Neutral Citation Number: [2010] IEHC 268

THE HIGH COURT

JUDICIAL REVIEW

2008 1375 JR

BETWEEN:

O. A.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Herbert delivered the 1st day of July 2010

Section 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000, provides that any application for leave to apply for judicial review to challenge a decision of the respondent made pursuant to the provisions of s. 3 of the Immigration Act 1999, shall be made within the period of 14 days commencing on the date on which the person was notified of the decision, unless this Court considers that there is good and sufficient reason to extend the period.

The letter of notification in the instant case is dated the 6th November, 2008, (Thursday) and was sent by post to the applicant's advised address at Hatch Hall, 25A Lower Hatch Street, Dublin. A copy of this letter was sent to A.C. Pendred & Co. then, and presently, solicitors for the applicant. It is accepted by Mr. Pendred, principal of that Firm, that this copy letter was received by his Firm on the 7th November, 2008, (Friday). Despite this fact, counsel for the respondent accepted that this Court should allow a period of three days for delivery of the notification to the applicant in ordinary course of post. Since the 9th November, 2008, fell on a Sunday, this Court must assume that the notification would have been delivered to the applicant's advised address on Monday the 10th November, 2008, at the latest. By reference to the date impressed by the Central Office Stamp, the application herein was received there on Thursday the 4th December, 2008. The application was therefore made ten days outside the maximum time permitted by s. 5(2)(a) of the Act of 1999. Counsel for the respondent submits that no good or sufficient reason has been shown on affidavit why the period should be extended by this Court.

In *G.K. v. The Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418 at 423, Hardiman J. pointed out that while this Court must address the extent of the delay and the reasons, if any, offered for it, it is not limited to considering these matters only. This Court should also consider other matters such as whether the applicant appears to have an arguable case, that there are reasonable and weighty, not just trivial or tenuous grounds, for contending that the decision of the respondent is invalid or ought to be quashed.

The extent of the delay on the part of the applicant in the instant case, must be judged by reference to the clear indication on the part of the Legislature in fixing a time limit as short as fourteen days, that great vigilance and promptness are demanded of those intending to rely upon the provisions of s. 5(2) to challenge a decision of the respondent by way of judicial review in matters to which the section applies. In *Re. The Reference of Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 at 392-4, the Supreme Court held that this Court should be prepared to grant an extension of time if satisfied that the particular applicant, though out to time, had acted with reasonable diligence in the circumstances of the case. Counsel for the respondent submitted that in the instant case no good or sufficient reason for the delay had been shown on affidavit and that while in other circumstances a delay of this nature might readily be excused as not in any way inordinate or inexcusable, in the context of a purported application under s. 5(2) the delay was inordinate and excessive.

In an affidavit sworn on 19th February, 2010, the Principal of the Firm of A.C. Pendred & Co. Solicitors, who at all material times represented and continued to represent the applicant, states that the copy of the s. 3(6) Notification from the respondent was received at the office of his firm on the 7th November, 2008, (Friday). He avers that he immediately wrote to the applicant at his notified address, Hatch Hall, asking him to call to the office as soon as possible in order to discuss the matter. An Post unsuccessfully attempted to deliver this letter on Monday the 10th November, 2008, and on each of the six following days, after which it returned the undelivered letter to the sender. This deponent states that the applicant had not informed him or his office until January 2009, that he had left the notified address.

Mr. Pendred states that the applicant's mother telephoned his office on Friday the 14th November, 2008, about an unconnected matter and, he had asked her to tell the applicant that he should come to the firm's office immediately. The deponent states that the applicant came to the office on Wednesday the 19th November, 2008. As the solicitor in the firm dealing with his case was on two days leave an appointment was made for the applicant for Friday the 21st November, 2008. Mr. Pendred avers that on that day the applicant "firmly instructed" him to seek relief by way of judicial review. There are entries in the Office Log of A.C. Pendred & Co. which, though not entirely clear, seem to confirm these dates.

In an affidavit sworn on the 22nd February, 2010, the solicitor who had responsibility for the applicant's file in the firm of A.C. Pendred & Co., until she left that firm at Christmas 2008, recalls that, "on the basis of a meeting with the applicant and a subsequent telephone conversation with his mother" she sent the file to counsel for an opinion on the 14th November, 2008. A copy of a letter in these terms bearing the date 14th November, 2008, is exhibited in the affidavit of Mr. Pendred. I am unable to accept the recollection of this solicitor that she had a meeting on the 10th November, 2008, with the applicant in which she received instructions, but in respect of which there is no Memorandum or Attendance or any other record. It is stated that the applicant had no appointment for that date but had a habit of attending the office frequently without appointment in order to seek reassurance, "as to the progress of his case". (The emphasis is mine). I am satisfied from the documents exhibited in the affidavit of Mr. Pendred that draft proceedings were received from counsel by Email on the 4th December. 2008.

Having regard to the foregoing facts and circumstances I am satisfied that the applicant's solicitors, A.C. Pendred & Co., and indeed

counsel, show reasonable diligence in considering and in progressing this application to the Court pursuant to the provisions of s. 5(2) of the Act of 1999. In my judgment the applicant must receive the benefit of that diligence, however unmeritorious and perhaps even unlawful (non-reporting of departure from the notified address) his own behaviour may have been. I therefore consider that there is good and sufficient reason to extend the time to enable this application for leave to be made.

By Order, made on the 30th October, 2008, the respondent, pursuant to the powers vested in him by the provisions of s. 3 of the Immigration Act 1999, required the applicant to leave this State within the period indicated in the order and, to remain thereafter out of the State. In deciding to exercise this power the respondent approved and acted upon a number of findings of the Supervising Officials of his Department, made following upon an examination of the applicant's file on the 23rd October 2008.

The relevant findings were as follows:-

> "1. The applicant claims that he fears losing his life at the hands of members of the Viking Cult if he is returned to Nigeria. However country of origin information indicates that if persons are threatened with attack from non-state actors, they can avail of police protection. . . . Having considered the country of origin information above, I am of the opinion that repatriating (the applicant) to Nigeria is not contrary to s. 5 of the Refugee Act 1996, as amended [non-refoulement] . . . (or) . . . to s. 4 of the Criminal Justice (U.N. Convention against Torture) Act 2000."

The country of origin information is identified as, a U.K. Home Office Country of Origin Report on Nigeria dated November 2007; a Danish Immigration Service Report on Human Rights Issues in Nigeria, dated 2004, a Report from a Landinfo Fact-Finding Mission to Nigeria 12th to 26th March and information provided by the Immigration and Law Refugee Board of Canada (1999).

> "2. The U.K. Home Office Country of Origin Report on Nigeria, (November 2007) indicates that there are treatment facilities for those with mental health problems (extract cited). Having taken into account all of the above, it is not accepted that there are any exceptional circumstances in this case which would suggest that there is a real risk that deporting (the applicant) to Nigeria would be a breach of Article 3 of the European Convention on Human Rights. The fact that the circumstances of (the applicant) in Nigeria may be less favourable than those enjoyed by him in Ireland does not exist as exceptional circumstances.
>
> 3. Having considered all of these facts, it is not accepted that the deportation of the applicant, and in particular the fact that the conditions and treatment available to him in Nigeria would be less favourable than those available to him in Ireland, would have consequences of such gravity as to engage rights under Article 8(1) [of the European Convention on Human Rights] as a result, the decision to deport the applicant in pursuance of lawful immigration control, does not constitute a breach of the right of "respect" for the applicant's private life under Article 8."

Having considered the country of origin information cited and which was before the respondent, the court is satisfied, and so finds, that it was rationally and reasonably open to the respondent to reach each of these conclusions. In my judgment the principle formulated by Edwards J. in *D.V.T.S. v. The Minister for Justice, Equality and Law Reform and Another* [2008] 3 I.R. 476 at 496, that:-

> "While this court accepts that it was entirely up to the second respondent [the Refugee Appeals Tribunal] to determine the weight (if any) to be attached to any particular piece of country of origin information it was not up to the second respondent to arbitrarily prefer one piece of country of origin information over another. In the case of conflicting information it was incumbent on the second respondent to engage in a rational analysis of the conflict and to justify its preferment of one view over another on the basis of that analysis. The difficulty in the present case is that the second respondent firstly, does not allude to the fact that the information is conflicting and secondly, does not give any indication as to why he was inclined to prefer the information contained in the US State Department report on Cameroon, 2004 and the UK fact finding Mission Report 2004 to that contained in the reports submitted by or on behalf of the applicant."

is not, contrary to what was submitted by counsel for the applicant, engaged in the present case. The country of origin information cited and relied upon by the respondent in the instant case does not contain conflicting information. I summarise this country of origin information as follows.

Individuals who fear persecution from non-state agents can seek protection from the Nigerian Federal Police Force. However, the Police are sometimes reluctant to take action against better armed groups or groups which enjoy the backing of senior government officials. Internal relocation is open to threatened persons, but if they are without family or other ties in the area of relocation, they may face lack of acceptance as well as difficulty in finding accommodation and land. Prosecutions brought as a result of Police action invariably result in a decision favouring the wealthier party. Nigerian Law requires the Police Force to investigate all complaints made to it. If a complainant is not satisfied with the Police response, there is a complaints process, starting with Area Commanders and progressing to State Police Headquarters and ultimately to Force Headquarters.

Fear of persecution from University Fraternity Cults is a common asylum claim submitted by Nigerians in Europe and North America. In media reports and other studies, names such as "Vikings" feature regularly. Press reports claim that these cults have committed murders on university campuses and sometimes operate in several universities. Some informants stated that these Cults could locate and persecute persons outside their particular campus both locally and nationally with the assistance of other cults and groups. Others are sceptical of this, stating that only a minority of students were involved in these cults and the cults were very dispirit and, feel little or no formal obligation to assist each other. It was commonly considered that the Cult Students were the children of military officers, chiefs, professors, judges, politicians, senior police officers and, other influential people who protected them from the law enforcement agencies in the event they got into trouble. Cult violence is claimed to include homicide, rape, physical assault and, psychological persecution and the abuse of drugs and occultism is often involved. There have been threats against Faculty Members in universities and against their children.

The Federal Government has taken and is taking serious action against these Cults, through the Ministry of Education, University Authorities, Police Security Agents, Student Union leaders, academic and non-academic Unions and, former Cult members. The Federal Government provided university authorities with a list of 36 cults one of which is "Vikings" and, has made considerable funding available to assist in their suppression.

Though mental health care is part of the national primary healthcare system and treatment is available at primary level, relatively few centres have trained staff and appropriate equipment. Community care is available in some States for patients with mental disorders. This is often provided by private medical practitioners and non government organisations especially faith based organisations. Each

State in Nigeria has at least one psychiatric hospital. Psychotherapy services are almost non-existent. Private psychiatric services do exist, but they are expensive. Psychiatric in-care patients tend to be advanced cases, difficult to treat and treatment often violates their integrity. Therapeutic drugs in common use for treating mental health problems are generally available and are relatively affordable. However, newer drug formulations are either unavailable or are very expensive.

Turning now to the circumstances of the applicant, substantial and uncontradicted expert evidence describing his medical condition was before the respondent. A Report dated the 24th January, 2007, from Dr. Consilia Walsh, Consultant Psychiatrist at St. Vincent's University Hospital, states that the applicant was diagnosed as suffering from psychotic depressive illness. He was referred to the Hospital on the 1st December, 2006, by a general medical practitioner because he was complaining of auditory and visual hallucinations, nightmares, broken sleep, low mood and, a feeling of hopelessness about the future. He claimed that he also felt threatened, that people were looking at him strangely and that the people who he claimed had killed in friend in Nigeria may have followed him to this State. The auditory hallucinations were urging him to self harm. He was carrying a knife. He was admitted to Hospital as an involuntary patient under the Medical Health Act 2001.

The applicant was treated with anti psychotic medication and his visual and auditory hallucinations receded. It was considered that he was suffering from pronounced depressive symptoms. This was treated with anti depressive medication. He was discharged from hospital on the 4th January, 2007. He continued to need intensive out-patient daily support from the community psychiatric nurse and, regular reviews of his medication. It was considered that the applicant continued to suffer from anxiety with socialisation and rehabilitation problems. In her report of the 24th January, 2007, Dr. Walsh considered that the applicant would need to attend the Psychiatric Services Department for the following twelve months and would also require support from the community psychiatric nurse and from mental health day services. A certificate dated 26th July, 2007, certified that the applicant was a regular attender at the Vergemont Day Centre at Clonskeagh Hospital.

In a follow up letter dated the 5th December, 2007, Dr. Walsh records that the applicant continued to attend the Psychiatric Services Out-Patient Clinic at Baggot Street Hospital. She considered that he continued to require anti-depressant and anti-psychotic medication and that he remained considerably disabled despite this medication and the support of the Psychiatric Day-Services. Her letter then continues:-

> "It would be of considerable benefit to his mental health if he were to be allowed join his mother and brothers whom he has only recently discovered to be living in Ireland. . . .
>
> Due to (the applicant's) experiences in Nigeria he has great need for security and support of family to improve his mental health."

In her initial Report dated the 24th January, 2007, Dr. Walsh described the applicant as "an isolated, vulnerable young man without family or social support". It is difficult to reconcile this description of the applicant with the statement at s. 3(6)(i) of the Examination of File (October 2008) that the applicant, "submitted *inter alia*, that he has integrated in the State, has established many friendships and does not wish to return to Nigeria". That is, unless there has been an enormous improvement in his medical condition allowing this change of circumstances to take place between the 24th January, 2007 and October, 2008, and despite what is stated in Dr. Walsh's follow-up letter of the 5th December, 2007.

The court is satisfied that the respondent carefully considered the individual circumstances of the applicant in the light of the identified country of origin material regarding university cults and, the availability of State protection in Nigeria and, the availability in Nigeria of outpatient and inpatient medical services, treatment, and, drugs for person suffering from mental health problems. The court is satisfied that it was reasonably and rationally open to the respondent to conclude, as he did, in the light of the high threshold set by Article 3 of the Schedule I of the European Convention on Human Rights Act 2003, [*Bensaid v. The United Kingdom*: U.C.H.R., 6th May, 2001, par. 40: Application 44599/98] that there were not relevant and substantial grounds for believing that there was a real and substantial risk that that applicant would be subjected to torture or to inhuman or degrading treatment or punishment by this non-public group [*H.L.R. v. France*: 29th April, 1997, E.C.H.R. Rep. 1997 – III p. 758: *N. v. Finland* 30th November, 2005, E.C.H.R.: Application No. 38885/02] should he be returned to Nigeria, or that the authorities in that State were unwilling or unable to provide appropriate protection. The country of origin material before the respondent demonstrated that medical treatment was available to the applicant in Nigeria. The fact that such treatment would be less favourable than that which the applicant enjoyed in this State is not sufficiently decisive to engage Article 3 rights [*Bensaid v. The United Kingdom* (above cited) par. 36-41] except in the sort of very exceptional circumstances identified in D. v. The United Kingdom 2nd May, 1997, E.C.H.R. – Reports 1997 III p. 792, which do not arise in the instant case.

This Court is satisfied that it was reasonably and rationally open to the respondent to conclude, as he did, that the fact that the conditions and the treatment available to the applicant in Nigeria would be less favourable than what were available to him in this State, would not have consequences for the applicant of such gravity as to substantially affect his moral integrity or amount to a real and substantial risk of his suffering inhuman or degrading treatment so as to engage rights under Article 8 of Schedule I of the Act of 2003. [Bensaid v. The United Kingdom (above cited) paras. 46-49].

Section 5 (Prohibition of refoulement) of the Refugee Act 1996, (as amended) provides as follows:-

> "(1) A person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.
>
> (2) Without prejudice to the generality of subsection (1), a person's freedom shall be regarded as being threatened if, inter alia, in the opinion of the Minister, the person is likely to be subject to a serious assault (including a serious assault of a sexual nature)."

Despite what was held by Clarke J. in *Kouaype v. the Minister for Justice, Equality and Law Reform* (Unreported, High Court, 9th November, 2005), in reaching his decision to make a Deportation Order in respect of this applicant the respondent appears to have placed no reliance whatsoever on the fact that the applicant had been refused refugee status. Neither has the respondent been zealous to observe the requirement of s. 5(1) that the threat be on account of the applicant's race, religion, nationality, membership of a particular social group or political opinion. For the purpose of considering the application or non-application of s. 5 of the Act of 1996, the respondent appears to have assumed in the applicant's favour that his story was true and that the alleged threat was for a statutory reason.

During the course of argument at the hearing of this application, counsel for the applicant urged that the opinion of the respondent

that the repatriation of the applicant to Nigeria would not be contrary to the provisions of s. 5 of the Refugee Act 1996, (as amended) was unreasonable and unjust and failed to have regard to the specific circumstances of the applicant. Counsel for the applicant submitted that the question to be determined by the respondent was, whether this particular individual in his state of health would be personally at risk as regards his life or freedom if repatriated to Nigeria and, not just whether persons generally, who might have been threatened by Cults in Nigeria, would be at risk having regard to the country of origin information. Counsel for the applicant submitted that the respondent had failed to consider, or had given insufficient weight to the reality that the applicant, having regard to the medical evidence, would be incapable of availing of police protection if returned it Nigeria.

Counsel for the respondent submitted that the respondent was only mandated by law to have regard to such representations as were made to him pursuant to the provisions of s. 3(3)(b)(i) of the Immigration Act 1999, and to the several matters specified in s. 3(6) of that Act. No representation had been made, or could reasonably be made to the respondent that the applicant, because of his medical condition might not be able to seek or obtain Police protection or assistance if repatriated to Nigeria. Counsel for the respondent further submitted that the issue did not arise as a humanitarian consideration pursuant to the provisions of s. 3(6)(h) of the Act of 1999, for the same reason.

Counsel for the respondent referred to the written representations, dated 11th July, 2007, made by the applicant to the respondent pursuant to the provisions of s. 3(6) of the Immigration Act 1999 and in particular to para. 11 thereof which states as follows:-

> "Section 3(6)(h) Humanitarian considerations you wish to bring to the Minister's attention:
>
> > 'The applicant is suffering from a psychiatric illness. He has been diagnosed with severe psychotic depression. He hears voice and there is a serious danger of self harm. His is currently receiving treatment from Dr. Consilia Walsh, but is not in a position to make any progress without a secure environment. Should he be returned to Nigeria the appropriate level of help with this particular illness will not be available to him. Dr. Walsh has expressed a concern for his safety as his mental health remains in a fragile state.'"

Counsel for the respondent submitted that this medical evidence did not support the claim now being advanced on behalf of the applicant and, even if the applicant had made such a claim he had not put any other evidence before the respondent which supported a claim.

It is not necessary for this Court to rule on the objections taken on behalf of the respondent, that the applicant cannot now raise, on this challenge by way of judicial review to the Decision of the respondent, an issue which he did not raise and, which was not raised on his behalf, either expressly or by compelling inference, before the respondent and in respect of which the respondent made no decisions. I find that there is an even more fundamental obstacle to the applicant establishing a "substantial ground" by reference to this issue.

In my judgment, whether this issue is a substantial ground for contending that the decision of the respondent to make a Deportation Order in respect of the applicant is invalid or ought to be quashed, is entirely dependent on whether the applicant can point to material before the respondent by reference to which it would be irrational and unreasonable and, in flagrant disregard of fundamental reason and common sense for the respondent to conclude that the applicant would be able to avail of the police protection which the country of origin information established was available to persons threatened by university cults in Nigeria. I find that there was no such material before the respondent and, it was reasonably and rationally open to the respondent on the material actually before him to come to the conclusion which he did, for the clear and comprehensive reasons stated, that repatriating the applicant to Nigeria would not be contrary to the provisions of s. 5 of the Refugee Act 1996, (as amended), or s. 4 of the Criminal Justice (United Nations Convention against Torture) Act 2000, or Schedule I, Article 3 of the European Convention on Human Rights Act 2003.

I am satisfied that the Decision of the respondent patently discloses, "the essential rationale on foot of which the decision was taken", (*A.O.M. v. The Minister for Justice, Equality and Law Reform, Ireland and The Attorney General* – Supreme Court [2010] I.E.S.C. p. 14, per. Murray C.J.). It is very important in this regard to re-emphasise that this Court may not usurp the function vested solely in the respondent by the Legislature, by substituting its own views on the merits of the evidence for those of the respondent.

The decision of the respondent records that the applicant sought asylum in this State on the 17th October, 2006. On the 14th November, 2006, the Refugee Applications Commissioner recommended that he be refused refugee status and, this decision was upheld by the Refugee Appeals Tribunal on the 24th May, 2007. On the 21st October, 2007, a decision to refuse his application for subsidiary protection was conveyed to the applicant. The decision of the respondent then addresses individually and carefully each of the matters required to be addressed by the provisions of s. 3(6) of the Immigration Act 1999.

It is noted that the applicant [section 3(6)(a)] was born on 30/06/1980, and [section 3(6)(b)] arrived in the State on 17/10/2006. The respondent noted, [Section 3(6)(c)] that the applicant claimed that his father's whereabouts are unknown. His mother and his three siblings are resident here. The applicant claimed in his asylum questionnaire that he had a partner in Nigeria (name and date of birth given). As regards section 3(6)(d) concerning the nature of his connection with the State, the respondent found that the applicant's sole connection to the State lies in his application for asylum in the State. The respondent noted [section 3(6)(e)] that the applicant claims to have attended school and university in Nigeria from 1991 until 2006. He claims to have had no employment history. In addressing the question of [section 3(6)(f)] of the applicant's employment (including self-employment) prospects in the State, the respondent acknowledges that the applicant is not permitted by law to work in the State. If he were permitted to work the respondent finds that his prospects of obtaining employment would be poor in the current economic climate. The respondent notes that it is claimed on behalf of the applicant that he would be prepared to work if given the opportunity to do so. If given the opportunity, the applicant would like to study and if possible complete a nursing course or a care assistance course. He claims that he was studying Pharmacy in Nigeria and would like to be given the opportunity to study Pharmacy or Medicine in Ireland.

Section 3(6)(g) obliges the respondent to consider the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions). The respondent noted that the applicant has not come to the adverse attention of the Gardaí during his time in the State. His character and conduct before entering the State cannot be verified. The applicant claimed that he is of good character and conduct and has not come to the attention of the Gardaí since his arrival in the State. The respondent noted that letters from (two of his siblings) and from (his mother), from Rachel Thornburgh, Duty Manager at Hatch Hall, and Martin Hartford, Vergemont Day Centre had been submitted in support of the applicant's application for leave to remain in the State. They attest to the applicant's good character. An affidavit from the applicant's mother (name given) was also considered. Other pleas from public representatives on behalf of the applicant attesting to his good character were considered. As to section 3(6)(i), representations made on behalf of the applicant by A.C. Pendred and Co., Solicitors submitted, inter alia, that the applicant is willing and able to work. The applicant claimed that he has integrated in the State, has established many friendships, and does not wish to return to Nigeria. Representations were also received on behalf of the applicant from Dr. Consilia Walsh, psychiatric

consultant, in relation to the applicant's psychiatric condition.

Under the heading "The Common Good", [section 3(6)(j)] the respondent noted that it is in the interests of the common good to uphold the integrity of the asylum and immigration procedures of the State. Considerations of national security and public policy did not have a bearing on this case.

Under the headings, "Private Life" and "Family Life" a number of these matters are further extensively considered, by the respondent expressly having regard to the provisions of Article 8, Schedule I, of the European Convention on Human Rights Act 2003. Article 8 provides as follows:-

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In addressing the question of whether Article 8 rights are engaged, the respondent has regard to the rulings in the following cases:-

> *Ezzoudhi v. France* (E.C.H.R: No. 47160/99: 13/2/01).
>
> *Re: Kugathas* [2002] E.W.C.A., Civ. 31.
>
> *S. v. United Kingdom* [1984] 40 D.R. 196.
>
> *Aziz, Cabales and, Balkandali v. United Kingdom* [1985] 7 E.H.R.R. 471.
>
> *Advic v. United Kingdom* [1995] E.H.C.R. 55 (6/9/1995).
>
> *R. (Mahmood) v. Home Secretary* [2001] 1 W.L.R 840.
>
> *Oguekwe v. The Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 795 (Supreme Court).

With respect to these section 3(6) grounds, Murray C.J. in *A.O.M. v. The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* [2010] I.E.S.C. 15, held as follows:-

> "As regards the second aspect of the Minister's functions under s. 3, namely, the requirement to take account of the so called 'humanitarian' grounds advanced by the applicant I am of the view that the Minister has been conferred with a broad discretion in this regard. He has to balance, on the one hand, the personal circumstances and other matters referred to in ss. 6 of s. 3 and the common good, public policy including the integrity of the asylum system, on the other. In virtually every case there will be some humanitarian consideration and, unlike s. 5, even if he is of the opinion that there are humanitarian considerations which tend to support a claim that a deportee be permitted to remain, even temporarily he is not bound to accede to such a request since he has to balance those considerations with the broader public policy considerations which may not be personal to the person concerned. It is evident from the terms of the decision that he took all the relevant considerations into account but explained that 'the interests of 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'.
>
> This is quintessentially a discretionary matter for the Minister in which he has to weigh competing interests and only the Minister, who has responsibility for public policy in this area, is in principle in a position to decide where that balance lies. One cannot rule out that there might be exceptional circumstances in which the principle of proportionality might arise but as a general rule the principle of proportionality would not arise for consideration in such cases and in any event the appellant has not shown that there is any basis for considering that there was any lack of proportionality in the decision taken by the Minister in this particular respect."

At the hearing of this application, pursuant to the provisions of s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000, for leave to challenge the decision of the respondent by way of judicial review, counsel for the applicant additionally submitted that there were substantial grounds for contending that the decision of the respondent requiring the applicant to leave and to remain thereafter out of this State was an interference by a public authority with the applicant's right to family life and, therefore an infringement of Article 8 of Schedule I of the European Convention on Human Rights Act 2003. I do not agree with this submission.

This issue of the right to family life and Article 8 of the Act of 2003, in the case of asylum seekers in this State was fully considered and authoritatively addressed in *B.I.S. and Z.S. (a minor suing by her and next friend T.S.) and Another v. The Minister for Justice, Equality and Law Reform* [2007] I.E.H.C. 398, by Dunne J. Having considered the decisions of the European Court of Human Rights in *Olsson v. Sweden* [1989] 11 E.H.R.R. 259: *Boughanemi v. France* [1996] 22 E.H.R.R. 228: *Moustaquim v. Belgium* 13 E.H.R.R. 208: *Radovanovic v. Austria* E.C.H.R. (22/4/2004): *Berrehab v. The Netherlands* [1988] 11 E.H.R.R. 328: *Advic v. The United Kingdom* [1995] 20 E.H.R.R., C.D. 125, and *A. and Family v. Sweden* [1994] 18 E.H.R.R., C.D. 209, the learned judge held as follows:-

"Looking at the cases referred to above the following principles can be noted:

> *1. Family can include the relationship between an adult child and his parents (see for example Boughanemi).*
>
> *2. Family life may also include siblings, adult or minor (see Boughanemi and Olssen).*
>
> *3. The relationship between a parent and an adult child does not necessarily constitute family life without evidence of further elements of dependency involving more than the usual, emotional ties. (See Advic).*
>
> *4. The existence or not of family life falling within the scope of Article 8 depends on a number of factors and the circumstances of each case.*

Applying those principles to the facts of this case it is clear that no case has been made to demonstrate that the first named

applicant is in any way dependent on his parents financially or otherwise. Undoubtedly as was stated in the grounding affidavit one of the principle reasons the first named applicant came to Ireland was to be with his mother, father and siblings, but there is nothing to suggest any other kind of dependency on his parents. It is perhaps for that reason that his parents have not joined in these proceedings.

As has been made clear in the cases referred to above the issue as to whether Article 8 rights have been engaged depends on the facts and circumstances of each and every case. In this case the emphasis has been placed on the relationship of the first named applicant with his younger siblings. The first named applicant arrived in this jurisdiction on the 22nd April, 2006. The first named respondent made the deportation order in relation to the first named applicant on the 27th July, 2006 and this fact was notified to him on the 25th August, 2006. The first named applicant was not part of a family unit with his parents between 2001 and 2006. I do not think that the visit by his parents to Nigeria in 2003 alters this fact. His relationship with his parents during that period but especially since he became an adult does not seem to me on the facts of this case to involve more than the normal, emotional ties. It seems to me on the facts of this case that it is impossible to argue that the first named applicant and the second and third named applicants had established such a relationship within that period of time such as to constitute family life within the meaning of Article 8. The applicants had not enjoyed any family life together outside the jurisdiction prior to the arrival of the first named applicant in this State. Accordingly, I am satisfied that the facts and circumstances of this case have not established family life within the meaning of Article 8.

In the event that I am incorrect in my view as to whether the relationship between the applicants and between the first named applicant and parents amounted to family life, the question would arise as to whether or not the conduct of the State is such as to interfere with the right to respect for family life. In the course of argument on this issue, counsel for the respondent referred to the case of R. (Mahmood) v. Home Secretary [2001] 1 W.L.R. 840 at 861 where Lord Philips stated the general principles under European Court of Human Rights case law as follows:

> *'(1) A state has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.*
>
> *(2) Article 8 does not impose on a State any general obligation to respect the choice of residence of married couples.*
>
> *(3) Removal or exclusion of one family member from a State where other members of the family are lawfully resident will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family members excluded, even where this involves a degree of hardship for some or all the members of the family.*
>
> *(4) Article 8 is likely to be violated by the exclusion of a member of a family that has been long established in a State if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled.*
>
> *(5) Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8.*
>
> *(6) Whether interference with family rights is justified in the interests of controlling immigration will depend on*
>
> *(i) the facts of the particular case and*
>
> *(ii) the circumstances prevailing in the state whose action is impugned.'*

Reliance was also placed on the judgment in Agbonlahor v. the Minister for Justice, Equality and Law Reform (Unreported, High Court, April 2007) in which Feeney J. at p. 8 stated as follows:-

> *'In considering immigration law under Article 8 the European Court has focused on an analysis of the individual facts in each particular case to ascertain whether the individuals asserting breach of rights are in truth asserting a choice of the State in which they would like to reside, as opposed to an interference by the State with their rights under Article 8.'*

He also went on to say at p. 19:-

> *'It is also of significance that in considering the issue of family life that it is appropriate to have regard to the lawfulness and length of stay as being significant factors in seeking to identify the exceptional cases where a State might be prevented from exercising the State's unquestioned entitlement to impose immigration control.'*

The facts and circumstances of this case involve a situation where the first named applicant entered the State illegally and was in the State for a very short period of time before the deportation order was made. It seems to me that this is a case in which the first named applicant is 'in truth asserting a choice of the State in which [he] would like to reside, as opposed to an interference by the State with [his] rights under Article 8' as Feeney J. described. In the circumstances I do not accept that the State has interfered with the rights of the applicants to respect for family life.

Assuming again for the sake of argument that I am incorrect in my view as to whether the applicants have established a right to respect for family life and that the State has not interfered with that right, the last question to be considered is whether the interference is justified by reference to Article 8.2 of the E.C.H.R. As can be seen from the cases I have referred to above, the key issue that has been considered by the European Court of Human Rights in respect of this aspect of the case has been whether the interference with the right to respect for family life was necessary in a democratic society. In the course of submissions on this point, reference was made to a decision of the House of Lords, R(Razgar) v. Home Secretary [2004] 1 A.C. 368, in which Lord Bingham stated at p. 390:-

> *'Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis.'*

That passage was approved by Feeney J. in Agbonlahor referred to above. I think it correctly expresses the approach to be taken in considering this issue. There is nothing before this court to indicate that the facts and circumstances of this case are such as to amount to one of the 'minority of exceptional cases'. Again I reject the submissions that the interference in this case by the State to respect for family life (if any) is not such as to violate any Article 8 rights that the applicants may have."

In my judgement, the facts before the respondent in the instant case are, save in one respect, very similar to but very much weaker overall than those highlighted by Dunne J. in *B.I.S. and Others v. The Minister for Justice, Equality and Law Reform*.

The applicant arrived here as an adult male of 26 years on the 17th October, 2006. After his applications for refugee status had been refused both by the Refugee Applications Commissioner and on appeal by the Refugee Appeals Tribunal and after a Subsidiary Protection order had been refused by the respondent, a Deportation Order was made in respect of him on the 30th October, 2008. His story, as recorded in the report of Dr. Consilia Walsh which was before the respondent, is that his parents "were separated" in Nigeria. He had a step-father and two half-siblings. After many years he made contact again with his biological father but lost touch with his mother. He fled Nigeria with the assistance of an aunt. He believed that his father may have been killed. In this Report dated 24th January, 2007, Dr. Walsh describes the applicant as, "an isolated, vulnerable young man, without family or social support in compromised living situation . . . ." In the Questionnaire completed by the applicant in applying for refugee status, he stated that he had a partner, (name and date of birth supplied) in Nigeria.

Between the 24th January, 2007 and the 27th October, 2007, the applicant discovered that his mother and three step-siblings were living in this State, (pursuant to leave granted on the 3rd May, 2007, to continue until 3rd May 2010). The applicant resides in direct provision accommodation at Hatch Hall in the City of Dublin. His mother in a letter dated 27th October, 2007, which was before the respondent, stated that the applicant visits her and his three step-siblings from time to time. She also stated:-

> *"I am willing for my son to live with me with the hope that we will be able to get through this difficulties in our lives as a family unit. My son will in turn be able to assist me in my recovery."*

It is noted in the Decision of the respondent that the applicant claimed that he has integrated in the State, has established many friendships and, does not wish to return to Nigeria. He stated that he had been studying Pharmacy in Nigeria, and would like to complete a nursing course or a care assistance course or study pharmacy or medicine in this State. The applicant stated that he would be prepared to work if given the opportunity.

Having, in my judgment, carefully and comprehensively addressed the facts before him, the respondent concluded that a decision to deport the applicant, in pursuance of lawful immigration control, did not constitute a breach of the right of "respect" for the applicant's private life under Article 8.

The respondent noted that the applicant was already an adult of 26 years when he entered the State in October 2006, and in a manner not very clearly explained, discovered and started to re-establish communication with his mother and siblings. The respondent found, having considered the documentation submitted regarding the applicant's psychiatric condition, that the issue of the applicant's "psychiatric illness" cannot be considered sufficient evidence of additional elements of dependency, involving more than the normal, emotional ties between a parent and an adult child. The respondent noted that there was no indication on file that the applicant was acting in either a supporting or parental role to the children. The respondent pointed to the fact that the applicant was able to live in Nigeria from the time he lost contact with his mother in 2002 until 2006 when he fled Nigeria without the support of his mother. He considered that an adult of 28 years with the high level of education of the applicant would be able to find employment and to support himself in Nigeria. While accepting that the applicant may have started to re-establish family ties with his mother and siblings, the respondent found that there was no sufficient evidence to suggest that the applicant had established "family life" with his mother and siblings.

The respondent pointed to the fact that the State reserves the right to control its borders and to control the entry, residence and removal of non-nationals. The respondent considered that the applicant's deportation, given the fact that he had been given a thorough and fair consideration of his case, was consistent with this principle. The State was not obliged to respect his choice to reside with his mother and siblings, in this State, especially as he is an adult and is not a dependant on his mother.

While it is fully accepted that the applicant's mother and siblings have a long established family unit in the State, the applicant himself has only been involved with them since after he sought asylum here in October 2006.

Taking into account all of these factors, the respondent concluded that the applicant has not established "family life" with his mother and siblings within the meaning of Article 8, and that therefore the proposed decision does not interfere with the applicant's right to respect to family life under Article 8(1) of Schedule I of the E.C.H.R Act 2003.

The court is satisfied that the applicant has not shown substantial grounds for contending that this conclusion on the part of the respondent was irrational, unreasonable, contrary to commonsense, or, disproportionate. The court is satisfied, having regard to the facts and circumstances of this application, that the applicant could not advance a reasonable and weighty argument that the relationship, such as it is, which exists between him and his mother and his siblings constitutes "family life". I am satisfied, having regard to the facts and circumstances of this application, and having regard to the decisions of the European Court of Human Rights and, to the case law in this State, that the applicant could not advance a reasonable and weighty argument that the medical evidence, taken at its height in favour of the applicant, establishes that as an adult male, he has such a level of dependence on his mother as to involve more than the usual emotional ties between a mother and her adult son. Having regard to the lawfulness, the duration and, the circumstances of this applicant's stay in the State, I am satisfied that he could not show substantial grounds for contending that the decision of the respondent to make a Deportation Order in respect of him in exercise of, "the States unquestioned entitlement to impose immigration control" was one of the, "small minority of exceptional cases", where that exercise lacked proportionality.

The Court therefore refuses leave to the applicant to seek judicial review of the decision of the respondent to make the order sought to be impugned.