Neutral Citation Number: [2009] IEHC 593

THE HIGH COURT

JUDICIAL REVIEW

2009 621 JR

BETWEEN

EMMANUELA IGIBA (A MINOR, SUING BY HER MOTHER AND NEXT FRIEND PHILOMENA IGIBA), ANTHONY IGIBA (A MINOR, SUING BY HIS MOTHER AND NEXT FRIEND PHILOMENA IGIBA), SHARON IGIBA (A MINOR, SUING BY HER MOTHER AND NEXT FRIEND PHILOMENA IGIBA) AND PHILOMENA IGIBA

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

AND

ATTORNEY GENERAL AND HUMAN RIGHTS COMMISSION

NOTICE PARTIES

JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 2nd day of December, 2009.

1. The applicants are a mother and her three children. The youngest child Emmanuela is a citizen of Ireland by reason of her birth in the State in April, 2003. The mother Ms Philomena Igiba and her two older children, who were born in Nigeria in 1998 and 2000, are nationals of Nigeria.

2. The applicants are seeking leave to apply for judicial review of the refusal of the Minister for Justice, Equality and Law Reform ("the Minister"), dated the 28th May, 2009, to revoke a deportation order made against Ms Igiba in July, 2006. The leave application took place at the Kings Inns in Court No. 1 on the 14th October, 2009. Mr. Michael McNamara B.L. appeared for the applicants. Ms. Sara Moorhead S.C. and Mr. David Conlan Smyth B.L. appeared for the respondents. The applicants' arguments are substantially the same as those advanced in the *Alli* and *Asibor* cases, though the facts of this case are significantly different.

Background

3. Ms Igiba who is a well educated science graduate first came to Ireland in March, 2003 when she was eight months pregnant with her third child. Her older children and her husband remained behind in Nigeria. On arrival she made an application for asylum but took no further step and when she failed to attend for interview her application was deemed to be withdrawn. Her daughter the first named applicant, Emmanuela, was born a few weeks after Ms Igiba's arrival in the State and after a passport was obtained for her Ms Igiba went to the U.K. where she and Emmanuela lived at least until late 2006. No information is available on her status in the U.K. and it is stated that mother and children travelled back and forth to Nigeria during that time.

4. In 2004, unaware that Ms Igiba had left the State, the Minister wrote to her at her stated address in Ireland, informing her that he was proposing to deport her. No response was received and the Minister proceeded with the process of the examination of her file under the mandatory statutory provisions including s. 5 of the Refugee Act 1996 which sets out the prohibition against refoulement. No danger of refoulement was identified and the deportation order was signed against her in July, 2006. A letter of notification then issued to her at her last address in Ireland. As she failed to present to the Garda National Immigration Bureau (GNIB) she was classed as an evader. No challenge has been taken to the validity of that deportation order.

5. At the hearing it was claimed that Ms Igiba re-entered the State in December, 2006 with Emmanuela and her two older children.[1]

In May, 2007 her solicitors, Ceemax & Co, made an application on her behalf for residence pursuant to the IBC/05 Scheme. In response she was informed that a deportation order had been made against her in 2006. No further action was taken by those solicitors. In August, 2007 the two older children who are the second and third applicants were enrolled in primary school in Ennis. In February, 2008 a second firm of solicitors, Colgan & Co., made an application for subsidiary protection on behalf of the applicants. That application was refused in September, 2008 and a proposal to deport the older children issued.

6. In October, 2008 a third firm of solicitors, Sarah Ryan & Co., made an application for revocation of the deportation order made against Ms Igiba and a parallel application for leave to remain on behalf of the older children. It was submitted that nothing in the applicant's history required the Minister to remove her from the State. It was submitted that Ms Igiba has a B.Sc in Chemistry; that Emmanuela was 5 years of age and at school in Ennis and that she has rights under the Constitution, EC law and the European Convention on Human Rights (ECHR). It was submitted that Ms Igiba intended to raise Emmanuela, Sharon and Anthony in Ireland and avail of education for them here. No mention was made to the fact that Ms Igiba and Emmanuela had been absent from the State between 2003 and 2006.

7. In February, 2009 the Minister affirmed the deportation order against Ms Igiba and signed deportation orders against Anthony and Sharon. The applicants commenced judicial review proceedings challenging those decisions. Meanwhile Sarah Ryan & Co., Solicitors, wrote to the Minister asking what arrangements had been put in place to ensure the vindication of Emmanuela's rights if she remained in Ireland after the deportation of her mother and siblings.

8. At the hearing of the leave application, the Court raised concerns about Ms Igiba's intention to leave Emmanuela in Ireland if she were deported. It was then agreed that as this may constitute a material change of circumstances, the Minister would consider a fresh application for revocation on that basis and the hearing was adjourned. However when the fresh application was brought it was based on essentially the same facts and principles as the first application and no mention was made of any intention to leave Emmanuela behind in Ireland. The application contained an expansion of the earlier submissions on the impact of the deportation on the welfare, well-being and education of the children and for the first time it was admitted that Ms Igiba and Emmanuela had been absent from the State between 2003 and 2006.

9. The Minister re-examined Ms Igiba's file on the basis of the fairly unchanged submissions. In May, 2009 he notified her of his decision not revoke the deportation order. He referred *inter alia* to the "insurmountable obstacles" test as set out in *R (Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840 and found that there were no insurmountable obstacles to the applicants establishing family life in Nigeria. He noted that "*Philomena Igiba has shown a flagrant disregard for the immigration laws of the state."* The State's interests in the general control of immigration and the absence of a less restrictive process than deportation were identified as a "substantial reason" requiring the deportation. That decision is challenged in these fresh proceedings as the previous proceedings were struck out in July, 2009.

THE ISSUES IN THE CASE

10. As was noted above, the applicants' arguments in this case are the same as the arguments made in the *Alli* and *Asibor* cases, essentially being that the Minister:

a. Erred by applying an "insurmountable obstacles" test;

b. Failed to identify a sufficient "substantial reason"; and

c. Failed to reach a reasonable and proportionate decision.

11. Ms Moorhead S.C. reiterated the lengthy submissions that she had made during the *Alli* and *Asibor* hearing, which are summarised in the *Alli* decision. She made a number of supplementary submissions in this case, which are set out below.

(a) Insurmountable Obstacles

12. Mr McNamara B.L., counsel for the applicants, argued that the Minister's application of the *Mahmood* "insurmountable obstacles" test constitutes an error of law. It follows from the decision of Denham J. in *Oguekwe v. The Minister for Justice, Equality and Law Reform* [2008] 2 I.L.R.M. 481 that the Minister ought instead to have asked whether it would be reasonable to expect the family to follow Ms Igiba to Nigeria. The *Oguekwe* reasonableness test is a lower standard than the *Mahmood* "insurmountable obstacles" test and this is clear from the leave decisions of Charleton J. *in H.L.Y. (Yang) v. The Minister for Justice, Equality and Law Reform* [2009] I.E.H.C. 96; *Alli v. The Minister* (Unreported, High Court, Feeney J., 11th June, 2009) and McMahon J. in *Asibor v. The Minister* [2009] I.E.H.C. 235.

13. Ms Moorhead reiterated her arguments in the *Alli* and *Asibor* cases and argued that the words used by the Minister are of little import and what is important is the reasonableness of his analysis. The applicants have latched on to particular phrases in the Minister's analysis and have failed to examine the analysis in the round, bearing in mind the circumstances of the Igiba family.

(b) Substantial Reason

14. Mr McNamara argued that a formula of words relating to immigration control was employed in the identification of a "substantial reason" and the same formula was also used in *Alli* and *Asibor*. This was not sufficient as a reason and the Minister ought instead to have identified a reason specific to the facts of the case which outweighed the

constitutional and Convention rights that are engaged.

15. Ms Moorhead relied *on Osunde v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Cooke J., 14th October, 2009)[2] cases but where no arguments on insurmountable obstacles were raised. There, Cooke J. noted that the Minister had engaged in an applicant-specific analysis of all of the relevant facts, was aware of the gravity of the consequences of his decision for the family, and gave reasons of substance for his decision. In the circumstances he was satisfied that general reasons of immigration control would constitute a sufficient "substantial reason" requiring the deportation of the applicant.

16. Ms Moorhead further argued that in this case, there was the additional issue of Ms Igiba's immigration history which was a sufficient, applicant-specific "substantial reason" which outweighed the applicants' constitutional and Convention rights.

(c) Proportionate and Reasonable Decision
17. Mr McNamara's final challenge to the refusal to revoke was that there is nothing in the examination of file to indicate that the Minister conducted an adequate balancing exercise between the competing rights of the State and the applicants. Instead, the Minister recited the competing interests and reduced his conclusions to a formula of words. He should have carried out an applicant-specific analysis of the impact of Ms Igiba's deportation on Emmanuela's educational opportunities, and he should also have taken account of the reduced educational and employment opportunities that would be available to Emmanuela in Ireland should she return as a Nigerian educated adult.

18. Ms Moorhead argued that the applicants have failed to identify which, if any, of the 16 factors enumerated by Denham J. in *Oguekwe* that the Minister has failed to consider. It is a feature of the case that there is an absence of any individual information given by Ms Igiba in either of the applications to revoke and that in the absence of fact-specific information, the Minister is not generally obliged to make any inquiries. He considered all of the facts that were presented to him. Of course formulaic sentences are used and common conclusions reached but that does not mean that a fact-specific balancing exercise has not been undertaken. If the words used and conclusions reached were not similar, there would be no consistency in the Minister's decision-making and the applicant's prospects for success would depend on the sympathies of the particular civil servant who took up the file.

THE COURT'S ASSESSMENT
19. This being an application to which s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000 applies, the applicants must establish substantial grounds for the contention that the Minister's refusal to revoke should be quashed. As is well established, this means that the applicants must show grounds that are reasonable, arguable and weighty, as opposed to trivial or tenuous.

20. The applicants' first ground relates to the use by the Minister of the so-called "insurmountable obstacles" test. The decision delivered in the *Alli* case contains a detailed examination of that argument and there is nothing to be gained by repeating that analysis in this case. In brief, the Court has found that to ask whether there exist any insurmountable obstacles to the family returning with the deportee is essentially the same as to ask whether it would be reasonable to expect the family members to establish family life elsewhere. In other words there is no difference of any substance between the test applied by the European Court of Human Rights (ECtHR), as distilled in *Mahmood*, and the test set out by Denham J. in *Oguekwe*. The U.K. jurisprudence which clarifies the application of *Mahmood* derives from a misunderstanding from what was said by Lord Bingham in *R v. Secretary of State for the Home Department, ex parte Razgar* [2004] 2 A.C. 368 and has no impact on the Irish situation as no "exceptionality" test has ever applied here. In the circumstances the applicants' first ground fails in this case as it did in *Alli* and *Asibor*.

21. The second ground relates to the identification of a "substantial reason" which requires the deportation of the parent of an Irish citizen child. This is also a matter that was considered at length by this Court in *Alli* and the conclusions reached in that case apply equally in this case. As was the case in *Alli* and *Asibor*, the Minister expressly considered each of the competing rights in their fact-specific context, and he balanced those rights against those of the State. He was clearly aware of the consequences of the deportation on the citizen child, her mother and her siblings. In the circumstances, it was open to him to identify general reasons of immigration control associated with the common good as a "substantial reason" which required the deportation of Ms Igiba. Provided that he engages in a fact-specific analysis and weighs the competing interests there is no obligation on the Minister to identify an applicant-specific reason.

22. A feature of this case which was not present in *Alli* and *Asibor* is that the Minister expressly noted that Ms Igiba had shown *"a flagrant disregard for the immigration laws of the state".* In the view of this Court, that was a significant factor which contributed to the Minister's conclusion that there were substantial reasons requiring the deportation of Ms Igiba. It is indisputable that Ms Igiba's immigration history with this State is marked by a distinct lack of candour on her part. In the first place she secured entry into the State by claiming asylum but she did not pursue that application after her newly born daughter had been issued with an Irish passport securing her Irish citizen status. She then left the country and she says that she went to the U.K. for a period of three years. Ms Igiba did not inform the authorities that she was leaving the State and in her first application for revocation in 2008 the impression was given that she had been in Ireland at all times since the birth of Emmanuela. It was only in May, 2009 after the matter had been uncovered in the course of an injunction application that she admitted she and Emmanuela had left Ireland and lived in the U.K. between 2003 and 2006. In her affidavit grounding these proceedings she avers that she lived continuously in the U.K. but it emerged during the course of the proceedings that she travelled to and from Nigeria during that time. There is no evidence as to when she actually returned to live in Ireland. This extreme lack of candour cannot be dismissed as insubstantial. It contributed towards the Minister's identification of a "substantial reason" which would outweigh the interests of the applicants. In the circumstances, and in particular following the extensive consideration given by the Supreme Court in *A.O. and D.L. v. The Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1 as to what constitutes a "substantial reason" requiring the deportation, the applicants' second ground fails.

23. The final ground relates to the requirement set out in *Oguekwe* that the Minister reaches a proportionate and reasonable decision. The question of whether a decision is proportionate and reasonable will, of course, depend on the facts of each case. As a matter of general principles, however, it is clear from this Court's analysis in *Alli* and *Asibor* that the constitutional and Convention rights of the applicants are weighty but they are <u>not</u> absolute and <u>may</u> be outweighed by matters associated with the common good. What is required is that Minister conducts a fact-specific assessment of the constitutional and Convention rights of the citizen child and the family. He must weigh those rights against the interests of the State and must not make a decision that impacts unnecessarily on those involved.

24. The Court was satisfied in *Alli* and *Asibor* that the Minister reached a proportionate and reasonable decision. It is of significance that the facts and circumstances of this case reveal a family which is in a significantly weaker position than the applicants in *Alli* and *Asibor* to resist their removal from the State. The proposed deportation in this case could not be said to have the same impact on the citizen child and on the family as a whole as was the case in *Alli* and *Asibor*. In those cases, the citizen children had continuously lived in the State from birth. The children's mothers had permission to remain in the State under the IBC/05 Scheme by reason of their parentage of the citizen children, and that permission extended to their foreign national children. The mothers informed the Minister that they intended to stay in Ireland with their children even if their husbands were deported. Thus the deportation of the father would necessarily effect a rupture, even if one of choice, of the family.

25. That is not the situation of Ms Igiba and her children. Their links to the State are considerably more tenuous that the relatively fragile links of the *Alli* and *Asibor* families. As far as can be ascertained, Ms Igiba is now satisfied that if she is deported Emmanuela, Anthony and Sharon will accompany her to Nigeria. Thus, the family will not be ruptured by the deportation. Similarly it cannot be said that the applicants have established any firm roots or links to the community in Ireland and so it could not be argued that there will be any serious interference with their private life insofar as it is linked to Ireland. Emmanuela was absent from the State for the first three and a half years of her life. As far as the Court is aware, her father is a national of Nigeria who resides in Nigeria and has never been present as a member of the family in Ireland. There is a notable absence of any reference of substance to him in the applicants' submissions to the Minister. The older children were born in 1997 and 2000, respectively, and it is claimed that they lived in Nigeria until 2006, presumably with their father. It might reasonably be assumed, not least in circumstances where their mother was educated to third level in Nigeria, that they both commenced their education in Nigeria, although it is a feature of this case no information has been put before the Court in that regard. Neither Emmanuela nor the older children have been in the State for an appreciable length of time and all of the children have lived outside of Ireland for much of their lives. In the circumstances there is, as was argued by the respondents, an air of unreality to the suggestion that there are any real or serious obstacles to the family being able to establish family life in Nigeria.

26. A further significant consideration is that Ms Igiba has never been given permission to remain in the State. She failed to pursue her asylum application and, because she left the State after giving birth to Emmanuela, she fell outside of the IBC/05 Scheme. Her presence in the State has merely been tolerated while her application and those of her children for leave to remain were determined. Apart from the brief period between her asylum application and the date of her s. 11 interview, her presence in the State has never been lawful. Similarly, Anthony and Sharon have not been lawfully present in the State at any time. No application for asylum was ever made on their behalf and deportation orders are presently extant against them.

27. In sum, these applicants are not in any sense "settled migrants" within the meaning of the jurisprudence of the European Court of Human Rights. Ms Igiba has deliberately flouted the immigration laws of the State and she could never have been under the impression that she would be granted permission to lawfully reside and settle in Ireland. The Minister was aware of all of these factors. In the circumstances it is unrealistic and near unstateable to suggest that the Minister's decision to deport Ms Igiba is disproportionate or unreasonable. In the light of the foregoing, I am *not* satisfied that the applicants have established substantial grounds and accordingly, I <u>*refuse*</u> leave.

---

[1] Ms Igiba says that Anthony and Sharon joined her and Emmanuela in the State at that time. The respondents have noted that there is no evidence that they were in the State until August, 2007.

[2] That decision had not issued at the time of the *Alli* and *Asibor* hearing in July, 2009 which involved principles similar to the *Alli* and *Asibor*