Neutral Citation Number: [2009] IEHC 233

THE HIGH COURT

JUDICIAL REVIEW

2009 68 JR

BETWEEN

I. N. M. (AN INFANT, SUING BY HIS MOTHER AND NEXT FRIEND F. M.)

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND

THE REFUGEE APPLICATIONS COMMISSIONER

RESPONDENTS

JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 19th day of May, 2009.

1. This is an application for leave to apply for judicial review of two decisions:-

(a) The decision of the Minister for Justice, Equality and Law Reform ("the Minister"), dated 21st January, 2005, to make a deportation order in respect of the applicant; and

(b) The refusal of the Office of the Refugee Applications Commissioner (ORAC) dated January, 2009, to accept and determine an individual application for asylum made on behalf of the applicant.

2. Mr. Paul O'Shea B.L. appeared for the applicant and Mr. Patrick O'Reilly B.L. appeared for the respondents. The hearing took place at the King's Inns, Court No. 2, on 21st April, 2009.

Background

3. Both the applicant and his mother, who is acting as his next friend in these proceedings, are nationals of Nigeria. The applicant was born in Nigeria in February, 2002. He is now six years old. He faces a deportation order which he seeks to revoke and he seeks to be considered as a completely new applicant into the refugee process. In order to understand the nature of this application it is necessary to outline some background information relating to the applicant's mother as she preceded her son to this State and the two cases are closely linked. From hereon the applicant will be referred to as the child and his next friend as the mother.

4. The mother made an application for asylum in the State on 16th September, 2003. According to her questionnaire she was almost 23 and a hairdresser with her own business. She was married and had a son of one and a half. She was a member of the Yoruba tribe and a Christian and English was her first language. She claimed to fear persecution on two fronts which caused her to leave Nigeria.

5. Her account of the events preceding her departure from Nigeria was that a wealthy but very much older man - Mr. Abdulai - wanted to marry her and called to her father's home seeking his approval from time to time. Her father was easygoing and left the decision to his daughter who was not interested as she had a boyfriend who she subsequently married. After she married, the older suitor continued from time to time to speak to her but caused her no problems. Eighteen months after she married her husband, she was abducted by this suitor and his friends; she was held in a derelict house for three days where she was beaten and raped until she agreed to marry Mr. Abdulai. During the early part of her detention she called the police and her husband but her phone and bag were then taken from her. When she was coerced into agreeing to marry Mr. Abdulai he apologised for the rapes and said he would return the next day with a doctor and take her away. She was then untied and that night she managed to escape and reported the incident to the police but was unable to furnish the address of the place of her imprisonment or Mr. Abdulai's address or any details about him which might identify him to the police although she said he was very rich, powerful and "above the law".

6. The police advised her to move away from the area while they were trying to establish who her abductor was. She feared for her safety and following the report to the police, put her things together and fled her town. The rape incidents caused her to be shunned by her husband and his family who considered that she had been adulterous and refused to help her or even take her calls. She was then told by a friend that Mr. Abdulai had come looking for her and said that he would find her no matter where she was. She was advised to leave the country. She sought refuge with a church who introduced her to a travel agent who arranged her travel to Ireland where she already had a sister living. She travelled from Lagos to Zurich on 14th September, 2003 and applied for asylum the next day but not at the airport. Her son did not feature in her account at all and she said she claimed asylum because she feared that she would be found by Mr. Abdulai and killed and that her husband's family would force her to walk naked in the market because she had slept with another man.

7. In her grounding affidavit the mother says that her son entered the State on 23rd January, 2004. No information is provided as to how he was treated at the airport or how and when he was reunited with his mother. An ASY-1 form was completed by his mother on his behalf on 12th February, 2004 at the offices of the Refugee Applications Commissioner (ORAC). That form notes that his mother is in Ireland and that his father had paid his air fare to this State. It records that he had travelled to Dublin by air from Lagos via Amsterdam and arrived through Dublin airport. No documents were

submitted on his behalf.

8. On 12th February, 2004, the same day as his mother made an application for refugee status on his behalf, she also signed a form requesting that her son be included as a dependant under her asylum application. This form also states "I understand that the decision which will be made in relation to my asylum claim will also apply to my child/children."

9. The mother attended for her s. 11 interview in June, 2004 when her son was two years and four months old. The child did not attend at the ORAC offices as a letter had been sent to mother stating that no facilities for the care of infants were available. Page No. 3 of the interview notes records that at the start of the interview the mother confirmed that she wished for her son to be included under her application and she was told that any issues arising in relation to the child should be raised during the course of the interview. No reply is recorded on behalf of the mother.

10. The child did not feature at all in the account given by his mother at her s. 11 interview. He was not mentioned by his mother when she was asked who lived with her at her last address in Nigeria - she replied said that she lived with her husband. She described how she and her husband married in a traditional ceremony on 14th January, 2002 at her house but did not mention his birth one month later. Previously in her questionnaire she stated that she had lost contact with her husband and child when she left Lagos State. Although the child was in the State for six months prior to her interview, his mother did not volunteer any information relating to any fears for her son's safety and the only mention made to him was when the authorised ORAC officer asked how she got in touch with her husband to have her son sent over. She replied that when she was in Ireland a man rang her with a message from her husband; she met that man and found that he had her son with him. She said her son was very sick at the time. The ORAC officer asked no further questions about the child and his mother volunteered no further information. In particular, no questions were asked as to where he was during the period of his mother's captivity and escape and while she was in this State or how the child was able to enter the State with a stranger or how and where she made contact with him. The mother was not asked if her son had a passport or who had travelled with him. In effect, the mother made no claim that her son was at any risk of persecution in Nigeria and for herself stated that she never had any problems in Nigeria until Mr. Abdulai abducted her in July, 2003.

11. The mother's claim did not succeed and a negative recommendation issued from ORAC in July, 2004. The s. 13 report made no reference to the child at all, nor did the covering letter by which the recommendation was notified to his mother. Negative credibility findings were made in relation to her claim and it was found that if she were being pursued by Mr. Abdulai the option of internal relocation was available to the mother to escape his attentions. Her recital of events was clearly found not to constitute persecution on even the most minimal basis and a finding was made under s. 13(6) (a) of the Refugee Act 1996, as amended, which meant that there would be no entitlement to an oral hearing on appeal.

12. The mother thereafter consulted with the Refugee Legal Services (RLS) who lodged a Form 2 Notice of Appeal on her behalf. That document made no reference to the child and the section in which the applicant's personal and family details including spouse and children were to be entered was left blank. A negative decision issued from the RAT in which again no reference was made to the child, although the covering letter by which the RAT decision was notified to the mother did mention that her son was included as a dependant in the appeal and it gave his date of birth. The RAT decision was notified to mother and child by letter dated 30th September, 2004.

13. Deportation orders were made in respect of the child and his mother on 21st January, 2005 and both applicants were requested to attend at the offices of the Garda National Immigration Bureau (GNIB) to make arrangements for their deportation. The decision of the RAT was not challenged. The decision to deport was not challenged but instead they failed to make contact with the GNIB and went into hiding and were classed as evaders. Since then, through three different firms of solicitors they have made a series of unsuccessful applications to the Minister.

14. In February, 2005, an application was made by Sean Mulvihill & Co., Solicitors, seeking revocation of the deportation order made in respect of the mother on the basis that she wished to marry an E.U. national and because her sister had residency rights here on the basis of an Irish born child. It was stated in that letter that *"if you do not revoke the deportation order, we will be issuing Judicial Review in this matter. Please forward S.3 and 5 analysis in this matter."* No evidence that any such marriage has occurred or is contemplated is before the Court. The Minister refused to revoke the deportation order and the solicitors were informed of this decision by letter dated 8th April, 2005. It was also noted that the full s. 3 and 5 considerations were sent to the Refugee Legal Service who the mother should contact to obtain the considerations. The refusal to deport was not challenged and the Minister received no confirmation that a marriage had taken place.

15. In October, 2006, Cathal O'Neill & Co., Solicitors came on record. No further steps were taken until September, 2007 - more than eighteen months after the decision not to revoke the deportation order - when applications for subsidiary protection were made on behalf of mother and the child. These applications were founded on the same assertions that had grounded the earlier asylum application. The claim for subsidiary protection contained the entire U.S. Department of State *Country Report on Human Rights Practices* for Nigeria for the year 2006 and the Amnesty International 2007 report on Nigeria, a 25 page report on "Rape - the silent weapon" and a 31 page report again from Amnesty International on "unheard voices" in Nigeria which related to the Niger Delta area.

16. In the letter accompanying this material it was submitted that:-

> *"Ms. [M.] has already been subjected to serious harm and direct threats of serious harm in Nigeria and this should be treated as a serious indication of a real risk to her and her son [I.] of suffering serious harm if returned there."*

17. The child was referred to specifically in the following terms:

> *"we refer to the obligation on the Minister as contained in the Directive to ensure the best interests of the child should be the primary consideration when implementing the directive. The best interests of the minor child could not possibly be served by his refoulement having regard to the prevailing country conditions in that state and having regard to their particular circumstances."*

18. On 14th September, 2008, the Minister exercised his discretion under Regulation 4(2) of the European Communities

(Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006) not to accept and determine the subsidiary protection applications as the applicants had not demonstrated new facts or circumstances which indicated a change of position from that at the time the deportation orders were made.

19. Meanwhile, on 3rd October, 2007, the same solicitors made representations to the Minister pursuant to s. 3 of the Immigration Act 1999, seeking humanitarian leave to remain on behalf of the mother. Specific reference was made to the child in the context of the mother's family and domestic circumstances and integration into the community. His school and sports activities were briefly outlined and his mother was stated to no longer have any ties to Nigeria.

20. In July, 2008, Sinnott & Co. came on record for the mother but no submissions were made for the mother or her son by this fourth firm of legal representatives.

21. Next, the mother herself made representations seeking leave to remain on her own behalf in November, 2008, and she forwarded details of her tax payments to indicate that she was not a charge on the State. In November, 2008, consideration was given to the representations made under s. 3 of the Act of 1999 and the file was once again examined but the deportation orders made in 2005 were affirmed. This decision was notified to the applicants in December, 2008, and mother and son were once again notified to present to the GNIB to make arrangements for their removal from the State.

22. The mother then sought to make a further individual application for asylum on behalf of her son on 8th January, 2009. ORAC refused to accept and determine that application, saying that the applicant had previously made an application for asylum on 12th February, 2004 and a decision had been made on his application and the mother was advised that any person who has previously been refused a declaration may not make a further application without the consent of the Minister to be re-admitted to the asylum system under s. 17(7) of the Refugee Act 1996, as amended. It does not appear that any such application was made and the child applicant now seeks an order of *certiorari* quashing this order of the ORAC. That application is brought within the statutory period.

Extension of Time

23. The deportation order that the applicant seeks to challenge was made on 21st January, 2005. These proceedings were commenced on 22nd January, 2009. The child applicant is therefore outside of the fourteen-day time limit allowed by s. 5 of the Illegal Immigrants (Trafficking) Act 2000 by a period of <u>*one day short of four years.*</u> An application for an extension of time has been made on behalf of the child applicant relying on the dictum of Peart J. in *Ojuade v. The Refugee Applications Commissioner & Anor* (Unreported, High Court, Peart J., 2nd May, 2008) to the effect that an extention of time should not be refused to a minor applicant of tender years where the mother did not act in time to seek to challenge decisions which adversely affected her and the child. In that decision, Peart J. referred to the statement of the Supreme Court in *In re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360, at p.380 that *"The High Court must extend time should constitutional principles of fairness and protection of constitutional rights so require."*

24. Counsel for the respondents strenuously opposed the extension of time. He relied on *J.A. and D.A. (Azeke) v. The Refugee Applications Commissioner & Anor* [2008] I.E.H.C. 440 where Irvine J. examined a number of decisions on extension of time where the delay was of a considerable length and re-interpreted the decision in *Ojuade*. Invine J. stated that the factors that are of significance when considering whether or not to grant an extension of time even where there is a child applicant are:-

> (1) The relevant statutory time limit and the extent of the delay by the applicants in the commencement of the within proceedings;
>
> (2) Whether or not the applicants were in receipt of legal advice over all or any part of the period in respect of which the extension of time is sought and whether such legal advice was available in respect of the decisions which it is hoped to impugn;
>
> (3) The reasons advanced for the delay;
>
> (4) The strength of the potential claims to be brought by each applicant should the extension of time to maintain the proceedings be permitted; and
>
> (5) The extent of which an injustice might be perpetrated by failing to grant the extension of time.

25. Counsel for the respondents has urged the Court to have regard, in particular, to factors (2) and (5) above and he drew the Court's attention to the considerable emphasis placed by Irvine J. on the fact that the mother and child in *Azeke* were legally represented at all relevant times by the RLS.

I. CHALLENGE TO THE ORAC REFUSAL

26. The child applicant complains that there was never any consideration of his asylum application and therefore no basis on which the deportation order could have been made. Mr O'Shea B.L., counsel for the applicant, argued that ORAC and the RAT dealt with the mother's asylum application in complete disregard of the child's situation and that no asylum application on behalf of the child was ever determined. He argued that there is a joint duty on behalf of the decision-makers to ascertain the facts relating to the child's asserted fear of persecution and he submitted that the decision-makers failed to make any attempt to ascertain those facts. He relied on the judgment of the Supreme Court in *A.N. (Nwole) v. The Minister for Justice, Equality and Law Reform* [2007] I.E.S.C. 44, where Finnegan J. set out the provisions of the UNHCR Handbook with respect to minor applicants and held as follows:-

> "Accordingly to comply with the [Geneva] Convention the procedural requirements are modest and may be met by the following:
>
> 1. the applicant for refugee status must furnish the relevant facts.
>
> 2. although the burden of proof, in principle, rests on the applicant the duty to ascertain and evaluate

all relevant facts is shared between the applicant and the State.

3. an appropriate procedure is to require the applicant to complete a questionnaire giving basic information to be followed by one or more personal interviews as may be required."

27. Counsel pointed out that no separate questionnaire was provided to the applicant's mother to be filled in on behalf of her son and while he accepted that the mother did not provide any information on any individual fears on behalf of her son at her s. 11 interview, he pointed out that no questions were asked of her in that regard. He argued that the manner in which the child applicant's claim was dealt with in this case mirrors the manner in which the minor applicants' claims were dealt with in Nwole, in which it was held that no application for asylum had, in fact, been made on behalf of the dependent children.

The Respondents' Submissions
28. Mr O'Reilly B.L., counsel for the respondents, argued that if no express reference was made to any fear of persecution on the child's behalf, the appropriate inference is that this is because there was no such fear. He sought to distinguish the facts of this case from those in *Ojuade* (see above) on the basis that an individual fear of persecution had been advanced on behalf of the child in that case. He relied instead on *J.A. (Azeke)* (see above), where the mother, as in this case, had indicated that she wished for her child to her included under her asylum application and where one of the grounds on which leave was sought was that ORAC and/or the RAT failed to separately consider or make findings referable to the child as opposed to his mother. Irvine J. held as follows:-

> *"[T]he strength of the challenge which the second named applicant wishes to make to the decision of the Commissioner and/or the Tribunal can at best be stated to be arguable. In my view, the potential challenge does not demonstrate substantial grounds upon which these decisions can be challenged principally because the first named applicant in her affidavit does not set out what facts she would have given to the interviewer or to the Tribunal had she been specifically asked to address the issue of D.A.'s fear of persecution should he be returned to Nigeria. She does not disclose any facts which are different from those which she relied upon herself to support her own application for refugee status that would have or could have altered the decision of the Commissioner or indeed the Tribunal in respect of the second named applicant's application for refugee status."*

29. However, Mr O'Reilly conceded that Azeke differs from this case insofar as reference was made in that case to the child in the body of the s. 13 report and in the letter notifying the mother of the RAT decision.

THE COURT'S ASSESSMENT
30. The issue that is before this Court is essentially whether, when a parent of young dependent children seeks asylum and states on the standard form that she wishes her children to be included in the same application, the fact that the parent makes no case of a distinct and individual fear of persecution on the child/children's behalf invalidates any finding that the child/children are failed asylum seekers. The determination of this issue will affect the next issues which are whether it is appropriate for the child to bring a separate, fresh claim and whether it is appropriate to extend the time by almost four years to revoke a deportation order made in January, 2005.

31. I am not at all convinced that there is merit in the child applicant's claim on any of the grounds claimed. Certain obligations fall on refugee applicants in the asylum process, the most important of which is to tell their story as to why they seek refugee status in a full and truthful way. When a parent seeks to include a dependent child in a claim for refugee status, then it is up to that parent to establish his/her claim first and to then establish whether the child has a separate and independent fear of persecution in its own right or whether the child's claim depends entirely on that of the parent. This is well trodden ground admirably elucidated by Peart J. in the High Court hearing in *Nwole* and followed in many judgments since then. His findings on the general principles applying where the parent brings an application on his/her own behalf but does not advance or bring to the attention of ORAC or the RAT any facts or circumstances relevant to that minor that are separate and distinct from the facts of circumstances relevant to the parent's application, were not considered by the Supreme Court in *N (A) & Ors v Min for Justice & Commissioner of An Garda Siochana* [2007] I.E.S.C. 44. The question for determination by the Supreme Court related to the refusal of an asylum application. Finnegan J. decided that if the head of the family is not a refugee there is nothing to prevent any one of his dependants, *if they can invoke reasons on their own account*, from applying for recognition of their status as refugees. He determined that *"there was no application by or on behalf of the minors"* and accordingly there could have been no refusal of the minors' applications and that s. 3(2) (f) of the Immigration Act 1999 did not apply to them: *"the basis upon which the Minister purported to make deportation orders in relation to the minors did not exist."* (emphasis added)

32. Nothing in the decision of the Supreme Court in *N.A. and others* changed the principle that it is entirely appropriate that members of the same family units should make joint asylum claims as clearly, if the parent establishes a well-founded fear of persecution for a Convention reason, then the spouse and dependent children are also at risk and in need of protection. Protection to the family is ensured in section 18 of the Refugee Act 1996, as amended, and Council Directive 2003/86/EC of 22 September, 2003 on the right to family reunification. It will be highly unusual for a parent to fail to establish a fear of persecution and for a dependent minor child to succeed. It will be even more unusual for a toddler to succeed where his mother fails. However the unusual does happen as where for instance the young child has a father who belongs to a persecuted group but the mother does not. It follows that where facts exist which could establish a totally independent claim for a child, then it is appropriate for the parent to fill out a separate form seeking asylum for the child or for the parent to elucidate in his/her own claim the separate facts which ground the minor child's individual claim. It is a matter of choice how the assessment is conducted, whether with the parent's claim or separately from the parent's claim.

33. There has been a noticeable tendency in the asylum judicial review lists to treat the decision of the Supreme Court in *Nwole* (reported as *N.A and others*) as an authority for the bringing of individual claims for each parent and then, when those claims have failed, to bring separate, serial claims for each child and then on behalf of those born in the period after the parents' claims have failed. This seems to happen most frequently when a failed asylum seeker is about to be deported and it is complained that the deportation is unlawful because a young child born in the State has not yet brought an asylum claim or has not received an individualised consideration. On each occasion the decision in *Nwole* is quoted as authority for the delaying of the deportation order pending the determination of the baby's claim even though no suggestion of any fear of persecution to that child has been raised previously in the representations seeking leave to remain. It cannot have been the intention of the Supreme Court when quashing the deportation orders in the *Nwole*

children's cases to create rights to all children to claim refugee status on an individual other than a family basis. It appears to be overlooked that in the concluding words of his decision Fennelly J. stated *"I would emphasise that this decision involves no other or wider proposition regarding the immigration status of the appellants."*

34. Later claims made on behalf of children when the adult claim has failed are of necessity made through the mouths of their parents who for many reasons do not wish to leave but are not permitted to remain in the State. It is not unknown that inventive grounds, doomed to failure, are raised in an effort to thwart the enforcement of their own valid deportation orders. If this is what was intended by the decision in Nwole then it follows that those parents could evade deportation indefinitely by continuing to have children. Of necessity this means that the stage comes when children who have never known any life but one in Ireland face returning to a country which is unknown to them and where standards of living may be wholly different from those they enjoyed here. This cannot contribute to an orderly immigration policy and gives advantages to failed asylum seekers who can produce children over those who do not or cannot have more children.

35. As I said previously, the *Nwole* case was confined to its own facts where deportation orders had been made in respect of child family members who were never at any stage included in their mother's claim. The Supreme Court's decision reveals that at the time when their mother claimed asylum, the practice was to deem a parent's application to be brought on behalf of all accompanying dependent children but no specific enquiry to this end was made and no forms were signed consenting to the inclusion of the children in the parent's claim. The practice now seems to be to enquire of the parent whether the child/children are to be included and for forms to be provided where this question is asked. A parent has the choice to bring a separate claim for the child but there seems to be no proviso for informing the parent that a separate application is appropriate *only where distinct grounds to be made out for the child/children.*

36. It seems to me that it may be more appropriate that families are dealt with by the same ORAC officer who becomes familiar with the family circumstances and that the parent is asked to recount the distinct circumstances which distinguish the minor children's claims from the parents.

37. In the last number of years there has been a trend for applicants for injunctions to prevent deportations to repeat as a mantra that "the concept of family unity works in favour of dependent children but not against them" as if the rejection of the parent's claim gives rise to a separate right of the children to make a new and previously unmentioned asylum application based on "new" facts. I very much doubt that this is what was intended or anticipated in the UNHCR Handbook or what was intended by the Supreme Court decision in *Nwole*. I do not accept that the *Nwole* decision is authority for the proposition that a joint parent and child asylum application case loses its validity regarding the child simply because the parent made no claim to persecution on behalf of the child, particularly in circumstances where it is explained to the parent that all matters relating to the child should be raised during the s. 11 interview and every opportunity is afforded to put forward a particular fear of persecution on behalf of the child.

38. The particular facts of this case lead me to reject the claim that no application for asylum was made on behalf of the child. The mother provided the child's details in his ASY-1 form shortly after he arrived in the State and signed a form seeking to include him in her asylum claim. When the mother attended at interview she was asked if this was still the situation and the early part of the interview includes at Question 1: *"I note that you have included your child under your application, do you still wish for them to be considered in this manner?* The answer "yes" is recorded. The form then states *"if yes, any issues you wish to raise in relation to your children should be raised here today."* The acknowledgement that the first three questions have been read to and agreed by the applicant is signed by the mother at the top of the next page. There is little doubt that he was included under her application. The applicant argues that the fact that no reference is made to him in either the s. 13 report or the RAT decision demonstrates that the exercise was a hollow one so devoid of any consideration that it should be deemed never to have occurred.

39. Counsel for the applicant places much reliance on the dictum of Finnegan J. in *Nwole* which sets out the three "modest" procedural requirements that must be met in order to comply with the Geneva Convention, as set out in the UNHCR Handbook. The first of those three requirements is that *"the applicant for refugee status must furnish the relevant facts*". This duty on the part of the mother appears to be ignored in the applicant's submissions. It is clear from the mother's questionnaire and interview that she had no fears for herself in Nigeria until, if the story were true, she was held by her elderly suitor. No fears were ever expressed regarding her son's safety in Nigeria and the ASY-1 form, questionnaire and interview are remarkable for their absence of any mention of the child at all. A reasonable inference to draw from this is that the child never faced any danger which could be described as a Convention fear of persecution, that he only came to Ireland to be with his mother and that there were no relevant facts independent of his mother's narrative. As has been said so often including in the Geneva Convention relating to the status of Refugees 1951, in the forms furnished to applicants before the interview, in countless decisions of this Court, and in para. 205 of the UNHCR Handbook:-.

> "The applicant should:
>
> (i) Tell the truth and assist the examiner to the full in establishing the facts of his case.
>
> (ii) Make an effort to support his statements by any available evidence and give a satisfactory explanation for any lack of evidence. If necessary he must make an effort to procure additional evidence.
>
> (iii) Supply all pertinent information concerning himself and his past experience in as much detail as is necessary to enable the examiner to establish the relevant facts. He should be asked to give a coherent explanation of all the reasons invoked in support of his application for refugee status and he should answer any questions put to him."

40. It is not up to the ORAC officer conducting the interview to probe the applicant to make any additional, better or possible case. The UNHCR Handbook states as follows with regard to the burden of proof at para. 196:-

> "It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and

evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. […]"

41. The applicant is very clearly advised to fully make out his/her case as to why protection is sought on the questionnaire as the questionnaire is the basis for the questions which will be posed at the later interview. While it is fully understood that a person genuinely fleeing persecution can arrive at the borders of a state in a confused, fearful and distraught condition requiring assistance for his most basic human needs and requiring assistance to procure documents to establish his identity and story, this situation is far removed from the reality in this case. The mother was in the State for a period of at least eight months when she attended for her interview. It cannot be said that she was suffering from the fears associated with foreign travel and flight which could have affected her ability to narrate her history. Her child had arrived in January, 2005, five or six months before the s. 11 interview. Their reunion had occurred and must have been an occasion of joy for them both. If any fears existed relating to her son's safety, she should have been able to articulate them. The written record of the interview indicates that the form was read out to the mother and she was informed that the recommendation made by ORAC following her interview would also apply to her son. This was not a case where no mention of the existence of her young son was made but rather where she was asked if she wished him to be included in her asylum application and where she stated that she did.

42. Being included in a joint application for a declaration of refugee status is not something which prejudices an applicant or child but rather facilitates a family application. If the parent expresses no fears on behalf of the minor dependants it is usually because there are no separate fears. If no fears are expressed it follows that they cannot be considered and will form no part of the asylum process decisions but the decisions cannot be impugned because there is no reference to the child's situation. The interviewer in this case actually raised the issue of the child at the interview but this did not prompt or encourage the mother to enlarge on her claim. The very obvious inference is that she had no fear. I am reinforced in this view by the contents of the affidavit sworn on 20th January, 2009 when for the first time she avers as follows with respect to her fears with respect to her son:

"I say that I have genuine fears for the safety of the Applicant in the event of his being sent back to Nigeria, including that he will be subjected to rituals and tribal markings on his face. I say that my husband, who in the past was against such matters is now, having been pressurised by others, anxious that they proceed." (emphasis added)

43. This suggests that previously these fears did not exist which may well be why they were never raised before ORAC or in the appeal submissions to the RAT. I am satisfied that there was a legitimate joint application for refugee status which included the child and that any failure to refer to the child in the s. 13 report or the decision of the RAT did not derive from any omission on their parts. I therefore reject the claim that the applicant was entitled to bring an individual application for asylum to the Commissioner for consideration in January, 2009 or that the rejection of the attempted claim was unlawful. If the mother can establish a genuinely new fear and can establish that this new fear provides a realistic prospect for succeeding in the asylum process then she can always avail of the procedure under s. 17(7) of the Refugee Act 1996.

II. CHALLENGE TO THE DEPORTATION ORDER – THE EXTENSION OF TIME

44. I do not believe that Peart J. in his very carefully considered judgment in Ojuade ever intended to make the proposition that child applicants are not bound by the same time limits as other refugee applicants or that an extension of time can be taken for granted in such cases. The fact of being a minor is a factor to be considered in determining whether there is good and sufficient reason to extend the strict time limits set by statute for challenging a deportation order or any other decision to which s. 5 of the Illegal Immigrants (Trafficking) Act 2000 applies.

45. I suspect that Peart J. was acutely conscious that his decision in favour of extending the time limit in Ojuade might be called upon as authority for a general proposition in favour of young minors as he specifically stated that:-

"That is not to be taken as expressing the view that in every case of delay by a parent in pursuing judicial review proceedings on behalf of his/her minor child an extension of time must always be granted in respect of that minor's application. There must always be room for deciding that in a particular case, the grounds being put forward by way of challenge to the decision are so unstatable that it would be unjust to permit the application to be made out of time. However that is not the situation in the present case"

46. The wide discretion to extend the time remains in the Court which, having considered the circumstances and explanations given, decides whether in all the circumstances there is good and sufficient reason to extend the time. Clearly, the longer the time which has elapsed since the expiry of the time limits, the stronger the circumstances and explanations must be. The Court is greatly assisted by the decision of Irvine J. in *J.A. (Azeke),* where the principles specifically applicable to extending time in the case of a minor applicant were discussed very carefully and in great detail. I note that the decision of Irvine J. was followed by Charleton J. in *Kalejaye-Matti & Anor v. The Minister for Justice, Equality and Law Reform & Ors* [2009] I.E.H.C. 125. I share the view of Charleton J. that as a matter of principle, it is important to seek to follow the decisions of other judges of the High Court unless there is a strong reason for not doing so. I propose therefore to address in turn each of the five factors which Irvine J. found to be of significance in *Azeke*.

(1) Relevant time limit and extent of delay

47. The time limit set out in s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000 is fourteen days. The extent of the extension of time sought in this case is almost four years which is by far the longest extension that I have been asked to consider in any asylum or immigration case. It is eight times the length of the six month extension granted by Peart J. in *Ojuade* and very significantly larger than the two and a half year extension refused by Irvine J. in *Azeke*, which she described as *"an extraordinarily lengthy extension of time".*

48. The strict application of the statutory fourteen day period is undoubtedly a short length of time during which proceedings must be commenced. While the vast majority of applicants do comply with the 14 day period its strictness is tempered by the generous discretion to extend which take account of particular recognised difficulties which frequently arise in the area of asylum and immigration matters. Frequently the applicant may be entirely faultless and where a short delay occurs the explanations offered lead to an extension to take account of those explanations.

(2) Was the applicant legally advise during the period of delay
49. In this case, the applicant and his mother were represented by the Refugee Legal Service at the RAT stage and they were thereafter represented by three further solicitors firms experienced in the law of asylum and immigration who made numerous (unsuccessful) applications to the Minister on his behalf and on behalf of his mother. None of those firms apart from the current solicitors sought to challenge the deportation order and no challenge was ever brought to the ORAC and RAT decisions. Obviously, the current legal advisers have taken a different view of the case but it is well established that an extension of time should not be granted simply because new legal advisers have come into the case and taken the view that an additional claim on new and distinct grounds should be made (see *Muresan v. The Minister for Justice, Equality and Law Reform* [2004] 2 I.L.R.M. 364.)

50. The fact is that the mother and her son were never without the benefit of legal advice. The minor applicant's rights to apply for refugee status were always protected by joint legal representation and he was never solely reliant on an uninformed parent or guardian. I find guidance in the decision of Irvine J. who states in *Azeke* that:-

> "When the Court is seeking to assess whether or not an applicant for an extension of time has established "good and sufficient reason", I do not believe that merely because an applicant is an infant that such fact of itself, without other good and sufficient reason, can justify an extension of time over and above that which would be afforded to an adult in equivalent circumstances where such an infant has had legal representation available to him over the relevant period."

51. As in that decision I am satisfied that the Court must be careful to guard against fostering a *laissez-faire* attitude to the time limits where minor applicants are concerned. Such an attitude could create an incentive to bring eleventh hour judicial review applications in previously inactive cases involving minors only when the parent is faced with the reality of a deportation. Such a situation would be a flagrant abuse of the asylum process and creates situations highly stressful for all concerned. In the circumstances, it cannot be assumed that simply because failed asylum seekers are minors that a different set of rules apply.

(3) The reasons for the delay
52. The grounding affidavit provided by the mother in this case offers little by way of explanation for the four year delay in commencing proceedings apart from the averment that she did not become aware that there was an issue with the validity of the deportation order until January, 2009 when she attended at the offices of her current solicitors and then sought to make "an asylum application" on behalf of the applicant. This seems to be an utterly inadequate reason for a highly exceptional delay and does not constitute in itself a good and sufficient reason to extend time.

(4) The Nature and Strength of the Grounds for Relief
53. I have considered whether, in spite of the quite extraordinary delay in the circumstances which pertain to this case, the strength of the applicant's case is nevertheless such that it would be unjust not to allow an extension of time as was held by the Supreme Court in *G.K. v The Minister for Justice, Equality and Law Reform* [2002] 1 I.L.R.M. 81.

54. As I have already stated I do not accept that the applicant child was not included under his mother's asylum application. No averments were made by the mother in the grounding affidavit to the effect that the s. 11 interview did not proceed as recorded in page no. 3 of the interview notes. An application for subsidiary protection was made on behalf of her child. As such an application can only be made after an asylum application has been rejected, it is logical to infer that at that time the mother and her advisers acted on the basis that the child's claim had failed. It is also notable that no fears for her child's safety in Nigeria were expressed in the subsidiary protection claim apart from unascertained or identified fears of life in Nigeria contained in a U.S. Department of State report. In particular, no reference was made to any fears that the child would be subject to rituals or facial marking.

55. I cannot close my eyes to the fact that the mother was obliged to put forward the fears that she claims on behalf of her child. As noted above, the Supreme Court held in Nwole that "the applicant for refugee status must furnish the relevant facts". It is quite simply not acceptable for an applicant to drip-feed information as a stalling technique. The mother in this case indicated that she wished for her child to be included under her application. She coasted through the asylum process without putting forward any individual fears on behalf of her child and then, at the eleventh hour, sought to make a further asylum application on his behalf. In her grounding affidavit she claims to fears that if returned to Nigeria, her son will be subject to rituals and tribal markings on his face. It is hard to see how, if that fear was truly subjectively held and objectively well-founded, it would not have been harboured by the mother from the date of the applicant's birth. Surely it would have been heightened in January, 2005, when deportation orders were first made in respect of them. The mother says her husband – who, in the past, was against such matters – has been pressurised by others and is now anxious that the rituals proceed. I cannot accept this averment in circumstances where the mother stated during her asylum application that she had lost contact with the applicant's father and she said in her subsidiary protection application that she was single. I am not satisfied that the merits of the application are of sufficient strength to merit the grant of an extension of time. I would go so far as to say that even if I were to grant an extension of time, I would refuse leave on the basis that substantial grounds have not be established.

(5) Any potential injustice perpetrated by failing to grant the extension of time.
56. In her decision in *Azeke* she said that an applicant for an extension of time *"should be in a position to demonstrate that justice would not be done if the extension of time was not granted having regard to the potential strength of his or her case."* I am not satisfied that the applicant has established any potential injustice would be done if the extension of time was not granted.

Conclusion on the deportation order
57. In the light of the foregoing, I am not satisfied that good and sufficient reason has been established for the extension of time and accordingly, I refuse to extend the time. The application for leave therefore fails.