomo entering into a bond in the sum specified in the Court Order to ensure compliance by the Applicant with the terms of that Order.