THE HIGH COURT

JUDICIAL REVIEW

2009 1174 JR

BETWEEN

WILLIAMS UGBO AND ANN BUCKLEY

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT OF MR JUSTICE HANNA, delivered on the 5th day of March, 2010

1. The first named applicant is a national of Nigeria. He applied unsuccessfully for asylum in September, 2008 and he had been notified that the Minister for Justice, Equality and Law Reform proposed to deport him when he married the second named applicant, who is a citizen of Ireland, in June, 2009. The applicants seek leave to apply for judicial review of the decision of the Minister, dated the 28th October, 2009, to make a deportation order against the first named applicant. In addition they seek liberty to amend their original statement of grounds dated the 12th November, 2009 so as to include grounds arising from Meadows v. The Minister for Justice, Equality and Law Reform & Others (Unreported, Supreme Court, 21st January, 2010).

Background

2. The papers relevant to the asylum application of the first named applicant are not exhibited in the proceedings but it appears that he claimed to have been assaulted in Nigeria in January, 2007 because he reported the vandalism of an oil-pipeline by his work friends to the police. He says he was in intensive care in a coma for eight months and after his release his attackers continued to threaten him and the police asked for money to protect him. He moved to another State where he lived for a few months until one of his attackers spotted him and told the local Muslim people that he was an informant to the police. Those people began to threaten him so he came to Ireland. The Refugee Applications Commissioner made a negative recommendation in his case which was affirmed on appeal. In 2008 the Minister informed him that he had decided not to grant a declaration of refugee status and proposed to deport him.

3. On the 30th March, 2009 the applicant applied for subsidiary protection and humanitarian leave to remain in the State. In support of the subsidiary protection application he briefly recounted the facts and circumstances which had grounded his asylum application. In a handwritten form appended to the application which appears to have been completed by the second named applicant on his behalf, it was submitted that he feared torture or inhuman and degrading treatment or punishment in Nigeria. The Minister was requested to consider two medical reports from Nigeria which were in the Minister's possession.

4. In support of the parallel application for leave to remain the applicant notified the Minister that he was engaged to be married to the second named applicant who is a citizen of Ireland and an employee of the Revenue Commissioners. It was stated that he is prepared to work in any capacity if permitted and that he is of good conduct. It was submitted that he is keen to foster bonds with Ireland and Irish society and that the grant of leave to remain would not in any way affect the integrity of the asylum and immigration procedures of the State. Reference was made to Article 12 of the ICCPR on the right to health. In the handwritten form appended to the application it was submitted that the whereabouts of his son and daughter in Nigeria were not known to him, that he was never married in Nigeria, that he loved his fiancée and they wanted to make a life together and would be living together at her address after their marriage in June, 2009. It was noted that it was his intention to secure employment as soon as possible; he had been a car dealer in Nigeria and was willing to take up any job and did not want to be on social welfare. Appended was a handwritten letter by the second named applicant providing her PPS number and reiterating the information in relation to their relationship and proposed date of marriage.

5. In relation to refoulement it was submitted that to return the first named applicant to Nigeria would breach Article 3 of the European Convention on Human Rights (ECHR) and that "the Applicant's basic human rights require safeguarding". It was stated that the applicant was compelled to seek international protection as a last resort, that internal relocation was not available to him and that he could not seek police protection because they had already been ineffective in protecting him. It was submitted that:-

> *"[T]here is Country of Origin information available concerning the situation in relation to obtaining state protection in Nigeria and when considered with the applicant's personal circumstances outlined above internal relocation was not an option to him."*

6. No country of origin information (COI) appears to have been furnished in support of the application, however. It was submitted that he had a legitimate fear of being persecuted or suffering serious harm and could not reasonably have been expected to move or stay in another part of Nigeria. The applicant's solicitors stated that the Michigan principles were instructive but they did not make any

more detailed submission in that regard. Finally it was submitted that if returned to Nigeria his life would be seriously in danger and he would be killed though it was not suggested by whom, for what reason or in what location.

7. The applicants married in Galway in June, 2009 and in July, 2009 their solicitors forwarded a copy of their marriage certificate and a copy of the passport of the second named applicant to the Minister. It was noted that the applicants were residing together at an address in Dublin. It appears the certificate was not received by the Minister or was not on the first named applicant's file when it was examined in November, 2009 but the Court is satisfied that nothing turns on this because when the file was examined the examining officer assumed that the marriage had taken place.

The Impugned Decision
8. By letter dated the 3rd November, 2009 the Minister informed the first named applicant that a deportation order had been made against him, stating:-

> *"In reaching this decision the Minister has satisfied himself that the provisions of section 5 (prohibition of refoulement) of the Refugee Act, 1996 (as amended) are compiled with in your case. The reasons for the Minister's decision are that you are a person whose application for a declaration as a refugee has been refused. Having had regard to the factors set out in section 3(6) of the Immigration Act, 1999 (as amended), including the representations received on your behalf, the Minister is satisfied that the interest of the public policy and the common good in maintaining the integrity of the asylum and immigration systems outweigh such features of your case as might tend to support your being granted leave to remain in this State."*

9. It is common case that this is the same standard letter that was sent to the applicant in the Meadows case.

10. Appended to the letter was the memorandum of examination of his file by an officer of the Repatriation Unit dated the 7th October, 2009. Consideration was first given to s. 3 of the Immigration Act 1999. It was noted that he was born in 1969 and had been in Ireland for approximately one year, that he last saw his children, born in 1994 and 1998 respectively, in Nigeria and that he had notified the Minister of his intention to marry an Irish national although no further details of the marriage had been forwarded to the Minister's department. It was noted that his connection with the State lies in his asylum application and that he had attended primary and secondary school in Nigeria and worked there as a clothes trader, in the fish business and as a car salesman. It was noted that his prospects of obtaining employment would be poor in the current economic climate and that he had not come to the attention of the Gardaí since coming to Ireland though his previous character and conduct before entering the State could not be verified. In relation to the humanitarian considerations on file it was noted that he submits that he suffered a head injury as a result of an assault in Nigeria and had notified his intention to marry an Irish national but the conclusion was reached that there was nothing in the humanitarian considerations on file to suggest that he should not be returned to Nigeria. The representations made on his behalf were summarised. It was noted that it is in the interest of the common good to uphold the asylum and immigration procedures of the State and that considerations of national security and public policy do not have a bearing on the case.

11. Consideration was next given to s. 5 of the Refugee Act 1996, i.e. the prohibition of refoulement. The account given by the applicant during his asylum application was summarised and extracts from a U.K. Home Office report on Nigeria (June, 2009) were reproduced in relation to geography; the Nigerian Constitution; security forces and police; avenues of complaint; human rights institutions, organisations and activists; corruption and government efforts to tackle same; medical issues; freedom of movement; exit-entry procedures; treatment of failed asylum seekers; citizenship and nationality. Having reproduced those extracts the officer concluded that "Having considered the facts of this case, I am of the opinion that repatriating [the first named applicant] to Nigeria is not contrary to Section 5 of the Refugee Act 1996, as amended, in this instance."

12. Consideration was next given to Article 3 of the ECHR in the light of his complaint that he suffered a broken skull. By reference to the same COI report it was concluded that any appropriate medical treatment that he might require was available to him in Nigeria and that there were no exceptional circumstances such that there was a sufficiently real risk that deporting him to Nigeria would be in breach of Article 3. The applicants do not seek to challenge the legality of that conclusion.

13. Consideration was then given to Article 8 of the ECHR. It was accepted that the deportation of the first named applicant would interfere with his right to respect for private life but that to deport him would not have consequences of such gravity as to engage rights under Article 8(1). It was also accepted that in the light of his assumed marriage to an Irish citizen, the deportation would interfere with the right to respect for their family life but it was submitted that the interference would:-

> *(1) Be in accordance with law (i.e. s. 3 of the Immigration Act 1999);*
>
> *(2) Pursue a pressing need and legitimate aim (i.e. to maintain control of national borders and operate a regulated system for the control, processing and monitoring of foreign nationals in the State); and*
>
> *(3) Be necessary in a democratic society, in pursuit of a pressing social need and proportionate to the legitimate aim being pursued within the meaning of Article 8(2).*

14. Reference was made to the decision of the European Court of Human Rights in Abdulaziz & Ors v. The United Kingdom [1985] 7 E.H.R.R. 471 where it was held that there is no general obligation on a State to respect the choice by a married couple of the country of matrimonial residence; that States enjoy a wide margin of appreciation in this area; that it is relevant whether there are any special reasons why the couple should not be expected to reside in the country to which the spouse is being deported; and that it is relevant whether they were aware, when they married, of the problems of entry and limited leave available. Reference was also made to similar principles set out in R (Mahmood) v. The Secretary of State for the Home Department [2001] 1 W.L.R. 840. It was noted that the first named applicant knew of his precarious immigration position in Ireland when he entered into his relationship with the second named applicant who now had a choice of whether to remain in Ireland or travel to Nigeria with her husband. It was stated that the fact that her husband is a national of Nigeria who lived there until his arrival in Ireland would ease the transition for her of travelling to reside in Nigeria. It was concluded therefore that the proposed deportation would not breach Article 8.

The Issues in the Case
15. The applicants seek leave to challenge the Minister's decision to make a deportation order on two key issues being that (1) he failed to have regard to the rights of the applicants and, in particular, the second named applicant under Article 41 of the Constitution; and (2) he failed to provide any reason or rationale for his conclusion that the provisions of s. 5 of the Refugee Act 1996 were complied with.

16. The Court has carefully considered the contents of the original statement of grounds dated the 12th November, 2009 and is

satisfied that although Article 41 of the Constitution was not specifically pleaded, clear and repeated reference was made to the consideration given to the constitutional rights of the applicants as a married couple and, in particular, the constitutional rights of the second named applicant as an Irish citizen. The Court is therefore satisfied that no extension of time is required in order for the applicants to seek leave on the first issue relating to Article 41 and the arguments advanced on that subject will be assessed in due course.

17. Careful examination of the original statement of grounds reveals no mention, explicit or implicit, of the prohibition of refoulement, s. 5 of the Refugee Act 1996 or the absence of reasons for concluding that the repatriation of the applicant would not breach s. 5. Neither was any emphasis placed on those issues in the grounding affidavit. The Court is satisfied that in seeking to amend their statement of grounds to include these issues, the applicants are seeking to add new grounds of relief which amount to a new cause of action. The grounds set out at 5.1 (f), 5.2 and 5.8 of the amended statement of grounds are not merely a recasting or a more acute restatement of the original grounds; they advance an entirely new and additional case which was not flagged in November, 2009.

18. In the circumstances and applying the principles set down in Muresan v. The Minister for Justice, Equality and Law Reform [2004] 2 I.L.R.M. 364, an extension of the 14 day time-limit allowed by s. 5 of the Illegal Immigrants (Trafficking) Act 2000 is required and the applicants are required to show good and sufficient reason for the extension. It is well established that a number of factors are relevant to the consideration of an application for an extension of time including the length of the time limit; the length of the delay; the legislative policy evidenced by the statute setting out the time limit, third party rights; the personal circumstances of the applicants; the blameworthiness of the applicants and their lawyers and the prima facie strength of the applicants' case. In F.A. (Azubugu) v. The Refugee Appeals Tribunal [2007] I.E.H.C. 290 Peart J. held that "each case will have to be considered on its own facts and circumstances. The Court must engage upon a balancing exercise in which a number of factors are weighed in the balance so that a just decision can be arrived at."

19. The length of time allowed by s. 5 of the Act of 2000 to initiate proceedings in cases such as the present is 14 days. In order to amend their statement of grounds in the manner required, the applicants require a 10 week extension of time. The Court notes that the delay in pleading or seeking to plead the new grounds in relation to refoulement ran to more than five times the length of time allowed to the applicants under the statute. Thus it is clear that the delay was substantial in the light of the short time frame envisaged by the Oireachtas. This is a significant consideration bearing in mind that the legislative policy underpinning s. 5 of the Act of 2000 was described by Peart J. in Azubugu as:-

> *"an intention on the part of the Oireachtas that applicants must act with great dispatch when considering whether or not to challenge a decision by way of judicial review, this being part of the legitimate objective for a democratic state to effectively control and regulate entry to the State by nationals of other countries." (emphasis added)*

20. The Court notes that the applicants were legally represented by the same solicitors and junior counsel at all relevant times. In their original statement of grounds they pleaded grounds of relief focussed almost exclusively on the family rights of the applicants under the Constitution and the ECHR. It appears that a decision was taken not to challenge the conclusions reached in relation to refoulement. The Court is satisfied that the proposed grounds in relation to refoulement could, with reasonable diligence, have been pleaded in the original statement of grounds. The affidavit of the applicants' solicitor suggests that the proposed amendment is designed to shorten and compress the grounds to focus the case and to save in time and costs. This goes no distance towards explaining the omission to plead grounds in relation to refoulement in November, 2009. The only explanation tentatively advanced on behalf of the applicants at the hearing was that the situation changed after the delivery of the Supreme Court's judgment in Meadows on the 21st January, 2010. The Court is not satisfied that this is a sufficient explanation for such a substantial period of delay. The obligation to give reasons or a rationale for a decision and to consider s. 5 of the Refugee Act 1996 has long been recognised by the judicial review courts and the sufficiency of the reasons given for a finding that refoulement is not in issue and / or the sufficiency of the consideration give to refoulement was frequently pleaded in asylum cases before the delivery of Meadows. The applicants' solicitors and junior counsel, and indeed their senior counsel who came into the case at a late stage, are experienced in asylum and immigration law. In the circumstances the Court would describe the motion to amend as an opportunistic application which, in the view of this Court, ought not to be granted in the absence of very compelling reasons which do not appear to be present in this case. There is no evidence at all that the applicants formed the intention to challenge the conclusions on refoulement within the 14-day period nor is there any averment to that effect on affidavit.

21. Third party rights are of no relevance in this case nor does the Court see any significance in discussing the blameworthiness of the applicants and their lawyers. The applicants have not brought any other particular personal or circumstances to the attention of the Court and there are none therefore to be considered in the context of the extension of time. The final consideration of relevance therefore is the prima facie strength of the applicants' case. This is, as was noted by Peart J. in Azubugu, just one of the factors to be considered. The applicants' case is that the Minister's decision in this case (i.e. the letter dated the 3rd November, 2009) was in standard form and in precisely the same terms as the decision in the Meadows case and that, as in Meadows, no reasons for the decision that the provisions of s. 5 of the Refugee Act 1996 were fulfilled are apparent from the decision or the memo containing the examination of the first named applicant's file. It was argued that because leave was granted on the absence of reasons for the findings on refoulement in Meadows, substantial grounds also exist on that ground in this case.

22. The Court does not accept that this is necessarily the case. The judgments of the majority of the Supreme Court made it clear that the Minister's obligation to specifically address and form an opinion on the question of refoulement arises only where there is a "claim or factual material" put forward to suggest that a deportation order "would expose the deportee to any of the risks referred to in s. 5". Murray C.J. was clear that if no such claim or factual material is put forward, the Minister's decision with regard to s. 5 considerations is "a mere formality and the rationale of the decision will be self evident". It was on that ground that Murray C.J. distinguished Meadows from Baby O v. Minister for Justice Equality and Law Reform [2002] 2 I.R 169 where Keane C.J. held that fair procedures did not require the Minister to give reasons for holding that s. 5 had been satisfied. Murray C.J. noted that in Baby O it did not appear that the applicant had relied at the leave to remain stage on any material that is "expressly" and "specifically relevant to refoulement, as distinct from humanitarian grounds". Murray C.J. was satisfied that "If there was no such material then the Minister's decision on s. 5 would have been one of form only and not required any rationale." He stated that the Baby O decision does not mean that the Minister is not obligated to ensure that his decision is in terms which would enable its rationale to be discerned expressly or by inference "in a case where an applicant has relied in his or her submissions on material expressly relevant to the prohibition on refoulement".

23. In the view of this Court, the submissions made on behalf of the applicant in this case in relation to refoulement were more akin to the submissions made in Baby O than the submissions made in Meadows. A careful reading of the decisions of the High Court and the Supreme Court in Meadows reveals that there were several atypical features not least that the applicant was an unaccompanied minor who was initially dealt with under the Hope Hanlon procedures. According to Gilligan J. in the High Court her solicitors made

"very extensive" submissions to the Minister on the risk of female genital mutilation in Nigeria, an eventuality which would undoubtedly violate s. 5 of the Refugee Act 1996. Particularly atypical was their request that the Minister give the applicant the opportunity of adducing expert evidence on the relevant cultural and social context including relevant gender and child issues as they pertain in Nigeria and as they would affect the applicant. Of further note is that the Minister did not respond to that application other than by notifying her of his decision to deport.

24. The submissions made in this case in relation to refoulement were of an entirely different nature. In no circumstances could those submissions, synopsised at paragraph 5 above, be described as "extensive". On the contrary, the Court would categorise those refoulement submissions in this case as being perfunctory, with attention being focussed instead on the humanitarian issues arising from the applicants' proposed marriage. No submissions were made as to why, when the applicant's asylum application had failed, his repatriation to Nigeria would violate s. 5 of the Refugee Act 1996. The facts grounding his asylum application were synopsised briefly with no expansion or comment. No reference was made to his failed asylum application. No documentation was submitted other than the letters relating to his proposed marriage and the two medical reports which had previously been considered by the asylum authorities. No country of origin information was appended on the situation prevailing in the applicant's home area and no biographical details in relation to his life in Nigeria were particularised. The persons he claimed to fear, their current whereabouts and activities since 2008 or the outcome of the police investigation into the vandalism of the pipeline were not referred to nor was it explained what or who he would fear apart from being killed.

25. In the circumstances the Court is satisfied on a preliminary consideration that this case is distinguishable from Meadows by reason of the absence of any real attempt to make out or substantiate a claim that the repatriation of the first named applicant would expose him to any of the risks referred to in s. 5. In the circumstances the Court is satisfied that, following the principles established in Meadows and Baby O, the Minister's obligation to consider s. 5 in this case was little more than a formality and the reasons for the conclusion that s. 5 was fulfilled are self-evident on the face of the decision when read together with the examination of file.

26. Having carefully weighed all the factors, the Court can see no justification for extending the time to allow the applicants amend their statement of grounds so as to include new grounds of relief which were in no way signposted or encompassed in the original statement of grounds. The application for liberty to amend is refused. The remaining issue is whether leave ought to be granted on the Article 41 arguments which the Court is satisfied were implicit in the original statement of grounds.

Failure to refer to Article 41

27. The applicants contend that decision to make a deportation order ought to be quashed by reason of the Minister's failure to make any reference to their rights under Article 41 of the Constitution and in particular Article 41.3.1° which provides that "The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack."

28. The Court has the deepest sympathy for the difficult position in which this couple finds themselves but must not lose sight of the fact that the essential role of the Court is to assess the legality of the impugned decision and ascertain whether or not substantial grounds are advanced in this respect. The nature of the Minister's obligations in this regard has been extensively considered and the law is clear from the decisions of Ryan J. in Fitzpatrick (F.P.) v. The Minister for Justice, Equality and Law Reform [2005] I.E.H.C. 9, Dunne J. in Sanni (B.I.S.) v. The Minister for Justice, Equality and Law Reform [2007] I.E.H.C. 398 (referring to Pok Sun Shum v. Minister for Justice [1986] I.R.L.M. 593), Birmingham J. in G.O. (Olaitan) v. The Minister for Justice, Equality and Law Reform (Unreported, High Court, 19th June, 2008) and the Supreme Court (Fennelly J.) in T.C. v. The Minister for Justice, Equality and Law Reform [2005] 4 I.R. 109. These decisions clarify that the Minister is under no obligation to expressly refer to Article 41 of the Constitution. It is perfectly clear from his decision that he was aware of the family and domestic circumstances of the applicants. It may be true, as was the case in Pok Sun Shum, that he did not take down the Constitution and consider the constitutional provisions relating to the family before reaching a decision or making a recommendation but, as Costello J. held in Pok Sun Shum, the Court does not think that that vitiates the decision that was reached. The Minister was clearly aware of the marital status of the applicants. He noted that they had arranged to marry in June, 2009 and that they intended to live together after the marriage and he proceeded on the assumption that the marriage had taken place. He noted that the first named applicant's solicitors submitted that he had formed close bonds with the Irish State during his year here. Extensive consideration was given to the couple's right to respect for their family life under Article 8 of the ECHR and it was found that, although the deportation would interfere with their family life, the interference would not breach Article 8. It was noted that the wife was faced with the decision as to whether to remain in Ireland or move to Nigeria, a transition which it was felt would be eased by the fact that her husband is Nigerian and lived there until 2008.

29. In the circumstances and in the light of the extensive caselaw on this issue, it is untenable to suggest that the applicants' marriage and the impact that the proposed deportation would have upon them was not at the forefront of the Minister's mind when he was making this decision. As was the case in Fitzpatrick, it seems to this Court that the marriage was highlighted in such a way as to make it quite unnecessary for there to be a specific recitation of the fact that the Minister considered the impact of the deportation on the constitutional rights of the second named applicant. Moreover the Court notes that no representations were made to the Minister at the leave to remain stage in relation to the constitutional rights of the couple. The applicants have not established substantial grounds on this issue.

30. As a subsidiary argument it was contended that the Minister erred in his assessment of the applicants' rights under Article 8 of the ECHR because he operated under an unfounded assumption that the family could move to Nigeria. Submissions were made at the hearing as to why it would be unreasonable to expect the second named applicant to move to Nigeria, based on her affidavit grounding these proceedings. The Court regrets that it cannot find merit in this argument, as the difficulties that might be faced by the second named applicant in Nigeria were not a matter that was before the Minister when he was considering whether or not to deport her husband. The only information in relation to the wife's circumstances that he had before him was her name; her statement that she loved the applicant and was engaged to be married to him and wished for him to remain in Ireland; the fact that she worked for the Revenue Commissioners for an unspecified length of time and in an unspecified capacity, earning an unspecified amount of money; her PPS number and her address. It is not clear whether the copy of her passport and therefore her date of birth and age were before the Minister but nothing much turns on that as it was not accompanied by any submissions as to why she should not be expected to join her husband in Nigeria if he was deported. No information was furnished about her family in Ireland, her religion, whether or not she has children, what foreign languages she speaks if any, her financial or other obligations in Ireland, her education and employment prospects, her knowledge of Nigerian culture and traditions, her health, her ability to travel or her relationship with her Nigerian in-laws, if any. The Minister is obliged under s. 3(6) of the Immigration Act 1999 to consider the family and domestic circumstances of a proposed deportee and the humanitarian considerations on the file only insofar as they are known to him. He gave the applicants ample opportunity to make representations to him and he considered the representations that they made without exception. He was under no obligation to enter into correspondence with them to ascertain whether or not the second named applicant would experience any difficulties in moving to Nigeria with her new husband.

31. In the light of the foregoing the Court is satisfied that the applicants have not established substantial grounds and leave is

therefore refused.

Postscript

32. The Court notes that there is material in the affidavit of the second named applicant which was not before the Minister when he was considering whether or not to deport the first named applicant. This material includes her averments in relation to (i) the hardship that the deportation would create for her family; (ii) the amount of money that she earns; (iii) the length of her service with the Revenue Commissioners; (iv) her ability to support her husband if he was permitted to remain in the State; (v) her unwillingness or fear to travel to or reside in Nigeria if her husband is returned there and her fear that she would not gain employment there or might be kidnapped simply because she is foreign or that she would be subjected to discriminatory laws and practices in Nigeria relating to females; (vi) the fact that her parents and nine siblings live in Ireland and she is close to them and it would be devastating to her and them if she was required to leave the State and reside elsewhere; (vii) her desire not to be separated from her close friends in Ireland; (viii) the possibility of moving to another EU Member State with her husband where she would seek work in order to secure an entitlement for them to reside there.

33. These are not matters that the Court could take into account in assessing the legality of the Minister's decision to deport because they were not before him but they may be matters which could for the basis for an application for revocation of the extant deportation order pursuant to s. 3(11) of the Immigration Act 1999. Such an application could be made even if effect is given to the deportation order in the interim and revocation would allow for the first named applicant to seek entry to the State by way of a visa. The Court in no way wishes to prejudge how such an application should be determined but there can be no doubt that the applicants' case under Article 8 of the ECHR would have been somewhat stronger if more detailed information had been put before the Minister in relation to the obstacles that the second named applicant would face in Nigeria.