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Neutral Citation Number: [2007] IEHC 398

THE HIGH COURT
JUDICIAL REVIEW

[2006 No. 1110 JR]

BETWEEN

B.I.S. AND Z.S. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND T.S.) AND I.S. (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND T.S.)

APPLICANTS

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Judgment delivered by Ms. Justice Dunne on the 30th day of November 2007

1. The first named applicant is from Nigeria and has failed in an application for asylum in this jurisdiction. The second and third named applicants are his siblings who were born in Ireland and reside here with their parents.

2. The first named applicant arrived in Ireland at Dun Laoghaire on the 22nd April, 2006 without any documentation. He was accompanied by his father. Initially it was stated that the first named applicant was fourteen years of age and residing in Donegal with his father but almost immediately it was admitted that he was nineteen years of age and had arrived in England a few weeks previously and that his father went to England to accompany him into Ireland. He was refused leave to land as he did not have the appropriate documents in relation to his identity and nationality and he immediately sought asylum. He was admitted into the State for the purpose of claiming asylum. He stated in the ASY1 form that he came to Ireland to join his parents who are entitled to reside here.

3. Following his claim for asylum, he attended for interview with the Office of Refugee Applications Commissioner (ORAC) on 5th May, 2006. His claim for asylum was rejected by a decision dated 17th May, 2006. An appeal to the Refugee Appeals Tribunal was unsuccessful.

4. On 22nd June, 2006 the first named applicant was sent a letter advising him that the respondent proposed to make a deportation order. That letter, as is usual, set out a number of options open to the first named applicant, namely, that he could leave the State voluntarily before the Minister made a deportation order; he could consent to the making a deportation order or he could make representations to remain temporarily in the State.

5. In setting out those options it was stated in the letter in relation to the first option:

> "except in very exceptional circumstances if you exercise this option you will not be made the subject of a deportation order, thus allowing you to seek to legally enter the State (eg on a tourist visa, work permit, etc.) at some point in the future."

6. It was further noted in relation to the third option, namely the option of making representations to remain in the State that:

> "if following consideration of the application, the Minister decides to refuse you temporary leave to remain you may be made subject to a deportation order the consequences of which are outlined above. You may not be given the option of leaving voluntarily or consenting to deportation."

7. In response to that letter the first named applicant's solicitor, Donal Gallagher, sent submissions by way of a leave to remain application. The application for leave to remain was refused and a letter dated 25th August, 2006 was sent to the first named applicant notifying him of this and enclosing a deportation order. It is that order that the applicants seek to challenge.

8. Having been granted leave to apply for judicial review, an amended statement required to ground an application for judicial review dated 20th December, 2006 was delivered. The grounds relied on were as follows:

> "1. The respondent has failed to protect and vindicate the right to family life and privacy of the applicants in making the deportation order herein. Deportation in the circumstances would be in breach of the second and third named applicants rights under the Constitution, EC law and under the European Convention on Human Rights, and in particular Article 8 thereof, and/or failed to impair the said right as little as possible in all the circumstances.
>
> 2. The respondent would fail to take … relevant matters into account if the deportation order against the first named applicant herein proceeded and would thereby act in breach of fair procedures and natural and constitutional justice. Without prejudice, the respondent:
>
> (a) Failed to consider the effect the deportation would have on the relationship between the first named applicant and the second and third applicants and on his relationship with other family members;
>
> (b) Failed to consider that the first named applicant may not be allowed to re-enter the State under the terms of the said deportation order to have contact with his family, who have their home in the State;
>
> (c) Failed to consider whether the disruptive effect could be minimised.
>
> 3. The decision to deport was made in breach of the requirements of natural and constitutional justice and was disproportionate in all the circumstances. Without prejudice, the respondent failed to give proper and/or adequate reasons why deportation was necessary in all the circumstances."

9. In the statement of grounds of opposition of the respondent it was stated that

> "the first named applicant has been living in Nigeria for some time with his adult sister and his grandmother. In the

circumstances he does not enjoy "family life" within the meaning of Article 8 of the European Convention on Human Rights with the second and third named applicants or with those members of his family who are lawfully resident in Ireland."

10. The statement of opposition went on to point out that the applicant never got permission to enter or remain in Ireland. He procured entry to the State by the making of an application for asylum after being refused leave to land.

11. The statement of opposition then went on to set out that it was the policy of the respondent to ensure that non nationals who enter the State without the requisite permission to enter and/or remain in the State, leave the State so as to obtain the necessary permission to enter and remain in the State. It was pointed out that this policy was pursued in the interest of maintaining the borders of the State and in maintaining the integrity of the asylum and immigration systems.

12. The statement of opposition went on to indicate that all of the circumstances relating to the applicants were considered by the respondent in relation to this particular matter and that having so considered them the deportation order was made.

13. It is necessary to set out some further details about the background of the first named applicant and his family and their circumstances.

14. It appears that the parents of the applicants came to Ireland in 2001 from Nigeria. The first named applicant has an older sister called Abiola born in 1985 who is still in Nigeria. The first named applicant and his older sister lived with their grandmother in Nigeria after their parents left Nigeria for Ireland. The first named applicant has made allegations as to maltreatment by his grandmother but he attended school while living there and subsequently he attended university in Nigeria. Around 2004 the first named applicant moved out of his grandmother's house and lived in the house of a man who had employed him. The first named applicant's mother and father visited him in Nigeria in 2003. He has a younger sister and brother the second and third named applicants respectively, Z. born on the 3rd June, 2001 and I. born on the 12th August, 2004 in Ireland.

15. I do not propose to set out the details as to the basis of the first named applicant's claim for asylum. His claim to be a refugee was refused and the decisions of ORAC and the Refugee Appeals Tribunal have not been challenged in these proceedings.

16. In the grounding affidavit of the first named applicant he stated as follows:

> "I say that I would like to be in a position to have regular access to my family in Ireland and I am disappointed that same was not properly considered before the decision to deport me was made. I do not believe that they will be in a financial or emotional state to visit me in Nigeria and I say that the relationship I have with them may be fatally ruptured."

17. Jacqueline Kelly the applicant's solicitor in an affidavit sworn by her on the 12th September, 2006 having referred to the background stated:

> "I say that the examination on file did not refer to the applicant's family or the fact that he would be separated from them. It did not refer to the fact that the deportation order instructed the first named applicant to remain outside the State. That will mean that he will not see his siblings or other family members as they will not be in a position to travel to Nigeria, as they have made Ireland their home.
>
> > 12. I say and have been instructed that the first named applicant would have considered voluntarily repatriating to Nigeria had he been given the choice following the refusal of the humanitarian leave to remain application, but that he was not given such a choice."

18. A replying affidavit was sworn by Dan Kelleher an Assistant Principal Officer in the Department of Justice, Equality and Law Reform. In his affidavit he exhibited relevant documentation including the decision of the Refugee Appeals Tribunal, the representations made on behalf of the first named applicant and the documentation annexed to the examination of file carried out by Ms. Audrey G. Walsh on the 17 July, 2006.

Submission on behalf of the applicants

19. The applicants in their submissions have challenged the decision of the respondent on a number of grounds which can be summarised as follows:

> 1. The respondent failed to consider the impact on the second and third named applicants of requiring the applicant to remain outside the State.
>
> 2. There was a disproportionate breach of the applicants' rights under Article 8 of the EHCR and under the Constitution.
>
> 3. The respondent failed to give the applicant an opportunity to voluntarily repatriate or consent to a deportation order after the rejection of leave to remain application and/or the failure to consider giving such an option.

20. The first two submissions referred to above are clearly interconnected and therefore I propose to deal with the arguments made under those headings together.

21. The essence of the complaint made was that the deportation order in this case went further than was necessary in requiring the first named applicant not only to leave the State but also to remain thereafter outside the State. It was submitted that the latter requirement was not necessary. It was further submitted that the deportation order was made in breach of fair procedures on the basis that the examination of file did not consider the effect of the deportation order on the first named applicant *vis-à-vis* his parents and the second and third named applicants. It was contended that the effect of the order on the first named applicant and also on the second and third named applicant should have been considered. It was added that the respondent was obliged to consider the rights of the first named applicant's siblings in making his order and it was argued that this was a right not based solely on the extent of past relationships but also was a right based on the potential for development of relationships between the siblings.

22. It was further submitted that if in fact there had been consideration of the rights of the first named applicant and the second and third named applicants that the decision of the respondent was disproportionate in that the making of the deportation order was not necessary for the purpose of upholding the policy in relation to asylum and immigration. Reference was made to the provisions of Article 8 of the European on Convention on Human Rights which provides:

> "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."

23. It was contended that Article 8 of the Convention concerns relations between siblings both as minors and as adults and also the relationship between adult children and their parents. On that basis it was submitted that the making of the deportation order coupled with the requirement to remain out of the jurisdiction is an interference with the first named applicant's right to private and family life under Article 8.1 of the ECHR. It was further submitted that it was for the respondent to justify that interference as provided for in Article 8.2. In that context counsel on behalf of the applicant analysed the role of the respondent *vis-à-vis* Article 8. It was not disputed that the deportation order and the requirement to remain outside the State was in accordance with law. It was accepted that the interference with the rights under Article 8 must be in pursuance of a legitimate aim of the State and it was accepted that in this regard the making of the deportation order and the requirement to remain outside the State was in pursuance of a legitimate aim. However, it was contended that the interference permitted in Article 8.2 must be necessary in a democratic State or to put it another way that the interference must be justified by a pressing social need and moreover, proportionate to the legitimate aim pursued. On this basis it was submitted that the order in this case and more particularly the requirement to remain outside the State did not satisfy this requirement.

24. Counsel on behalf of the applicants referred to a number of decisions of the European Court of Human Rights in support of his arguments in this respect and I will refer to those decisions subsequently. It was submitted on behalf of the applicants that the effect of the deportation order together with the requirement that the first named applicant remain outside the State is such that the relationship between him and his siblings and parents will be adversely affected. It was contended that this effect was disproportionate and an unconsidered effect bearing in mind the limited possibility of contact between the applicants. It was further submitted that the case law from the European Court of Human Rights also mirrored the right of family members under the Constitution. On that basis, it was submitted the deportation order did not strike the appropriate balance between the aim of removing the applicant from the State on the one hand and on the other, the rights of all the applicants under Article 8 and the provisions of Article 41 of the Constitution in that the requirement that the first named applicant remain outside the State was not the most limited necessary restriction on the applicants Article 8 rights as required by Article 8.2 and was therefore not a proportionate restriction of the second and third named applicants constitutional rights.

25. The final limb of the argument on behalf of the applicants was in relation to the failure to give the first named applicant an opportunity to voluntarily repatriate or consent to a deportation order after the rejection of the leave to remain application and/or the failure to consider giving him such an option. In this context, reference was made again to the options given to the first named applicant in the s. 3 letter dated 22nd June, 2006. It was submitted that there is nothing to indicate that such an option was given or would be given to the first named applicant. Further it was submitted that because of the obligations under Article 8 and the Constitution that this option ought to have been at the very least considered. In this context it is submitted that in not considering such an option that all of the applicants Article 8 and Constitutional rights had been breached. In other words, it was suggested that the option open to a failed asylum seeker who sought leave to remain should not have been limited as set out in the letter as follows:

> "if following consideration of the application, the Minister decides to refuse you temporary leave to remain you may be made subject to a deportation order the consequences of which are outlined above. You may not be given the option of leaving voluntarily or consenting to deportation."

26. In essence the argument was made that Article 8 rights were engaged in the case and there was nothing to show at all that Article 8 rights were considered. The only ground cited for the refusal of permission was based on the need to control immigration.

Submissions on behalf of the respondent

27. Counsel on behalf of the respondent noted that the net issue in these proceedings was whether the respondent properly considered the rights of the applicants. It was submitted that this issue related to the extent of the requirement on the part of the respondent to give reasons for his administrative decisions. An aspect of this issue is whether or not the applicants could discharge the onus on them to show that the respondent did not consider their rights.

28. Counsel on behalf of the respondent noted that it appeared to be conceded on behalf of the first named applicant that he did not have an entitlement to have his leave to remain application granted. The issues raised revolve around the second part of the deportation order namely the requirement to remain out of the jurisdiction.

29. It was submitted that the respondent took into account all the relevant grounds in making his decision. Reference was made to the affidavit of Dan Kelleher, an Assistant Principal Officer in the Department of Justice Equality and Law Reform, sworn herein on behalf of the respondent on 16th February, 2007. In the course of that affidavit, Mr. Kelleher referred to a number of documents which were before the respondent in making his decision, namely, the notice of appeal to the Refugee Appeals Tribunal, the decision of the Refugee Appeals Tribunal and the representations made on behalf of the applicant by the Refugee Legal Service contained in letter of Donal Gallagher dated 13th July, 2006 setting out the grounds upon which leave to remain was sought, an examination of file prepared by Ms. Audrey G. Walsh on 17th July, 2006. Counsel referred to the letter of Donal Gallagher, Solicitor, on behalf of the first named respondent, in which it was specifically noted that the family circumstances of the applicants were set out at p. 2 of the letter and at p. 4 to 5 humanitarian considerations were referred to including the possibility of breaches of the human rights of the first named applicant under, inter alia, the ECHR. Counsel pointed out that there was no suggestion that the respondent did not have all of the relevant information before him. The entire file was before the respondent.

30. It was submitted that the Minister considered in detail the position of the family and the relationship of the applicants. To suggest otherwise is not borne out by the documents. Further Mr. Kelleher in his affidavit expressly stated that in the case of the first named applicant the respondent "personally" considered all of the circumstances of the applicant, including the fact that he had family members, namely his parents and two of his siblings resident in the State. In the circumstances it was submitted that the respondent considered the applicants rights, including Article 8 rights, as he clearly took into account the information put before him concerning the relationship between the applicants. It was further stated that in the letter notifying the first named applicant of the making of the deportation order the respondent gave his reasons as he is required to do so pursuant to s. 3(3)(b)(ii) of the Immigration Act, 1999. Counsel then referred to a number of authorities in support of his submissions as to the nature of the consideration by the Minister in similar situations. Accepting that the Minister in making his decision in this case had not expressly referred to the fact that he had taken into consideration the constitutional rights of the applicants and the rights pursuant to Article 8 of the ECHR, it was submitted that it is not necessary for the Minister to expressly make reference to such provisions in giving his decision. It was further submitted that the commencement of European Convention on Human Rights Act, 2003 did not alter the nature of the obligation in Irish law to give reasons for the decision.

31. The submissions then went on to deal with the issue of family life as provided for in Article 8 and it was pointed out that in making the application for leave to remain the first named applicant did not put before the respondent any information relating to the effect on his relationships with the minor applicants of the deportation order or any issue which might be relevant to the provisions of Article 8 or the Convention as a whole. As pointed out previously, the decision in this case was made personally by the respondent. He considered the entire file before him and the decision he made was based on whether or not the applicant had put forward circumstances which could convince the respondent not to make a deportation order. An issue was raised as to whether or not the first named applicant, an adult could claim family ties with his siblings. There was little evidence before the respondent as to his connections with his siblings. Indeed there was nothing to indicate that he had any ties with his siblings prior to his arrival in the State. He had been left by his parents in 2001 when under the age of eighteen together with his older sister. It appears that in 2003 when his parents returned to Nigeria they applied for a visa for the purpose of bringing the first named applicant and his sister to Ireland but this was apparently refused. Although it was denied on affidavit that any application for a visa had been made in Nigeria, it was accepted in the course of the submissions that in fact such an application had been made. It was pointed out that when unsuccessful in that application, that the first named applicant sought to circumvent immigration law by attempting to enter the country illegally as described previously.

32. Counsel on behalf of the respondent then sought to deal in detail with the claim by the first named applicant that his Article 8 rights have been breached. It was submitted that in order to show that there had been a breach the applicant must show (a) that he enjoyed family life within the meaning of the Convention (b) that the State has interfered with his right to respect for his family life and (c) that the interference was not justifiable in accordance with Article 8(2). So far as these issues are concerned it was submitted that the first named applicant does not enjoy family life within the meaning of Article 8 with the second and third named applicants or indeed his parents, by virtue of the fact that he was at all material times over the age of eighteen, that is to say an adult. Between 2001 and 2006 he lived apart from his parents with his paternal grandmother and elder sister. It was submitted that the European Court of Human Rights has held that an adult does not enjoy family life within the meaning of Article 8 in relation to his parents and younger siblings and reference was made to a number of authorities in support of this submission. I will refer to those authorities later. Accordingly it was submitted that in the absence of family life there could be no issue as to whether the State had failed to respect such family life. It was pointed out that there was no question of dependency or mutual rights on the part of the applicant.

33. Counsel also considered whether the State had interfered with the right to respect for family life. In this regard it was submitted that there had not been any failure on the part of the State to respect the applicant's right to a family life. It was submitted that the purpose of Article 8 is to protect the individual from arbitrary State measures and in this regard reference was made to the decision in the case of *Agbonlahor v. Minister for Justice* (Unreported, High Court, Feeney J. April 2007). It was submitted that the first named applicant in this case was an illegal entrant into the State who had been refused permission to land and was only in the State by virtue of the application for asylum. By contrast cases in which Article 8 had been successfully invoked were cases involving people who had been lawfully in the relevant State for a period of time. In this regard was made to a number of authorities such as *Yilmaz v. Germany*, [2004] 28 EHRR 23, *Bouchelkia v. France* [1998] 25 EHRR 686 and *El Boujaidi v. France* [2000] 30 EHRR 233. Reliance was also placed on the decision in the case of *Berrehab v. Netherlands* [1988] 11 EHRR 323. Counsel contrasted the position of the first named applicant who has no permission to be in the State with the position of persons such as those referred to in the cases mentioned above who have had permission to enter and remain in a contracting State and are subsequently sought to be removed. In other words the cases in which a breach of Article 8 has been found to have occurred are all cases where the person whose rights are alleged to have been breached had been permitted by a contracting State to set down roots in that State in accordance with a series of lawful permissions to reside within that State. It is only in those cases that contracting States have been prevented from acting on foot of a lawful immigration policy. Reference was then made to series of Irish cases in which it has been emphasised that there is no right to choose to live in the State on the basis of a relationship to family members living here, as considered in cases such as *T.C. v. Minister for Justice* [2005] 4 IR 109, *Osheku v. Ireland* [1986] IR 733, and *Pok Sun Shum v. Ireland* [1986] ILRM 595. Further in the case of *A.O. and D.L. v. Minister for Justice* [2003] IR 1, it was accepted by the Supreme Court that parentage of an Irish born child did not confer a right on the parents of that child to remain in the State. Accordingly on the basis of those authorities it was submitted that there was no interference by the State in the rights under Article 8. It was submitted that the facts of this case were analogous to those of *Abdulaziz v. United Kingdom* [1985] 7 EHRR 471 and *(R) Mahmood v Home Secretary* [2001] 1 WLR 840. Accordingly it was submitted that there was no interference by the State with the right to respect for family life.

34. Finally counsel on behalf of the respondent considered if there was interference, whether such interference was justified by reference to Article 8(2). In that regard it was submitted that any decision made in pursuance of the lawful immigration policy of the State is proportionate to a legitimate aim. Reliance was placed on the decision in *Agbonlahor*. Feeney J. in *Agbonlahor* had approved a decision in the House of Lords in the case of *R (Razgar) v. Home Secretary* [2004] I A.C. 368 in which Lord Bingham had 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."

35. Relying on that passage it was submitted that the first named applicant has not set forth any circumstances to indicate that this was an exceptional case. Reference was made again to the decision in *A.O.and D.L.* and it was pointed out that whilst there is a blood relationship between the first named applicant and his siblings and indeed his parents that is not family life. Accordingly, it was submitted that if one could say there was an interference with the first named applicant's right to respect for family life the deportation order was made in pursuance of a lawful immigration policy and therefore any interference must be regarded as being proportionate to a legitimate aim within the meaning of Article 8(2).

36. Finally it was submitted that the first named applicant could not complain if the Minister acted unlawfully in failing to give him an opportunity to voluntarily repatriate or consent to deportation after the making of the deportation order. It was pointed out that the Minister is obliged by virtue of s. 3(4) of the Act of 1999 to furnish those options to the first named applicant in the letter informing him of the decision. It was also submitted that in any event the first named applicant has never sought to leave the State and continues to assert an entitlement to remain in the State. In those circumstances it was submitted that the first named applicant was not entitled to challenge the procedures by which non-nationals are afforded the opportunity to voluntarily repatriate or consent to the making of a deportation order. Thus it was submitted that the applicant was not entitled to the relief sought herein.

37. In response to the submissions on behalf of the respondent, counsel for the applicant accepted that there was no challenge brought as such to the form of letter sent to a failed asylum seeker pursuant to s. 3(4) of the Immigration Act, 1999. However, the point was made that discretion was left to the Minister as to how he should respond to the representations made and that there were lesser interventions available to the Minister. In other words did the Minister restrict the rights of the individual in the least way possible? Accordingly, the issue is whether or not the response of the Minister was proportionate.

Decision

38. The first part of the case made by the applicants that I want to deal with is the argument that the respondent failed to consider the impact of the deportation order on the second and third named applicants of requiring the respondent to remain outside the State. Complaint was made that the examination of file under s. 3 of the Immigration Act, 1999 as amended did not consider this issue.

39. In the course of argument on this point, counsel for the respondent referred to the case of *Pok Sun Shum v. Minister for Justice* [1986] I.R.L.M. 593. That was a case in which it was argued that the effect of deportation of the plaintiff who was married to an Irish citizen was invalid because inadequate consideration had been given to the rights of the family pursuant to the Constitution. In that case Costello J. stated at p. 600:

> "It is true … that no official of the Department, and perhaps I can properly assume the Minister himself, did not take down the constitution and consider the constitutional provisions relating to the family before reaching a decision or making a recommendation, but I do not think that that vitiates the decision that was reached. The Minister was well aware of the marital status of the applicant. As I pointed out, in the course of discussion with counsel, it would seem to me to be unnecessary to send out an officer to enquire as to the effect of (a) the refusal of a certificate of naturalisation and (b) a refusal to permit residence in the country because it seems to me that the Minister was entitled to assume that these would be very serious indeed. …the evidence clearly suggests that the Minister was aware of the applicant's marital status and that is sufficient, to my mind, that there was no failure to carry out fair procedures in the plaintiffs case."

40. A similar issue arise in the case of *P.F. v. Minister for Justice*, (Unreported, High Court, Ryan J. 26th January, 2005). In that case a decision not to revoke a deportation order was challenged. The reason given in that case was that the Irish husband and his Romanian wife had not resided together as a family unit for a period of time since her deportation. It was contended that the Minister was under an obligation to address himself to the constitutional rights of the Irish husband. This aspect of the case was rejected by Ryan J. who stated:

> "It seems to me as a matter of fact that the issue of marriage was considered by the respondent. The letter of application of the 8th April, 2003, which is quoted above, gives the marriage as the only basis of the request. It is clear from the documentary material preceding the letter of rejection that the marriage was discussed. The reason given for refusing the application refers to the family unit. In the circumstances, it seems to me to be an untenable proposition that the marriage and the impact of the deportation on Mr. and Mrs. F. were not present to the mind of the respondent in making the decision not to revoke Mrs F's deportation order. It seems to me that the marriage is highlighted in such a way as to make it quite unnecessary for there to be a specific recitation of the consideration of the impact on Mr. F. as an issue."

41. That decision was subsequently overturned on appeal but not on that particular point.

42. Having regard to the effect of those two decisions it seems to me that it is necessary to consider the papers before the Minister over all and to consider in those circumstances whether it could be said that the Minister was aware of the family circumstances of the applicants and that he would have been aware of the effect of any order on those involved. I have already referred to the material which was before the Minister as set out in the affidavit of Dan Kelleher. In the examination of file by the second supervisor it was noted as follows:

> "Mr. S's parents have residency in the State; however, Mr. S. is nineteen years old, an adult in his own right and has been resident in Nigeria without his parents for four years previous to his travel to this State."

43. It was also noted in that examination of file that:

> "his parents have been living in Ireland since 2001. He stated that he and his sister were living with his grandmother. He stated that his grandmother maltreated them and she would spend the money, which his parents sent on drink and parties. He stated that his parents returned to Nigeria in 2003 and applied for a visa to bring Mr. S. and his sister to Ireland; however they were refused."

44. In the examination of file by the first supervisor again reference was made to his family circumstances. It was noted as follows:

> "His parents … arrived in the State and claimed asylum on the 22nd February, 2001 and 01/05/2001 respectively. They withdrew their applications for asylum. On 15/07/2002 they were granted permission to remain in the state on the basis of parentage to an Irish born child. On his questionnaire Mr. S. stated that he had three siblings. His sister Miss Z.S. and his brother Mr. I.S. were born in the State on 03/06/2001 and 17/08/2004, respectively. He stated that his remaining sister was resident in Nigeria. He stated that he had been cared for by his paternal grandmother in Nigeria. In a personal statement submitted by the Refugee Legal Service, Mr. S. stated, inter alia that his grandmother was now deceased."

45. Under the heading "nature of person's connection with the State" it was stated as follows:

> "Mr. S's connection to the State lies in his application for asylum in the State. He is also the sibling of two Irish born children …. His parents have been granted residency in the State on the basis of their parentage to Irish born children."

46. Counsel on behalf of the respondent also relied on the decision in *McMichael v. The United Kingdom*, a decision of the European Court of Human Rights given on the 24th February, 1995 in which it was stated:

> "Article 8 contains no explicit procedural requirements, the decision making process leading to measures of interference must be fair and such as to afford due respect to the interest safeguarded by Article 8."

47. Having regard to the decisions to which I have referred, it seems to me that it is not necessary for the Minister to spell out specifically that he has considered the impact of the making of an order in circumstances where on the stated facts it must be abundantly clear that there would be an impact. The parents of the first named applicant reside in this jurisdiction. He has two siblings who were born in this jurisdiction. To paraphrase slightly the words of Ryan J. in the decision of *P.F. v. Minister for Justice*, it seems to me to be an untenable proposition that the family circumstances of the first named applicant and the impact of the deportation on the first named applicant and indeed the second and third named applicants and on his parents were not present to the mind of the respondent in making the decision to deport the first named applicant. The respondent had all the information in relation to the circumstances of the first named applicant. He knew the nature and extent of the family unit. It does not seem to me

to be necessary to specifically recite that the Minister considered the impact of the deportation on either the first named applicant or the second and third named applicants or indeed his parents or to state expressly that he considered Article 8.

48. One final point to make in respect of this issue is that whilst it is my view that the Minister in making his decision could not but have been aware that the decision would have an effect to impact on the second and third named applicants bearing in mind the nature of the decision being made, it is noteworthy that in the personal representations made on behalf of the first named applicant very little was said by the first named applicant in this regard. In setting out his family and domestic circumstances all that was put before the respondent was as follows:

> "Mr. S. is living at [ ] Co. Donegal. Mr. S. lives there with his parents; T. and B.A.S, his sister Z.S. aged five years and his brother I.S. who will be two years old in August. Mr. S's parents have been granted residency on the basis of having an Irish born child, they were granted residency rights in Ireland in June 2002. Mr. S's family have integrated well into the community in [ ], and Mr. S. as a part of that family has an expectation that he will be permitted to remain with them. …"

49. Thus it can be seen that little was said to the respondent as to the effect of the making of a deportation order in respect of its impact on the applicants as a whole. Nonetheless as I have indicated I fail to see how it could be suggested that in the circumstances of all the information before him could be said to have failed to consider the impact. Accordingly, I am satisfied that the decision cannot be vitiated on the basis of any lack of fair procedures in this regard.

50. The second issue I wish to deal with is the consideration of the Article 8 rights of the applicants and in particular of the first named applicant. It was submitted that there has been a disproportionate breach of their rights under Article 8 of the European Convention on Human Rights. The arguments in this regard raise a number of questions:

> 1. To what extent does Article 8 cover relations between siblings where the siblings include minors and adults?
>
> 2. What is understood by "family life"?
>
> 3. Has the State interfered with family life?
>
> 4. Is any interference justified?

51. In the context of considering the questions referred to above, it is important to bear in mind the approach of the applicants in this case. The applicants do not challenge the right of the respondent to make a deportation order and to require that the first named applicant remain outside the jurisdiction. They accept that to that extent the decision of the respondent is in accordance with law. Equally it is accepted that the deportation and requirement to remain outside the State is in pursuance of a legitimate aim, namely the control of the State's borders and entry into the State. However, it is said and this is the main thrust of their argument under Article 8.2 that any interference by the State in the exercise of the right to respect for private and family life must be "necessary in a democratic society". Thus it is said the interference must be justified and proportionate to the legitimate aim pursued. In this case, it is submitted that the requirement to remain outside the State is not proportionate to the legitimate aim pursued.

52. Accordingly, taking the first of these issues I want to refer to a number of authorities from the European Court of Human Rights which were opened in the course of argument. The first of these is *Olsson v. Sweden* [1989] 11 E.H.R.R. 259. In that the case the applicants complained that the taking of their children into public care, the refusal to terminate the care and the implementation of the care decision violated their right to family life under Article 8. The court held that there had been a violation of Article 8 on account of the manner in which the decision was implemented notwithstanding that its aim was to re-unite the family ultimately. Counsel on behalf of the applicants relied in particular on a passage from para. 81 of the judgment of the Court:

> "In point of fact the steps taken by the Swedish authorities ran counter to such an aim. The ties between members of the family and the prospects of their successful reunification will perforce be weakened if impediments are placed in the way of their having easy and regular access to each other. Yet the very placement of Helena and Thomas at so great a distance from their parents and from Stefan must have adversely affected the possibility of contacts between them. This situation was compounded by the restriction imposed by the authorities on parental access; whilst those restrictions may to a certain extent have been warranted by the applicant's attitude toward the foster families, it is not to be ruled out that the failure to establish a harmonious relationship was partly due to the distances involved. It is true that regular contacts were maintained between Helena and Thomas, but the reasons given by the Government for not placing them together are not convincing. It is also true that Stefan had special needs but this is not sufficient to justify the distance that separated him from the other two children."

53. The court went on to conclude at para. 82:

> "The measures taken in implementation of the care decision were not supported by the 'sufficient' reasons justifying them as proportionate to the legitimate aim pursued. They were therefore notwithstanding the domestic authority's margin of appreciation, not 'necessary in a democratic society.'"

54. The next case relied was *Boughanemi v. France* [1996] 22 E.H.R.R. 228, a case in which a Tunisian who had lived in France since 1968 was deported in 1988 after being convicted of a number criminal offences. He returned to France and lived there illegally with a French woman whose child he formally recognised in 1994. His parents, brothers and sisters were legally resident in France. On being deported again in October 1994 he complained of a violation of Article 8 of the Convention. At para. 35 of the judgment the court stated:

> "The court considers that the government's doubts as to the reality of family ties between Mr. Boughanemi and Ms. S. are not wholly unfounded. It would appear that their life together did not begin until after the applicants return as an illegal immigrant and only lasted one year. When he was deported for the second time the couple had already separated; this separation occurred several months before the child's birth.
>
> However these observations do not justify finding that the applicant had no private and family life in France.
>
> In the first place, Mr. Boughanemi recognised, admittedly somewhat belatedly, the child born to Ms. S. The concept of family life on which Article 8 is based embraces, even where there is no cohabitation, the tie between a parent and his or her child, regardless of whether or not the latter is legitimate. Although that tie may be broken by subsequent events, this can only happen in exceptional circumstances. In the present case neither the belated character of the former

recognition nor the applicant's alleged conduct in regard to the child constitutes such a circumstance.

Secondly Mr. Boughanemi's parents and his ten brothers and sisters are legally resident in France and there is no evidence that he has no ties with them. Mr. Boughanemi's deportation had the effect of separating him from them and from the child. It can therefore be regarded as an interference with the exercise of the right guaranteed under Article 8."

55. Counsel for the applicants placed reliance on that decision as showing that a deportation which would separate the applicant in that case, from his parents, his child and ten siblings could be regarded as an interference with his rights pursuant to Article 8 and thus it is argued that the same position is true in this case, that is that, the deportation of the first named applicant herein which would have the effect of separating him from his parents and his siblings could be regarded as an interference with the exercise of the right guaranteed under Article 8. In that particular case it was held that the applicant's deportation was not disproportionate to the aim pursued as the applicant had been found guilty of serious criminal offences. Reference was also made to the case of *Moustaquim v. Belgium* 13 E.H.R.R. 802 in which the court considered the question as to whether or not a deportation in the circumstances of that case had been "necessary in a democratic society". In that case it was held that whilst recognising that States had to take appropriate measures to ensure the maintenance of public order, the court said that where decisions were taken which might affect family life, they were not to be taken lightly. In the case concerned, the court felt that factors such as the family circumstances and his age at the time of the commission of a number offences meant that the decision did not show sufficient respect for the applicants right to family life and accordingly, it was found that there was a violation of Article 8.

56. Reliance was also placed on the decision in the case of *Radovanovic v. Austria*, an unpublished decision of the European Court of Human Rights delivered on the 22nd April, 2004. The applicant in that case had until he was ten years old resided for the most part in Serbia and Montenegro with his grandparents. In 1989 he went to live with his parents and sister in Austria where they had been residing lawfully. He also resided lawfully in Austria and ultimately received an unlimited resident's permit. Following convictions at the Vienna Juvenile Court, the Vienna Federal Police Office issued a residence prohibition of unlimited duration against the applicant. After serving a sentence in respect of his conviction it was proposed to expel him from Austria. At para. 28 of the judgment it was stated:

"28. The court notes that it was common ground between the parties that the resident's prohibition constituted an interference with the applicant's right to respect to his private and family life, as guaranteed by Article 8.1 of the Convention. Furthermore, there was no dispute that the interference was in accordance with the law and pursued a legitimate aim, namely the prevention of disorder or crime, within the meaning of Article 8.2 of the Convention. The court endorses this assessment.

29. The dispute in the case relates to the question of whether the interference was necessary in a democratic society.

30. The court recalls that no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention. Nevertheless, the expulsion of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life guaranteed by Article 8.1 of the Convention (see *Moustaquim v. Belgium*, Judgment of 18th February, 1991)."

57. Relying on that authority, counsel for the applicants submit that the effect of the order in this case requiring the first named applicant to remain outside the State has a disproportionate effect and that the relationship between the first named applicant, his siblings and parents will be profoundly affected. Thus it was argued that the order deporting the first named applicant and requiring him to remain outside the State does not achieve the balance between the legitimate aim of the State on the one hand and the rights of the applicants on the other hand. Finally reliance was placed by the applicants on the decision in the case of *Berrehab v. Netherlands* [1988] 11 E.H.R.R. 328 at para. 22 in which the court recognised that although the first named applicant in that case could travel to the Netherlands from Morocco on a temporary visa, the possibility of maintaining family relationships was theoretical in a situation where regular contact were essential in view of the very young age of the child of the applicant.

58. By way of contrast with those cases which were relied on in support of the applicant's arguments, counsel on behalf of the respondent argued that a contrary position was in fact the case in relation to family life. Reference was made to a decision of the second chamber of the European Court of Human Rights in a case called *Advic v. United Kingdom* [1995] 20 E.H.R.R, C.D. 125. In that case the applicant complained that the refusal to allow his application for re-entry to the United Kingdom amounted to a breach of his right to respect for this private and family life under Article 8. It would be helpful to examine the facts and circumstances of that particular case. The applicant was someone who had lawfully resided in the UK for eighteen years in the past and was seeking readmission. It was noted that the exclusion of a person from a country in which his close relatives reside, may raise an issue under Article 8 of the Convention. However, the nature of the link that exists between the relatives concerned has to be considered. In that particular case it was noted as follows at p. 126:

"Although this will depend on the circumstances of each particular case, the Commission has already considered that the protection of Article 8 did not cover links between adult brothers who had been living apart for a long period of time and who were not dependent on each other. … Moreover the relationship between a parent and an adult child would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties…."

59. In that particular case the applicant at the time of making the application had only one close relative in the United Kingdom a brother from whom he had been separated since 1975. There was no evidence to suggest that the applicant had been in any way financially dependent on him. He did however have children who had established themselves in the United Kingdom and this was apparently taken into consideration when looking at the decision. It was noted that the children were adults. Until the children had arrived in the United Kingdom they had lived with the applicant but there was no indication that the applicant now depended on them financially. The children at that stage were students who were dependent on the support of a local authority within the UK. The applicant's wife was also present in the United Kingdom when his appeal was examined, but she had been present on the basis of a visitor's visa and has since left the United Kingdom. It was held that her temporary presence in the United Kingdom could not create any right for the applicant under Article 8. In the circumstances it was held that it had not been shown that there existed sufficient links between the applicant and his relatives residing in the United Kingdom to give rise to the protection of Article 8 of the Convention. In those circumstances the application was found to be inadmissible on the basis that there was no breach of the applicants right to respect for his right to private and family life within the meaning of Article 8 of the Convention.

60. Another case *A and Family v. Sweden* was referred to in this context [1994] 18 E.H.R.R. C.D. 209. In that case it was noted:

"As regards the fact of the present case, the Commission observes that the applicants are Lebanese citizens, who entered Sweden in October 1990 following the alleged disappearance of their husband and father. In January the first

applicant the younger sister and her daughter were granted a permanent residence permit in Sweden and subsequently also the sister's husband. The first applicant's parents were granted permanent residence permits in Sweden in July 1990 and in September 1991 respectively. A further sister of the first applicant was granted a residence permit in Norway in 1993. The first applicant's brother and Aunt appear to be living in Lebanon.

The Commission recalls that the existence or not of family life falling within the scope of Article 8 will depend on a number of factors and on the circumstances of each particular case. Even if the applicants husband/father has disappeared, the Commission primarily considers that they must be regarded as an independent family unit. Thus, neither the first applicant's relationship with her parents and sister in Sweden, nor the other applicant's relationship with their grandparents and in that country could be regarded as 'family life' within the meaning of Article 8. Even assuming that the applicant's relationship with the whole of her extended family could be considered 'family life', the Commission observes that, contrary to the applicant's contention, these family members are not all resident in Sweden."

61. In that case it was found that a complaint under Article 8 was inadmissible.

62. 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 normal, 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.

63. 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.

64. As has been made clear in the cases referred to above the issue as to whether Article 8 rights have been engaged depending 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 his 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.

65. 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 on behalf of the respondent referred to the case of R. (Mahmood) v. Home Secretary [2001] 1 W.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 members of the family.

(4) Article 8 is likely to be violated by the expulsion 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."

66. Reliance was also placed on the judgment in *Agbonlahor v. Minister for Justice*, (Unreported, High Court, Feeney J. April 2007) in which he stated at p. 8 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."

67. 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."

68. 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 it. In the circumstances I do not accept that the State has interfered with the rights of the applicants to respect for family life.

69. 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 consider is whether the interference is justified by reference to Article 8.2 of the ECHR. 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."

70. 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.

71. The final leg of the argument made on behalf of the first named applicant relates to the proposal to deport, made pursuant to s. 3 of the Act of 1999. In the letter pursuant to s. 3(4) of the Act of 1999 the respondent as required by the subsection, gave the first named applicant a number of options. Section 3(4) of the Act of 1999 provides as follows:

> "A notification of a proposal of the Minister under subsection (3) shall include:
>
> (a) A statement that the person concerned may make representations in writing to the Minister within 15 working days of the sending to him or her of the notification,
>
> (b) A statement that the person may leave the State before the Minister decides the matter and shall require the person to so inform the Minister in writing and to furnish the Minister with information concerning his or her arrangements for leaving,
>
> (c) A statement that the person may consent to the making of the deportation order within 15 working days of the sending to him or her of the notification and that the Minister shall thereupon arrange for the removal of the person from the State as soon as practicable, and
>
> (d) Any other information which the Minister considers appropriate in the circumstances."

72. The first named applicant herein took the option of making representations. In the letter sent to the first named applicant on 22nd June, 2006 it was noted that if the option of making representations to remain temporarily in the State were made that:

> "In relation to the exercise of this option it is very important that you note the following:
>
> If following consideration of the application, the Minister decides to refuse temporary leave to remain you may be made subject to a deportation order, the consequences of which are outlined above. You may not be given the option of leaving voluntarily or consenting to deportation."

73. In those circumstances it seems to me that the first named applicant was fully aware of the consequences of the option he pursued. The options were clearly set out. Further it was never suggested by the first named applicant that he would leave the jurisdiction voluntarily if unsuccessful. The thrust of the arguments on behalf of the first named applicant in this regard is that the letter of the 22nd June, 2006 set out a number of options which left discretion to the respondent. It was emphasised that there were lesser interventions available to the respondent than the making of a deportation order and it was suggested that the Minister had not restricted the right to respect for family life in the least way possible. However the issue is not one that places the onus on the respondent as to the exercise of discretion. On the contrary it is the first named applicant who was given the options and he selected the option of making representations. Having selected that option it seems to me that there is no obligation on the Minister to consider giving the applicant in any given case a set of fresh options. That is not what s. 3 provides and it should be borne in mind that there is no challenge to the provisions of s. 3 in these proceedings. In the circumstances I do not accept that there has been any breach of the first named applicant's rights under the European Convention on Human Rights or the Constitution as asserted on behalf of the first named applicant. The decision of the respondent was taken pursuant to the lawful operation of immigration control and as was noted by Lord Bingham in the *Razgar* case "will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis". I am not satisfied that this is one of the small minority of exceptional cases. Finally, it should be noted that the applicants in relation to this case accepted that their constitutional rights mirrored those under the Convention.

74. In the circumstances it seems to me that applicants are not entitled to succeed in this application.