

THE HIGH COURT**JUDICIAL REVIEW****[2011 No. 975 J.R.]****BETWEEN**

C.O.O (NIGERIA) AND G.F.O (A MINOR SUING BY HER MOTHER AND NEXT FRIEND C.O.O) M.A.F.O (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND C.O.O) M.F.O (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND C.O.O)
APPLICANTS

AND**THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL****RESPONDENTS****JUDGMENT of Mr. Justice Robert Eagar delivered on the 4th day of March 2015**

1. This is an application for an order of *certiorari* by way of judicial review quashing the deportation orders directed to the Applicants dated the 5th August 2011 and further a declaration that the deportation of the Applicants violates the provisions of Article 8 of the European Convention on Human Rights and Fundamental Freedoms of 1950.

2. The grounds upon which the reliefs were sought are summarised in the claim that the first named Respondent failed and omitted to make the best interests of the infant Applicants a primary consideration in the first named Respondent's decision whether to make deportation orders in respect of them and the failure of the first named Respondent to consider the Applicants' constitutional rights.

3. The history of this matter is contained in the affidavit of C.O.O, the mother, who is the first Applicant and the mother of the other three infant Applicants. She is a Nigerian national and she was born in Nigeria on the 19th August 1967. She came to Ireland in December 2006 from Nigeria to seek asylum. She is married but has had no contact from her husband and the father of the three minor Applicants since she left Nigeria and in her affidavit she states she believes the relationship to be over. The first named Applicant had a son in the State on the 16th February 2007 by virtue of the Irish Nationality and Citizenship Act 2004 the child is not an Irish citizen.

4. The second named Applicant was born in Nigeria on the 12th May 2002 and arrived in the State on the 3rd September 2008 as an unaccompanied minor. The third named Applicant was born in Nigeria on the 4th November 2004. He arrived with the second named Applicant on the 3rd September 2008 as an unaccompanied minor. As said below the fourth named Applicant is the son of the first named Applicant having been born in Ireland on the 16th February 2007.

5. Applications were made by each of the Applicants for refugee status including an appeal to the Refugee Appeals Tribunal.

6. Subsequent to this the four Applicants applied to the first named Respondent for subsidiary protection but this was also unsuccessful and deportation orders were made on the 5th August 2011. It is this decision that is challenged by the Applicants.

7. Counsel on behalf of the Applicants indicated that the examination of the files undertaken pursuant to the provisions of s.3 (6) of the Immigration Act 1999 (as amended) did not refer to "the best interests of the child". In particular he complains that in the case of the child born in Ireland, the fourth named Applicant, there is no examination of his interests undertaken at all, his case being subsumed completely into his mother's claim. In the case of the second and third named Applicants there is nothing beyond a recording of age and class in school. He referred to the case of *Dos Santos v. The Minister for Justice & Ors* [2014] IEHC 559, a judgment of McDermott J. He also contended that there was no application of whether the proposed deportations would offend the provisions of the Constitution of Ireland and in particular Article 40.3, Article 41 and Article 42. He also contended that the Supreme Court decision in *Oguekwe v. The Minister for Justice Equality and Law Reform* [2008] IEHC 25 required the first named Respondent to consider the Applicants' rights under the European Convention on Human Rights and Fundamental Freedoms of 1950. He submitted that the first named Respondent accepted that the deportations are an interference with family life and proceeds to conclude that there is no grave interference.

8. He also referred to the provisions of the Thirty-First Amendment of the Constitution. This provides for an Article expressly related to children's rights. The Thirty-First Amendment is currently the subject of a legal challenge. The *Jordan* Case has been heard by the Supreme Court and judgment has been reserved by that court.

9. Counsel on behalf of the Respondent argued that the quality of life that the Applicants will experience in Ireland may be higher than that which they expect to enjoy in Nigeria. He submitted that the first named Respondent considered the welfare of the minor Applicants and concluded that it was best served by them remaining with the first named Applicant and he referred in particular to *Dos Santos*, a decision of McDermott J. on the 19th November 2014. He also referred to the decision of *Dada v. The Minister for Justice Equality and Law Reform* [2006] IEHC 140 a, decision of O'Neill J. He also referred to the decision of *Adeniron v. The Minister for Justice Equality and Law Reform* [2010] IEHC 92, where Clark J. held that the deportation of a Nigerian mother and children all of whom were failed asylum seekers did not involve any interference with family rights under Article 8 of the Convention. He also referred to *R. (Mahmood) v. The Home Secretary* [2001] 1WLR 840 where the House of Lords laid down the English and Welsh position under the European Convention on Human Rights in relation to asylum seekers. He also referred to the judgment of MacEochaidh J. in the application for leave to seek judicial review in the case of *Dos Santos & Ors v. The Minister for Justice Equality and Law Reform & Ors* which was delivered by him on the 30th May 2013.

Examination of file by the first named Respondent

10. The relevant provisions for this are contained in s.3 of the Immigration Act 1999 as amended by the Illegal Immigrants (Trafficking) Act 2000. Section 3 provides for the first named Respondent to make a deportation order by requiring any non nationals

specified in the order to leave the State within such period as may be specified in the order and to remain thereafter out of the State. Section 3 (6) sets out the issues which the first named Respondent shall have regard to in making a deportation order.

11. Section 3(6) states as follows:-

"(6) In determining whether to make a deportation order in relation to a person, the Minister shall have regard to—

(a) the Age of the person; (this Court's emphasis)

(b) the Duration of residence in the State of the person; (this Court's emphasis)

(c) the family and domestic circumstances of the person;

(d) the nature of the person's connection with the State, if any; (this Court's emphasis)

(e) the employment (including self-employment) record of the person;

(f) the employment (including self-employment) prospects of the person;

(g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions); (this Court's emphasis)

(h) humanitarian considerations;

(i) any representations duly made by or on behalf of the person;

(j) the common good; and

(k) considerations of national security and public policy, so far as they appear or are known to the Minister."

12. In this case the deportation orders were made by the first named Respondent on the 5th August 2011 and I propose to deal with the issues raised by and on behalf of the first named Respondent.

a) Age

The examination of the file in relation to C.O.O. included an examination in relation to M.F.O. the fourth named Applicant. That decision marked the ages of the two Applicants at the time of writing the submission.

b) Duration of residence in the State of the Person

This was also dealt with in relation to the arrival in the State of the first named Applicant on the birth of the fourth named Applicant in Ireland.

c) The family and domestic circumstances of the person

It is noted by the executive officer that at her asylum interview she also mentioned three children who were her husband's born between March 1994 and July 1996 and that no details were given in relation to these children. The domestic circumstances as set out by the executive officer are that the second and third named Applicants arrived in the State as unaccompanied minors and have been reunited with their mother and they are all living together. Nothing further is said of the domestic circumstances.

d) Nature of persons connected with the State

This is briefly mentioned as the connection to the State of the first named Applicant lies in her application for asylum in the State.

e) Employment (including self employment) record of the person

Asylum seekers in Ireland are not entitled to work. Ireland is one of two EU Member States (the other is Lithuania) which bars asylum seekers from working under all circumstances. It appears to me somewhat unnecessary to enquire into the employment, including self employment, of a person who has applied for asylum and failed and will be subject to a deportation order.

It is useful to know that the first named Applicant had participated in a FETAC accredited child development and play course organised by a community development project in Athlone. She had also undertaken voluntary work in a church in which she is an active member. She had also done some voluntary work at a local primary school for a number of months providing breakfast for children in a breakfast club. She had also attended courses in sewing, crafts, cookery, home management and first aid. She has also been a volunteer with the local Tidy Towns giving two to three hours per week and the second named and third named Applicants attended a local school.

f) The Employment prospects(including self employment) of the person

The executive officer confirms that the first named Applicant is not permitted by law to work in the State. She goes on to say that if she was permitted to work, her prospects of obtaining employment would be poor in the current economic climate and quotes a Department of Finance Economic Bulletin for April 2010 and an article from the Irish Times of April 2010 indicating that a possible return to growth in the Irish economy would not result in any increased employment and states that the Irish economy is still experiencing a severe recession and further states that the first named Applicant's chances of obtaining employment are poor.

g) The character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions)

Clear information was provided that she had not come to the adverse attention of the Gardai and representations were made of her good character. These were from Irish citizens who knew the first named Applicant. The executive officer did not make any comment on the representations in relation to character of the first named Respondent having outlined the various good references submitted.

h) Humanitarian considerations

Smith & Co, Solicitors had submitted that C.O.O and her son M.F.O suffer from asthma and they both require regular medical treatment in this respect. A medical report from a doctor on behalf of both stated that they both suffer from asthma and that the first named Applicant requires regular medication and the fourth named Applicant requires an inhaler on a permanent basis currently. They both need to attend surgery on a frequent basis because of that asthma. The executive officer concludes that having considered the humanitarian information on file in this case there is nothing to suggest that the first and fourth named Applicants should not be returned to Nigeria.

i) Representations made on behalf of the Applicants

These representations suggest that the first named Applicant had made significant efforts to improve her circumstances since arriving in the State and had not come to the adverse attention of the Gardai. She had participated in many courses and undertaken voluntary work and could readily find employment if permitted to reside and work in the State. She was also extremely anxious to regularise her status in the State for the benefit of her children. It was further submitted that due to the prevailing social, economic and political conditions in Nigeria it was not safe to return there and would also deny the benefits afforded to them in Ireland with regard to healthcare, education and other forms of assistance provided for the State.

It was also submitted that the first named Applicant would not have much money if she returned as she cannot locate her husband and fears he may be dead. The Country of Origin Information had also been included. I note that the sworn evidence of the first named applicant where she states at para. 6:-

"I say that I have no home and no means of livelihood or support in Nigeria although a single mother with responsibility for three young children I and they would receive no social support of any form and that they would be extremely vulnerable to serious harm".

She also says that she has no means of feeding or caring for her children there. She would fear greatly for her children's survival. She also continues to be in fear of those persons who threatened her life. She further states at para. 7:-

"I say that I am advised that the first named Respondent states that the fourth named Applicant is a Nigerian national. I say although he does have a right to acquire Nigerian citizenship that this has not occurred. I say I do not wish him to acquire Nigerian nationality. I do not believe that he can have a healthy and normal childhood, or that he could develop, in that country. I say that my wish and my hope is that he and his brother and sister may grow up in Ireland where they are happy and feel at home and most importantly are healthy, safe and secure."

j) The common good

The executive officer indicates that it was in the interests of the common good to uphold the integrity of the asylum and immigration procedures of the State.

k) Consideration of national security and public policy

The executive officer finds that considerations of national security and public policy do not have a bearing on this case.

13. Country of Origin Information was then considered by the executive officer. An Open Society Justice Initiative Report of May 2010 said:-

"The national police force of Nigeria was the largest institution in Nigeria and the country's largest employer."

She also continued:-

"...policing in Nigeria is also characterised by pervasive corruption, such as diverting police resources for personal protection or enrichment in a variety of police-for-hire arrangements, harassment and intimidation of victims and the destruction of evidence including the bodies of victims of extra judicial executions. Officers routinely practice extortion on members of the public at road blocks and public highways...for a majority of police officers, the police uniform is a tool for generating income."

14. An Amnesty International Report of the 9th December 2009 which was mentioned by the executive officer says that the Nigerian police force has a complaints mechanism in place but most complaints against law enforcement officials are not processed.

15. She considered political violence and quotes an Action Aid Report of the 31st May 2010:-

"Observers at the Nigerian political terrain are, in the majority, in agreement that acts of political violence remain major threats to the credibility of the country's elections."

16. With regard to the treatment of failed asylum seekers the British/Danish Fact- Finding Mission Report, published in October 2008, said that it was not illegal for Nigerians to travel abroad and apply for asylum. Therefore the Nigerian Immigration Service and the police would have no legal basis to detain and arrest a returned failed asylum seeker.

17. With regard to women, the Freedom House Report is cited by the executive officer – Freedom in the World 2009 Nigeria, covering events in 2008 and released on the 16th November 2009. This report observed:-

"Nigerian women face social societal discrimination, although their educational opportunities have eroded a number of barriers over the years. In some ethnic groups women are denied equal rights to inherit property and spousal rape is not considered a crime. Many women are subjected to female genital mutilation although the precise incidents are unknown. While the Federal Government publicly opposes FGM it has taken no action to ban the practice..."

18. Human trafficking to, from and within the country for the purpose of labour and prostitution is reported to be on the rise.

19. In relation to social and economic rights an executive officer quoted the US State Department Country Report on Human Rights Practices (2009 Nigeria) released on the 11th March 2010 which stated that: -

"Some women made considerable progress in both the academic and business worlds, but women overall remained

marginalised. No laws barred women from owning land but some customary land tenures allowed only men to own land and women could gain access to land only through their marriage or family. Many customary practices also did not recognise a woman's right to inherit her husband's property and many widows became destitute when their in-laws took virtually all of the deceased's property."

20. In relation to children the report of the United Nations Children's Fund (UNICEF) assessed on the 28th May 2010 provided information about children in the country:-

"Health, healthcare and general living conditions in Nigeria are poor, especially for children and women. Infant and under five mortality rates are high. The weakened public health care system with low coverage of key interventions has resulted in the persistence of a high disease burden."

In relation to HIV/AIDS the report states:-

"This remains a major issue of concern among children, young people and women in Nigeria...the epidemic is increasing the population of orphans in the country which is already estimated at 7 million. Nigeria's education system is also in a state of neglect largely due its decaying institutional infrastructure."

21. In relation to medical issues the executive officer quoted the International Organisation for Migration Country Sheet for Nigeria:-

"Public (State owned) Hospitals. These consist of general Hospitals, as well as University teaching and specialist Hospitals. Charges are moderate but some of them lack equipment and adequate amenities. There are often delays and a large number of patients mean they may not be attended to promptly."

22. The next issue is the consideration under Article 8 of the European Convention on Human Rights in respect for private and family life. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ratified by Ireland on the 25th February 1953 reads:-

"Article 8

Right to respect for private and family life

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 wellbeing 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. The executive officer quoted the five questions which are likely to be addressed when considering Article 8 rights in the context of a proposal to remove an individual and cited the case of *R. (Razgar) v. The Home Secretary* [2004] 2AC 368. This concerned an Iraqi Kurd who entered the United Kingdom from Germany and claimed asylum in 1999.

1) The Court of Appeal held that having regard to the jurisprudence of the European Court of Human Rights, the right to respect for private life, guaranteed by Article 8 protected those features of a person's private life which are integral to his identity or ability to function socially and preservation of mental stability was recognised to be an indispensable precondition to effective enjoyment of the right. That such rights could exceptionally be engaged by the foreseeable consequences for health of removal pursuant to an immigration decision, where a claimant could demonstrate grave interference such as would amount to a flagrant denial of the right but that removal could not be resisted merely because medical treatment or facilities in the removing country were better or more accessible than the receiving country.

2) On an application for judicial review of the Secretary of State's decision to certify, the reviewing court would exercise a supervisory jurisdiction adopting such careful scrutiny as was required when an irrevocable step, potentially in breach of fundamental human rights was an issue, that in considering whether a challenge to the Secretary of State's removal decision would necessarily clearly fail the reviewing court will consider how, if there were an appeal, it would fair before an adjudicator. It would ask and determine the same questions namely whether removal would interfere with the Applicant's right under Article 8 (1) to a sufficiently serious extent as to potentially engage that Article. That is so whether striking a fair balance between his rights and the wider interests of the community such interference was justified under Article 8(2).

24. In the course of the judgment the five questions which are likely to be addressed when considering Article 8 rights in the context of a proposal to remove an individual are as follows:

1) Will the proposed removal be an interference by a public authority with the exercise of the Applicant's right to respect for his private or as the case may be family life?

2) If so, will such interference have consequences of gravity as potentially to engage the operation of Article 8?

3) If so, is such interference in accordance with the law?

4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder and crime, for the protection of health or morals or for the protection of rights and freedoms of others?

5) If so, is such interference proportionate to the legitimate public aim sought to be achieved?

25. The executive officer in considering the first question accepted that the decision by the first named Respondent to deport may constitute an interference with the Applicants' right to respect for their private lives within the meaning of Article 8 (1) of the ECHR. She outlines this related to their educational and other social ties that they have been formed in the State as well as any matters relating to their personal development since their arrival in the State. In relation to family life she then outlines that the Applicant is a married woman with three children. Her other three children are not Irish citizens and all were unsuccessful asylum claimants. She

suggested that a decision to deport the Applicants would not constitute an interference with the right to respect for the family life under Article 8 of the ECHR and made a recommendation which was subsequently acted upon that the first named Respondent make deportation orders.

26. The role of this court as outlined by *Razgar* is to exercise a supervisory jurisdiction, adopting such careful scrutiny as was required where an irrevocable step, potentially in breach of fundamental human rights, was an issue.

27. McDermott J. delivered a judgment on the 19th day of November 2014 in the case of *Dos Santos & Ors v. The Minister for Justice Equality & Ors* [2014] IEHC 559. The Applicants were Brazilian nationals some of whom had been in the State from 2002. They had not applied for any form of protection from the State but just lived in Ireland until their status was questioned by the Garda National Immigration Bureau. In dealing with Article 41 and the welfare of the children and parental responsibility McDermott J. indicated that:-

"Though all the Applicants are non-citizens, they constitute a family vested with rights under Article 41 which recognises the family as the natural, primary and fundamental unit group of society and a moral institution possessing inalienable and imprescriptible rights antecedent and superior to all positive law, which the State guarantees to protect in its Constitution and authority."

He continued:-

"These rights are not absolute and unqualified."

He further continued that:-

"...the Applicants are non-nationals. They do not have a constitutional right to reside in the State. The constitutional rights of the family are in no way compromised by its deportation. Its unity will be maintained. The parents have no right to choose that they and the children should remain in the state. Their decision is clearly circumscribed by immigration law which they have flouted in a planned way since 2003."

28. He also dealt with Article 40.3 of the Constitution:-

"A child possesses constitutional rights as a member of a family unit and an individual. There is a constitutional presumption that the welfare of the child, including his/her religious, moral, intellectual, physical and social needs, is to be found with the family..."

29. McDermott J. continued that the core element of any consideration lies in the effect of the disruption of family and the consequences for the child of deportation.

30. McDermott J. decided:-

"The court is not satisfied on the basis of these authorities, that a non-national child illegally in the State has a right under Article 40.3 to a private life consisting of a right to remain in the State and/or participate in community life whether at national or local level. No authority was cited in support of the existence of such a right."

31. It is interesting to note that the family in the *Dos Santos* case never had a formal legal status within Ireland. In this case it is clear that from the time that the Applicants came to Ireland and applied for refugee status they were illegally in the State. That situation changed when the Refugee Appeals Tribunal made a judgment on their appeal and agreed with the Refugee Applications Commissioner that they were not to be recognised as refugees. At that stage the Minister would have written to them indicating that she proposed to deport them and at that stage their situation may have changed. However I do make the point that McDermott J's decision in *Dos Santos* is somewhat different to that of the Applicants in this case.

32. I now propose to look at the consideration given by the first named Respondent to the three children. In the case of the youngest child and fourth named Applicant M.F.O. the determination in relation to his case was included in the examination of the file of the first named Applicant, his mother.

33. The fourth named Applicant was born in Ireland but is not a citizen of the State. At the time of the decision he was 3 years and 7 months old and is now 7 years of age. Section 3(6) of the Immigration Act 1999 as amended by the Illegal Immigrations (Trafficking) Act 2000 is quite clear in its terms where the first named Respondent *"in determining whether to make a deportation order in relation to a person, the Minister shall have regard to etc"*. It is in my view not sufficient for the first named Respondent to make a determination to consider the situation of a child born in Ireland (although not an Irish citizen) in conjunction with that of his mother, in this case the first named Applicant. In this regard I believe that the first named Respondent has failed to adequately examine the position of the fourth named Applicant and in those circumstances I will grant an order of *certiorari* quashing the purported deportation order relating to the fourth named Applicant.

34. In relation to the second and third named Applicants the executive officer on behalf of the first named Respondent considered the position of G.F.O, the second named Applicant and M.A.F.O, the third named Applicant using the headings provided by s. 3 (6) of the Immigration Act (as amended). At the time of the examination the second named Respondent was 8 years and 3 months old and it is noted that the executive officer identified the nature of the person's connection with the State as lying in her application for asylum in the State. The reality was that in fact she was in school in the State. This appears not to have been included in the connections to the State.

35. The executive officer reviewed the position of children and dealing with health, healthcare and general living conditions in Nigeria and I am not satisfied that the first named Respondent has failed in an adequate assessment of the second named Applicant. The same applies in respect of the third named Respondent. However this court is of the view that should the Thirty-First Amendment of the Constitution become law the obligations on the first named Respondent with regard to the second and third named Applicants would change remarkably. The first named Respondent will have to give far greater consideration to the welfare of an Applicant child than the balancing test which is approved by the rules in *Razgar*. As the Thirty-First Amendment of the Constitution can have no relevance at this stage I am bound to find and I must refuse the application for *certiorari* of the deportations of the first named, second named and third named Applicants.

36. In those circumstances I am quashing the decision of the first named Respondent in respect of the fourth named Applicant but refuse the application for *certiorari* in the case of the first, second and third named Respondents.

37. However this court is of the view that had the Thirty-First Amendment to the Constitution become law the obligations on the first named Respondent with regard to the second and third named Respondents would have to be taken into account and it is clear that the first named Respondent will have to give far greater consideration to the welfare of Applicant's children than the balance in which is approved by the rules in *Razgar*.

38. As Article 42A.4.1 of the Constitution can have no relevance at this stage to these proceedings. I am bound to find that I must refuse the application for *certiorari* of the deportation orders of the Applicants.