Neutral Citation Number: [2008] IEHC 433

THE HIGH COURT

2006 1155 JR

BETWEEN

**E. O., S. O. (A MINOR, SUING BY HIS MOTHER AND NEXT FRIEND E. O.),
D.O. (A MINOR, SUING BY HER MOTHER AND NEXT FRIEND E. O.) AND
J. O. (A MINOR, SUING BY HIS MOTHER AND NEXT FRIEND E. O.)**

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, THE REFUGEE APPEALS TRIBUNAL, THE REFUGEE APPLICATIONS COMMISSIONER, THE ATTORNEY GENERAL, AND IRELAND

RESPONDENTS

AND

HUMAN RIGHTS COMMISSION

NOTICE PARTY

Judgment of Mr. Justice Hedigan delivered on the 18th day of December, 2008.

1. The applicants are seeking leave to apply for judicial review of two decisions:-

> (i) The decision of the Minister for Justice, Equality and Law Reform ("the Minister") to make deportation orders in respect of the first, second and third named applicants; and
>
> (ii) The decision of the Refugee Appeals Tribunal ("RAT") to affirm the earlier recommendation of the Office of the Refugee Applications Commissioner ("ORAC") that the third named applicant should not be granted a declaration of refugee status.

Background

2. Each of the applicants in this case is a national of Nigeria. The first named applicant is the mother of the second, third and fourth named applicants, who are minors. The second and third named applicants were born in Nigeria in 2002 and 2004, respectively. The first named applicant applied for asylum upon arrival in the State on 3rd October, 2005; she gave consent for the second and third named applicants to be included under her application. She claimed that she fled Nigeria in 2005 after suffering persecution as a result of difficulties experienced by her husband (*Oke O.*) over chieftaincy matters; she stated that they had to re-locate on a number of occasions and that she was sexually abused and raped many times. She said that her husband had been kidnapped and she did not know where he was, and that her husband's friend, Emmanuel, arranged their travel and accompanied them to Ireland.

3. A negative recommendation issued from ORAC in respect of the first, second and third named applicants. Their appeal to the RAT was rejected by decision dated 6th March, 2006; that decision was notified to them on the same day. Soon afterwards, on 31st May, 2006, the first named applicant gave birth to the fourth named applicant. Some confusion surrounds the identity of his father; the first named applicant's husband, *Oke O.*, is named on his birth certificate but it has been submitted that he is, in fact, the son of *Emmanuel*, who is variously described as *Oke O.'s* friend and manager, and who it appears the first named applicant says raped her in Nigeria. In any event, the fourth named applicant was not included under the first named applicant's original asylum application; the ORAC and RAT decisions do not therefore relate to him. He remains in the asylum process.

4. The first named applicant was informed in March, 2006 that the Minister was proposing to make deportation orders in respect of her and the second and third named applicants. Representations seeking leave to remain in the State were made and considered, and deportation orders were made in respect of the first, second and third named applicants; those orders were notified to them on 15th September, 2006.

Extension of Time: The RAT Decision

5. The Notice of Motion herein was instituted on 27th September, 2006. The applicants are therefore outside of the 14 day time limit set out in s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000, by a period of six months and one week in respect of the RAT decision. Just one paragraph of the first named applicant's grounding affidavit addressed this substantial period of delay. In that paragraph, she simply states that she had always wished to challenge the RAT decision but failed to get any advice relating to the notification to her of the RAT decision. She instructed her current solicitors only after the deportation orders were notified to her.

6. Reliance is placed on the judgment of Peart J. in *Ojuade v. The Refugee Applications Commissioner & Anor* (Unreported, High Court, Peart J., 2nd May, 2008), wherein the judgment of the Supreme Court in *A.N. & Ors v. The Minister for Justice, Equality and Law Reform* [2007] IESC 44 was interpreted with respect to the extension of time in the case of a minor. Peart J. held as follows:-

> "In my view, since the second named applicant is a minor, and one of very tender years, she ought not to be refused an extension of time simply because the court is satisfied that her mother, the first named applicant, did not act in time to seek to challenge decisions made which affect her also."

7. The respondents oppose the extension of time. It is argued that the explanation offered by the first named applicant in her grounding affidavit is wholly inadequate. It is complained that the first named applicant implicitly impugns the conduct of the RLS members who were acting for the applicants at the time of the RAT decision, and it is argued that those complaints are utterly unsubstantiated. It is complained that the RLS were not named as notice parties and could easily have been so named. Reliance is placed on the following passage in the ex tempore judgment *in Jolly v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Finlay Geoghegan J., 6th November, 2003):-

> "This court may only consider extending the time where what might be considered to be good and sufficient reasons are set out on affidavit either by the applicant or on some other person swearing an affidavit or making a declaration on his behalf."

8. In that case, Finlay Geoghegan J. refused to extend time on the basis that no reference was made to the delay in the applicant's affidavit, nor did that affidavit set out any grounds or facts which would permit the court to consider exercising its discretion under s. 5(2)(a) of the Act of 2000. The respondents submit that although consideration of an application for an extension of time will normally require consideration of the merits, in accordance with the judgment of McGuinness J. in *C.S. v. The Minister for Justice, Equality and Law Reform* (Unreported, Supreme Court, 27th July, 2004), in circumstances such as the present where no reasonable explanation is

provided on affidavit, the court need not examine the merits.

9. Further reliance is placed on the judgment of Gilligan J. *in Bugovski v. The Minister for Justice, Equality and Law Reform* [2005] IEHC 78; it is argued that that decision is on all fours with the within case. Gilligan J. refused to grant an extension of time on the basis that in that case, in the absence of a "clear oversight or errors by the lawyers previously acting for the applicant", it was clear that:-

> "[…] the applicant does not have a very strong or indeed almost unanswerable case on the merits of the substantive action and there is no question that an obvious or substantial injustice would be done to him if he was deprived of the opportunity to litigate his claim."

10. The respondents submit that the same standard should be applied in the present case.

Conclusion on the Extension of Time
11. In *K.A. & Anor v. The Refugee Applications Commissioner* [2008] IEHC 314, this Court indicated that it would adopt the approach taken by Peart J. in *Ojuade* without hesitation, and that I concur that a minor applicant, who can really only speak through his or her parents, should not be penalised for that parent's failure to act with all due expedition. That notwithstanding, I took the view that *Ojuade* is not authority for the proposition that an extension of time should be granted to minor applicants as a matter of course. I have considered the grounds advanced by the applicants in respect of their challenge to the RAT decision, and I have considered the explanation that the applicants have advanced in support of their application for an extension of time. As this Court noted in *O.S.T. v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Hedigan J., 12th December, 2008), where there has been a lengthy period of inordinate delay such as in the present case, an extension of time may be given only where reasonable, clear and credible reasons of some weight are proffered so as to explain the delay. This is because the 14-day period that is set out in the Act of 2000 must be regarded with the utmost seriousness. That 14-day period applies without exception, whether the applicant is a minor or not.

12. As was the case in *O.S.T.*, it is my view that the applicant has failed to advance any such reasons in the present case. The matters set out in the first named applicant's grounding affidavit are insufficient to explain the six month delay between the notification of the RAT decision to the applicants and the issue of the within proceedings. In the circumstances, I am not satisfied that there is good and sufficient reason to extend time with respect to the RAT decision.

13. This application proceeds, therefore, with respect only to the Minister's decision to make a deportation order. That being so, it is helpful to further outline the context and nature of that decision.

The Minister's Decision to make Deportation Orders
14. Three sets of representations were made by the Refugee Legal Service (RLS), seeking leave to remain temporarily in the State on behalf of the first, second and third named applicants. In a letter dated 10th April, 2006, which put forward submissions on the various matters to which the Minister is obliged to have regard under s. 3(6) of the Immigration Act 1999, it was stated that the first named applicant lived with her son and daughter and was pregnant with a further child; no reference was made to her marital status or the whereabouts of her husband. The first named applicant's personal statement was submitted by letter dated 20th April, 2006; at the end of the statement she noted briefly that her husband was "alive and well" in Ireland. Also submitted to the Minister was a letter from a Senior Social Work Practitioner at the Rotunda Hospital, dated 6th April, 2006; therein, reference was made *inter alia* to the fact that the first named applicant had indicated that her husband was in Cloverhill prison pending a decision. A number of other documents, including letters of reference, were also submitted.

15. An Executive Officer of the Minister's Department gave consideration to the first, second and third named applicants' file under s. 5 of the Refugee Act 1996, and s. 3(6) (h) and (i) of the Immigration Act 1999, and a Clerical Officer gave consideration to the file under s. 3(6) (a) to (g) of the Act of 1999. The Executive Officer also set out considerations relating to the Irish-born fourth named applicant. She noted that he is not an Irish citizen, and is entitled to Nigerian citizenship. She also noted that the first named applicant's husband is in the State, having arrived on 20th February, 2006; she noted that his asylum application was then before the RAT. She cited the judgment of the Supreme Court in P, B, and L with respect to the Minister's discretion to deport a person whose application for asylum had been refused, even though that person's partner had an application for leave to remain pending.

16. In the course of the Clerical Officer's analysis, consideration was given to the applicants' family and domestic circumstances under s. 3(6)(c) of the Immigration Act 1999. The Officer set out that the first named applicant was married with two children, and that she had stated that she did not know the whereabouts of her husband. He stated that a check with the Department of Social and Family Affairs had revealed that the first named applicant had given birth to a son in Ireland. He also noted that the Department's records showed that the first named applicant's husband was also in the State, and reference was made to the letter of the Social Worker to the effect that the husband was, on 4th April, 2006, in Cloverhill prison.

17. Both Officers recommended that deportation orders should be made in respect of the first, second and third named applicants. That recommendation was approved by an Assistant Principal and the Minister's decision to make three deportation orders was notified to the applicants by letter dated 15th September, 2006.

The Submissions
18. The applicants' primary submissions in respect of the impugned decision may be summarised as follows:-

a. Flawed consideration of Article 8 rights; and

b. Mistake of fact.

(a) Treatment of Article 8 rights
19. The applicants contend that the Minister failed to adequately assess the proportionality of the proposed interference with the right to respect for their family life under Article 8 of the European Convention on Human Rights. It is submitted that where a deportation has the potential to interfere with the family rights of an applicant, the proportionality of that interference must be assessed under Article 8(2) of the Convention. Reliance is placed on *Spartariu v. The Minister for Justice, Equality and Law Reform* [2005] IEHC 104, where Peart J. held that it was at least arguable that where the Minister is proposing to make a decision that would infringe rights protected under the Convention or the Constitution, the Minister must carry out "the exercise of considering and balancing the competing interests and factors", as appears to be required under the jurisprudence of the Strasbourg Court, in order to

be satisfied that the measure is necessary in a democratic society and proportionate to the aim pursued. It is submitted that the *Spartariu* case preceded a number of other judgments to similar effect, culminating in the decision of the Supreme Court in *Oguekwe v. The Minister for Justice, Equality and Law Reform* [2008] IESC 25. It is submitted that such a balancing of interests was required particularly in circumstances where there had not yet been a final determination as to persecutory risk faced in Nigeria by the first named applicant's husband, or the fourth named applicant.

20. With respect to the balancing of interests, the respondents rely on the judgment of Dunne J. in *Sanni v. The Minister for Justice, Equality and Law Reform* [2007] IEHC 398, wherein it is stated that it is necessary for the Minister to consider whether, on a consideration of the papers as a whole, the Minister was aware of the family circumstances.

21. The applicants further contend that the Minister erred by failing to consider the rights of the family as a whole, including the fourth named applicant and the first named applicant's husband (i.e. the second and third named applicants' father), albeit that their deportation was not proposed and their files were not under consideration. It is argued that the Minister was aware that mother, father and three minors were together in the State and that in the circumstances, the entirety of that family should have been considered. Reliance is placed on the decision of the House of Lords *in Beoku-Betts (FC) v. Secretary of State for the Home Department* [2008] 3 W.L.R. 166, wherein Baroness Hale held (at p.168) as follows:-

> "To insist that an appeal to the Asylum and Immigration Tribunal consider only the effect upon other family members as it affects the appellant, and that a judicial review brought by other family members considers only the effect upon the appellant as it affects them, is not only artificial and impracticable. It also risks missing the central point about family life, which is that the whole is greater than the sum of its individual parts. The right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed."

22. The respondents submit that the family and domestic circumstances of the applicants were fully considered in the departmental analysis; it is submitted that reference was made in the analysis carried out by the Clerical Officer with respect to s. 3(6)(c) of the Immigration Act 1999, not only to the information contained in the three sets of representations made by the RLS on behalf of the applicants, seeking leave to remain, but that the analysing officer went further and carried out checks with respect to the birth of the fourth named applicant and the status of the first named applicant's husband. It is further submitted that detailed consideration was given by the Executive Officer to the situation of the fourth named applicant.

23. With respect to *Beoku-Betts*, the respondents have referred the court to para. 12 of the House of Lords' judgment, where it was noted that the evidence relating to the appellants' family included a number of statements from members of the appellant's family, and that it was undisputed that the family was close-knit and interacted on a very regular basis, that the appellant had a strong relationship with his sisters, that he then resided with his mother and younger sister, and that he had a range of cousins and uncles in the UK. It was also accepted that his mother relied upon him for emotional support in the aftermath of the family's departure from their country of origin. The respondents submit that the nature of the evidence put before the English Immigration Appeal Tribunal in that case was much more comprehensive than the evidence put before the Minister in the present case.

24. The Court has also been referred to the Strasbourg case of *Sezen v. The Netherlands* (2006) 43 E.H.R.R. 621, which was considered by the House of Lords, and which relates to "a functioning family unit where the parents and children are living together". It is submitted that there is no functioning family unit in the present case outside of the first named applicant and her children; upon the information that was before the Minister, there was no indication that the first named applicant's husband forms part of the functioning family unit.

(b) Mistake of Fact
25. It is complained that the Minister has erred with respect to the name of the fourth named applicant in the s. 3 analysis; reference is made to a child named "Paul Toluwalope, born in the State on 10 February, 2005". It is accepted that this is a typographical error, but it is argued that no 'slip' rule applies in respect of deportation orders.

26. The respondents submit that it is clear from the decision that the official is dealing with the fourth named applicant; it is submitted that any error that was made in respect of his name cannot be fatal to the validity of the decision.

The Court's Assessment
27. This being an application to which s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000, applies, the applicants must show substantial grounds for the contention that the Minister's decision ought to be quashed. As is now well established, this means that grounds must be shown that are reasonable, arguable and weighty, as opposed to trivial or tenuous.

(a) Treatment of Article 8 rights
28. It seems clear to me that the Minister's treatment of the first, second and third named applicants' family rights must be viewed in the light of the information that was before him. At the outset, it must be noted that the first named applicant was particularly parsimonious with information at the leave to remain stage in the within case. The inference may even be drawn that she deliberately did not put to the Minister that her husband was a part of their functioning family unit. Three sets of representations were made on behalf of the applicants seeking leave to remain temporarily in the State. Only two passing references were made to the husband in those representations, one by the first named applicant's Social Work Practitioner, relaying information given to her by the first named applicant, and one by the first named applicant herself as what might be seen as an afterthought in her personal statement. No reference was made to the first named applicant's husband in the representations that were drafted by the RLS with respect to the various matters that require consideration under s. 3(6) of the Act of 1999; it is noteworthy that those representations were forwarded four days after the letter was written by the Social Worker. Thus, the inference must be drawn that the first named applicant knew, when instructing the RLS with respect to her family and domestic circumstances under s. 3(6), that her husband was detained in Cloverhill prison, but it seems that she did not put that information to her solicitors. Moreover, different addresses are listed for the first named applicant and her husband on the birth certificate of the fourth named applicant, which names the husband as the father of that child albeit that it appears his father may, in fact, be Emmanuel, the husband's friend and/or manager.

29. Bearing all those factors in mind, the court recalls that the applicants are not passive participants in the process; they were obliged to act in their own interests and were not entitled to sit back and wait for things to happen and then complain in that regard (*Lupascu v. The Minister for Justice, Equality and Law Reform* [2004] IEHC 400). In that context it is noteworthy that the applicant is an educated woman who holds a B.Sc in Physics, worked as a physics teacher in Nigeria for three years, and speaks English. It was open to her to update the Minister as to changes in her domestic and family circumstances if her husband had become part of the functioning family unit, but she did not do so. Furthermore, she made no attempt to update the Minister as to the birth of the fourth named applicant in Ireland in May, 2006. Of note also is the fact that no reference was made in the representations seeking leave to

remain as to the Article 8 rights of the applicants.

30. In the light of the foregoing, I am of the view that the within case can be distinguished from the circumstances of *Beoku-Betts (FC) v. Secretary of State for the Home Department* [2008] 3 W.L.R. 166. That notwithstanding, I consider that the analysing officers gave a thorough consideration to the applicants' family and domestic circumstances, both in the Executive Officer's portion of the analysis and in the Clerical Officer's portion thereof; indeed, it may be said that the Minister went above and beyond what was required, by making enquiries outside of the submissions made in support of the applicants' request for leave to remain.

31. As to the applicant's complaints with respect to the adequacy of the assessment given to their right to respect for their family life, it must be noted that there is no prohibition of the deportation of a mother pending the determination of her child's asylum application (see *Adegbemi v. The Minister for Justice, Equality and Law Reform* [2007] IEHC 393). In such circumstances, as this Court stated in *P.A. & Ors v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Hedigan J., 18th November, 2008), it is practical and reasonable to assume – in the absence of any indication to the contrary – that the mother will discharge her maternal duty to her child and take the child with her upon her deportation. The unity of the functioning family in the present case was, therefore, never in danger, and there was no question that the applicants' family life would be in any way interfered with in the event of the deportation of the first, second and third named applicants. Thus, although Article 8 rights were engaged, there was no potential interference with those rights and so, it was not necessary to consider whether such an interference would be justified under Article 8(2).

32. Moreover, the court reiterates that it concurs with the conclusions reached by Dunne J. in *Sanni v. The Minister for Justice, Equality and Law Reform* [2007] IEHC 398 as to the extent of the Minister's obligations in the context of cases such as the present. Dunne J. held as follows:-

> "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."

33. In the light of the judgment in *Sanni*, this Court is of the view that it does not follow from the fact that something is not expressly referred to in a decision that it has not been considered. In my judgment, it is abundantly clear that the analysing Officers were aware of the family and domestic circumstances of the first, second and third named applicants; they were clearly aware that the first named applicant's husband was now in Ireland, and that a third child had been born to her. They were, therefore, aware of any effect that the deportation orders would have on those involved. In the circumstances, and in particular in the light of the fact that the husband cannot be viewed as a member of the functioning family unit, I am of the view that if there was any requirement to have regard to the applicants' right to respect for their private life, the analysing officers complied with that requirement.

(b) Mistake of Fact

34. It is clear that the mistake complained of is merely a typographical error and that the analysing Officers were fully aware of the facts relating to the fourth named applicant; that minor error in no way renders the decision unreasonable or irrational.

Conclusion

35. In the light of the foregoing, I am not satisfied that substantial grounds have been shown and, accordingly, I must refuse