

**THE HIGH COURT  
JUDICIAL REVIEW**

[2006 No. 504 J.R.]

BETWEEN

**MERCY OVIawe, MARRIAN OVIawe, EMMANUEL OVIawe (SUING THROUGH HIS MOTHER AND NEXT FRIEND MERCY OVIawe),  
MICHAEL OVIawe (SUING THROUGH HIS MOTHER AND NEXT FRIEND MERCY OVIawe) LUCKY OVIawe (SUING THROUGH HIS  
MOTHER AND NEXT FRIEND MERCY OVIawe), PEACE OVIawe (SUING THROUGH HIS MOTHER AND NEXT FRIEND MERCY  
OVIawe), FAITH OVIawe (SUING THROUGH HIS MOTHER AND NEXT FRIEND MERCY OVIawe) UNITY OVIawe (SUING  
THROUGH HIS MOTHER AND NEXT FRIEND)**

APPLICANTS

AND

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL**

RESPONDENTS

AND

**THE HUMAN RIGHTS COMMISSION**

NOTICE PARTY

**Supplementary Judgment of Ms. Justice Finlay Geoghegan delivered the 14th day of November, 2006.**

**Related judgment and proceedings**

1. This application was heard of one of eight similar applications for judicial review challenging the validity of decisions taken by the respondent under the administrative procedures known as IBC/05. The principal judgment was delivered by me today in Bode and Ors. v. The Minister for Justice, Equality and Law Reform, 2006 No. 102 JR. That judgment insofar as it relates to IBC/05 should be considered to form part of this judgment. The grounds relied upon to challenge the respondent's decision in this judgment was in some respects identical and in other respects similar to the grounds of challenge in the Bode proceedings.

**Relevant background facts**

2. The first named applicant is a national of Nigeria who arrived in the State in March 2002. The seventh and eighth named applicants were born in the State on 29th July, 2002 and are Irish citizens. They are the twin son and daughter of the first named applicant. The remaining applicants are other children of the first named applicant who have resided with her in the State since 2002.

3. The first named applicant submitted an application on IBC/05 seeking permission to remain in the State on the basis of her parentage of her Irish born children in February 2005.

4. By letter of 16th November 2005 the application of the first named applicant was refused. The reason given was in the following terms

"The Minister stated in his announcement that persons of good character who give honest and complete details can expect to be granted permission to remain in the State. I am advised by the Garda National Immigration Bureau that in January 2001 and January 2004 you were convicted of offences contrary to Section 4 of the Theft Act, 2001. On that basis, I am not satisfied that you are person of good character as set out in the Minister's announcement and, accordingly, your application for permission to remain in the State under the revised arrangements is hereby refused."

5. It is common case that Mrs. Oviawe was convicted in the State in January 2004 of offences contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act, 2004. The charges related to the theft of goods to the value of €99.00. Mrs. Oviawe pleaded guilty to the convictions. She was sentenced in total to three months which was suspended for 12 months on her bond of €300 to keep the peace and be of good behaviour.

6. It is also common case that Mrs. Oviawe in her application form IBC/05 disclosed her conviction for shoplifting.

7. It is undisputed that in the case of Mrs. Oviawe, as was the position with Mr. Bode that her application under IBC/05 was considered and determined without any consideration of the constitutionally protected personal rights of her citizen children.

8. By order of the High Court of 8th May, 2006 the applicants were given leave to seek an order of certiorari quashing the decision of the respondent dated 16th November, 2005 to refuse to grant permission to reside in the State to the first named applicant and other ancillary reliefs.

**Differences with Bode proceedings**

9. The only difference of substance between this and the Bode proceedings is the reason for the refusal of the application on IBC/05. This difference, having regard to the reasons and conclusion in the Bode judgment necessitate consideration of the following issues:

1. Were the revised arrangements known as IBC/05 addressed to non-national parents of Irish born children born before 1 January, 2005 with a criminal conviction?
2. Does the fact of Mrs. Oviawe's criminal conviction alter the entitlement of her twin citizen children to have their personal rights within the meaning of Article 40.3 of the Constitution or right to respect for their private life within the meaning of article 8 of the Convention considered and taken into account by the Minister in determining their mother's application under IBC/05.

**Application of IBC/05 to persons with Criminal record**

10. The formal announcement published on 15th January, 2005 of the revised arrangements for the consideration of applications for permission to remain in the State by non national parents of Irish born children born before 1 January 2005 contains no reference to criminal convictions or the consequences for any applicant of having a criminal conviction in the State.

11. In the announcement of the Minister of 14th December, 2005, the Minister had indicated "each case will be examined thoroughly and I intend to grant residence only to those people who can show that they have been resident in Ireland taking care of their Irish citizen children have not been involved in criminal activity". This appears to presume persons with criminal convictions might apply.

12. The form IBC/05 asked whether the applicant had been convicted of any offence in the State or abroad and if so to give details. It cannot be considered that such question excluded a person with a criminal conviction from being an addressee of the scheme and entitled to make an application and have that application considered and determined by the Minister.

13. Hence I have concluded that Mrs. Oviawe, notwithstanding her criminal conviction was a person invited to make an application on the form IBC/05 for permission to remain in the State based on the parentage of her Irish born twins.

#### **Differences to Constitutional or convention position of children**

14. For the reasons fully set out in the Bode judgment I have formed the view that as IBC/05 was addressed to Mrs. Oviawe her twin citizen children have a qualified right to have their constitutionally protected personal rights under Article 40.3 considered and taken into account by the respondent in considering and determining their mother's application under IBC/05.

15. No submission was made on behalf of the respondent that any interest of the common good or the protection of any other constitutional rights required him to determine an application from a person under IBC/05 with a criminal record such as Mrs. Oviawe without considering the constitutionally protected rights of the citizen children.

16. Similarly, no submission was made under article 8 of the Convention seeking to justify the decision taken, without a consideration of the citizen children's right by reason of the criminal conviction of Mrs. Oviawe.

17. Accordingly, whilst a criminal conviction is a relevant matter for the Minister to consider in an application for leave to remain in the State, its existence does not alter the conclusions reached in the Bode judgment in relation to consequences of the failure of the respondent to consider the personal rights of the citizen children protected by Article 40.3 of the Constitution and article 8 of the Convention.

#### **Conclusions**

18. For the reasons set out both in this judgment and the Bode judgment:

1. The decision taken by the respondent on the IBC/05 application of the first named applicant as communicated in the letter of 16th November, 2005 is unlawful as it was taken in breach of the seventh and eighth named applicants' rights under Article 40.3 of the Constitution.
2. The decision of the respondent on the IBC/05 application of the first named applicant communicated in the letter of 16th November, 2005 is unlawful as it was in breach of the respondent's obligations under s. 3(1) of the European Convention on Human Rights Act, 2003 as it was not taken in a manner of which is compatible with the State's obligations under article 8 of the Convention to respect the right to private life of the seventh and eighth named applicants as citizens of the State.

#### **Relief**

19. The applicants are entitled to an order of certiorari quashing the decision of the respondent dated 16th November, 2005 to refuse to grant permission to reside in the State to the first named applicant herein and an order remitting the application for consideration and determination in accordance with law.