Neutral Citation Number: [2006] IEHC 345

THE HIGH COURT
JUDICIAL REVIEW

2005 No. 1271 J.R.

BETWEEN

CHUKA PAUL OGUEKWE,
BLESSING OGUEKWE,
PRINCE RONIEL OGUEKWE
(A MINOR SUING BY HIS FATHER AND NEXT FRIEND, CHUKA PAUL OGUEKWE)

APPLICANTS

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

AND
HUMAN RIGHTS COMMISSION
ATTORNEY GENERAL

NOTICE PARTIES

Supplementary judgment of Ms. Justice Finlay Geoghegan delivered on the 14th day of November, 2006.

Related proceedings and judgment
1. These proceedings were heard with the application for judicial review in *Deborah Olarantimi Bode and Others v. The Minister for Justice, Equality and Law Reform* [2006] No. 102 J.R. and the other similar applications referred to in the judgment delivered by me today in the Bode proceedings. The applicants herein challenge the validity of the decision to refuse Mr. Oguekwe's application on IBC/05 on the same grounds and with the same submissions as advanced in the Bode proceedings.

2. Whilst the factual circumstances of the applicants herein differ from the applicants in the Bode proceedings those differences are not relevant to the submissions made and considered in relation to the alleged invalidity of the decisions taken on the applications on IBC/05 in the Bode judgment.

Relevant background facts
3. The first named applicant, Mr. Oguekwe, is a national of Nigeria and entered the State on 3rd February, 2005 on a visa. In submission this was stated to be a tourist visa, nothing turns on this. Mr. Oguekwe then applied for asylum on either 4th or 8th February, 2005. Nothing turns on the difference in dates stated by the parties. He states he did so in order to "enter the system".

4. The second named applicant is the wife of the first named applicant whom she married in Nigeria on 28th November, 2001. The second named applicant, Mrs. Oguekwe, has resided continuously in the State since April, 2003.

5. The third named applicant, Prince Roniel Oguekwe, was born in the State on 9th June, 2003. He is an Irish citizen and has resided continuously in the State since birth.

6. On 9th February, 2005 Mr. Oguekwe applied for permission to remain in the State under the IBC/05 Scheme. On that day he informed the office of the Refugee Applications Commissioner (ORAC) that he intended withdrawing his claim for asylum. On that date a recommendation was issued from ORAC that he not be declared a refugee. This was by reason of the provisions of s. 13 of the Refugee Act, 1996 (as amended) which mandate such a recommendation where an application is withdrawn.

7. On 25th February, 2005 the respondent issued a letter refusing the declaration for refugee status and it is stated informing the applicant of his options.

8. On 10th March, 2005 the applicant was informed that his application under the IBC/05 Scheme was refused by reason of his lack of continuous residency since the birth of his child. He was informed that the fifteen days for the formal response to the letter of 25th February, 2005 ran from that date. Whilst the letter of 25th February, 2005 was not put in evidence, the court presumes (as is the norm) that the letter indicated as one of the options the entitlement of Mr. Oguekwe to make submissions under s. 3 of the Immigration Act, 1999.

9. On 8th March, 2005 Mr. Oguekwe personally submitted representations under s. 3 of the Act of 1999 on a form available for that purpose.

10. In the meantime, Mrs. Oguekwe had made an application under IBC/05 which appears to have been received on 11th February, 2005. By a decision of 3rd May, 2005 Mrs. Oguekwe was granted permission to remain in the State for two years with effect from that date. In a letter received by the repatriation unit of the Department on 24th May, 2005 Mrs. Oguekwe informed the Department of the decision in her favour under IBC/05 and in reliance on that, made representations in support of her husband's application under s. 3 of the Act of 1999 for leave to remain in the State. In that letter she indicates that since receipt of her residency permission she has commenced looking for a job and believes that she will be working soonest. She then states:

> "Dear Sir, If I am the only one working it won't be easy on the family to pay our house rent and paying bills and paying our son's crèche money and feeding.
>
> Please Sir, if my husband will be granted on basis of humanitarianism so that he can start working too. So he can help take care of the family."

11. By letter dated the 16th November, 2005, Mr. Oguekwe was informed that the respondent had made a deportation order in respect of him. He was sent a copy of the deportation order of the 9th November, 2005. In that letter he was also told that he was being sent a copy of "the Minister's consideration pursuant to s. 3 of the Immigration Act 1999 and s. 5 of the Refugee Act 1996". The documents enclosed were an examination of file of a Clerical Officer dated the 28th September, 2005, with a recommendation from an Executive Officer of the same date and of an Assistant Principle Officer of the 29th September, 2005. The examination of file is stamped approved by the respondent.

12. It is not disputed that the matters considered by the respondent prior to making the deportation order are those set out in the examination of file dated 28th September 2005 and that the reasons for the decision must be considered to be those set out therein.

Leave and grounds
13. By consent order of the 3rd April, 2006, leave was granted to apply for judicial review seeking the following reliefs and related declarations:

> 1. An order of *certiorari* quashing the decision of the respondent dated the 10th March, 2005, to refuse to grant residency in the State to the first named applicant.
>
> 2. An order of *certiorari* quashing the deportation order in respect of the first named applicant dated the 9th November, 2005.

14. The decision of the 10th March, 2005, is the decision made on the application on IBC/05.

Conclusion on refusal on IBC/05
15. There is no substantive difference between the position of the third named applicant herein as a citizen child and his father as an applicant on IBC/05 so as to distinguish them in any way from the conclusions I reached in the Bode judgment in relation to the revised arrangements known as IBC/05. Accordingly for the reasons fully set out in that judgment and which should be considered to form part of this judgment I have concluded that the decision taken by the respondent on the application on IBC/05 of the first named applicant, as communicated in the letter dated the 10th March, 2005, is unlawful and invalid, in failing to consider the personal rights of the third named applicant and was taken in breach of the third named applicant's rights under Article 40.3 of the Constitution. Further, 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 taken in a manner which is not compatible with the State's obligations under article 8 of the Convention.

Challenge to validity of decision to deport
16. The applicants challenge the validity of the decision to deport the first named applicant on multiple grounds. The principal grounds relied on were:

> 1. The decision to deport was taken is in breach of the third named applicant, the citizen child's rights under Article 40.3 and Article 41 of the Constitution in that
>
> > (i) it failed to give due consideration to the facts and factors relating to the personal rights, including the welfare rights, of the third named applicant;
> >
> > (ii) it failed to identify a grave and substantial reason favouring deportation.
>
> 2. The decision to deport is in breach of the respondent's obligations under s. 3 of the European Convention on Human Rights Act 2003, as it was not taken in a manner compatible with the State's obligations under article 8 of the Convention. Other grounds were also advanced. It is proposed to consider the above initially.

Applicable law
17. In deciding whether or not to make a deportation order in respect of the first named applicant, the Minister was exercising the express power conferred by s. 3 of the Immigration Act of 1999.

18. Section 3 of the Act of 1999 provides:

> "Subject to the provisions of section 5 (prohibition of *refoulement*) of the -Refugee Act, 1996-, and the subsequent provisions of this section, the Minister may by order (in this Act referred to as "a deportation order") require any non-national 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."

19. Subsection 3(3) of the Act of 1999 sets out the classes of persons in respect of whom an order under sub-s. 3(1) may be made. This includes at para. (f) "a person whose application for asylum has been refused by the Minister." It is undisputed that the first named applicant falls into that category.

20. The procedure to be followed by the Minister is prescribed and constrained by subsections (3), (4) and (6). These require the Minister (except in the circumstances set out in subs. (5) which do not apply to the facts herein) to give notice in writing to the person concerned, of a proposal to deport and then at subs. (3)(b) provides:

> "(b) A person who has been notified of a proposal under paragraph (a) may, within 15 working days of the sending of the notification, make representations in writing to the Minister and the Minister shall –
>
> > (i) before deciding the matter, take into consideration any representations duly made to him or her under this paragraph in relation to the proposal, and
> >
> > (ii) notify the person in writing of his or her decision and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language that the person understands."

21. Subsection (6) then provides:

> 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;
> >
> > (b) the duration of residence in the State of the person;
> >
> > (c) the family and domestic circumstances of the person;
> >
> > (d) the nature of the person's connection with the State, if any;

(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);

(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."

22. Section 5 of the Refugee Act, 1996 and s. 4 of the Criminal Justice (U.N. Convention against Torture) Act, 2000 also constrain the power of the Minister to deport. Whilst these are referred to in the examination of file, no issue arises in these proceedings under either of those Acts.

23. It is not in dispute that the discretion given to the respondent by s. 3 of the Act of 1999 is further constrained by the obligation to exercise that power, in a manner which is consistent with and not in breach of the constitutionally protected rights of persons affected by the order. It is further not in dispute that the power of the Minister is also constrained by the provisions of s. 3 of the European Convention on Human Rights Act 2003. It is proposed to consider each of these constraints separately.

Personal rights of the citizen child

24. The relevant personal rights of the citizen child within the meaning of Article 40.3.1 of the Constitution, which it was contended the respondent was obliged to have regard to, in exercising his discretion as to whether or not to make a deportation order of one or both of the citizen child's parents, were the same rights as contended for in relation to decisions taken under IBC/05 and set out in the Bode judgment. These are:

1. The right to live in the State.

2. The right to be reared and educated with due regard to his/her welfare including a right to have his/her welfare considered in the sense of what is in his/her best interests in decisions affecting him/her.

3. Where as in the case of the applicants herein the parents are married to each other the rights which as an individual, the child derives from being a member of a family within the meaning of Article 41.

25. As noted in the Bode judgment, Counsel for the respondent, did not dispute that each of the above were personal rights of the citizen child within the meaning of Article 40.3.1.

26. It is also common case that the respondent, in considering whether he should make a deportation order in respect of the parent of a citizen child with constitutionally protected rights, the respondent is bound to do so in accordance with the judgments of the Supreme Court in *A.O. and D.L. v. The Minister for Justice* [2003] 1 I.R. 32. The obligations imposed on the respondent are set out in slightly differing ways in the judgments of Denham J., Murray J. (as he then was) and Hardiman J.

27. Denham J. at p. 62 stated:-

"The respondent is obliged to consider the facts of each case by an appropriate inquiry in a fair and proper manner as to the facts and factors affecting the family. If the respondent is satisfied for good and sufficient reason that the common good requires that the residence of the parents within the State should be terminated, even though that has the necessary consequence that in order to remain a family unit the child who is an Irish citizen must also leave the State, then that is an order he is entitled to make. The child has rights of citizenship and as a consequence he or she also has rights of residence in Ireland. He or she also has the right to the society, care and company of his or her parents. However, it does not flow from the rights of the child that the family or parents and siblings of Irish children have the right to reside in Ireland. It is for the respondent to weigh the factors in a fair and just manner in each case in accordance with the law and the Constitution. The respondent may deport parents if he is satisfied that for good and sufficient reason the common good requires that the residence of the parents within the State should be terminated, even though that has the necessary consequence that in order to remain a family unit the child who is an Irish citizen must also leave the State. It is appropriate in balancing all the factors of a case to place weight on the time factor, the integrity of the immigration system and the Dublin Convention."

28. Murray J. at p. 91 states:-

"A child or infant of non-national parents has, *prima facie*, a right to remain in the State. While in the State such a child has the right to the company and parentage of its parents. These rights are not absolute but are qualified. The rights do not confer on the non-national parents any constitutional or other right to remain in the State. The rights referred to are qualified in the sense that the respondent, having had due regard to those rights and taking account of all relevant factual circumstances, may decide for good and sufficient reason, associated with the common good, that the non-national parents be deported, even if this necessarily has the effect that the child who is a citizen leaves the State with its parents. In deciding whether there is such good and sufficient reason in the interests of the common good for deporting the non-national parents, the respondent should ensure that his decision to deport, in the circumstances of the case, is not disproportionate to the ends sought to be achieved."

29. Hardiman J. at p. 157 states:-

"...it seems to me that the existence of the Irish born child does not fundamentally transform the rights of the parents though it requires specific consideration of the respondent who must reasonably be satisfied of the existence of a grave and substantial reason favouring deportation."

30. In considering the above statements in the context of the guarantee in Article 40.3.1 of the personal rights of the citizen, it

appears to me that if the respondent is to take a decision to deport the parent of an Irish citizen child which is consistent with the State guarantee in Article 40.3.1 "to respect" and "as far as practicable… to defend and vindicate" the personal rights of the citizen child that the decision making process must include the following elements:

> (i) It must consider the facts relevant to the personal rights of the citizen child protected by Article 40.3 of the Constitution, if necessary by an appropriate enquiry in a fair and proper manner; and
>
> (ii) It must identify the grave and substantial reason at the relevant time, which requires the deportation of the non-national parent of the Irish citizen; and
>
> (iii) It must demonstrate that the respondent considers deportation, having regard to each of the above, to be a reasonable and proportionate decision.

31. In considering the above it is important to note that the personal rights of the citizen child to be reared and educated with due regard to his welfare and to have his welfare in the sense of what is in his best interests, considered in the context of a proposal to deport a parent, does not appear to have been asserted in the above decision. Further, the proposal in *A.O. and D.L. v. The Minister for Justice* was to deport both of the parents of the citizen child. At the time the decision was taken herein, the proposal was only to deport one parent and the other parent had been granted leave to remain in the State under IBC/05.

32. The only submission of principle, made on behalf of the respondent as to the facts in relation to the citizen child and his family, which he was obliged to take into account in deciding whether or not to make a deportation order, was that those matters must be determined in accordance with the representations, if any, made to the respondent, by or on behalf of the proposed deportee under sub-s. 3(3) of the Act of 1999. The respondent is expressly obliged to have regard to the representations by subs-s. 3(3)(b) and then under subs. 3(6) the respondent is to have regard to the matters specified in paras. (a) to (k) therein "so far as they appear or are known to the Minister". In the scheme of the section this would appear to refer back, at least in part, to representations which may have been made.

33. However s. 3 of the Act of 1999 applies to all proposed deportees. Where, as in this case, the proposed deportee is the parent of a citizen child, it does not appear to me that it would be consistent with the rights of the citizen child under Article 40.3, to limit the respondent's obligation to have regard to facts relating to the constitutionally protected rights of the citizen child to those facts, set out by the parent in the representations made under s. 3(3) of the Act of 1999. Denham J. in *A.O. and D.L. v. Minister for Justice* stated that the Minister must consider the facts "by an appropriate inquiry in a fair and proper manner".

34. The real dispute between the parties on this aspect of the claim related to the nature of the consideration required of the respondent, of the facts relevant to the personal rights of the citizen child to comply with the principles set out in the decision of the Supreme Court in *A.O. and D.L v. The Minister for Justice*. Those principles must be considered in relation not only to the right of the citizen child to live in Ireland, but also to the undisputed personal rights asserted in these proceedings in accordance with the decision of the Supreme Court in *G. v. An Bord Uchtála* [1980] I.R. 32 including the right to be educated and reared with due regard for his welfare and to have his welfare including what is in his best interest, taken into account in a decision affecting him or his upbringing.

35. It is difficult to state in the abstract in clear terms the nature of the consideration which must be given by the respondent, to the facts relevant to the rights of the citizen child to live in the state and to be educated and reared with due regard for its welfare and have its welfare, including what is in its best interest, taken into account in the decision making. It will always depend to some extent upon the factual circumstances of the citizen child and his parent or parents in the State.

36. As appears from the principles already set out in this judgment and in the Bode judgment, the decision making must be consistent with the State guarantee to respect and "as far as practicable… to defend and vindicate" the relevant personal rights of the citizen child. Bearing in mind that purpose it appears to me that the consideration must:

> (i) Be fact specific to the individual child in relation to his age, current educational progress, development and opportunities within the State in the context of his family circumstances in the State; and
>
> (ii) It must include some factual consideration of the educational and other relevant conditions and development opportunities available for the citizen child in the country to which his parents are being deported.

37. As a matter of common sense, unless the factual matters considered are such as to give the respondent an understanding, of what in reality in most cases will be the lesser educational and other development opportunities for the citizen child in the country to which his parents are being deported, how can the respondent form a view (as appears to be required by the decision in *A.O and D.L. v. The Minister for Justice*) that having regard to the identified grave and substantial reason and the child's constitutionally protected personal rights the decision to deport is proportional or reasonable.

38. Unlike the position in *A.O. and D.L. v. The Minister for Justice*, s. 3 of the European Convention on Human Rights Act 2003 applied to the decision of the respondent herein. This appears to impose similar but not identical obligations on the respondent in determining whether or not to deport the parent of a citizen child.

39. Section 3(1) of the European Convention on Human Rights Act, 2003 provides:

> "Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

40. It is undisputed that this section requires the respondent to perform his function of deciding whether or not to make a deportation order in respect of the first named applicant in a manner compatible with the State's obligations under the Convention provisions.

41. At the hearing before me it was accepted, that in determining whether or not to make a deportation order, rights of the applicants under article 8 of the Convention were engaged. Article 8 provides:

> "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 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."

42. I was referred to many decisions of the European Court of Human Rights (E.C.H.R.) and the Courts of England and Wales in addition to the decision of the Supreme Court in *Cirpaci v Minister Justice and Ors.* (unreported, Fennelly J 25th June, 2005) in relation to the obligations imposed by article 8 of the Convention on those making immigration decision. In attempting to identify the questions which must be addressed, of particular assistance are *Abdulaziz et al* (1985) 7 EHRR 471, *Berrehab v Netherlands* (1988) 11 EHRR 322, the helpful summary of the principles set out by Phillips L.J. in *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 and the subsequent decision in an expulsion case, *Boultif v Switzerland* (2001) 33 EHRR 50. From these I derive the following conclusions.

43. The actual obligations imposed on the Minister by s. 3 of the Act of 2003 so as to act in a manner consistent with the State's obligations under article 8 of the Convention, will depend upon the factual circumstances of the individuals and family concerned and the potential interference in the rights of the individual members of that family to respect for their private and family life.

44. Where, as on the facts of this application, there is an acceptance that the applicants enjoy a family and/or private life in the State so as to engage the rights to respect for private and family life under article 8(1) of the Convention, then the following appear to be the questions which must be addressed by a person, determining whether or not to recommend or make a deportation order under s. 3 of the Act of 1999.

> 1. Whether or not the proposed decision will constitute an interference with the exercise of the applicants' or other family members' rights to respect for his or her private and family life.
>
> 2. Unless a conclusion is reached that the proposed decision will not constitute an interference, as that term has been construed by the European Court of Human Rights then:
>
> (i) Is the proposed decision being taken in accordance with law; and
>
> (ii) Does the proposed interference pursue a legitimate aim i.e. one of the matters specified in article 8.2
>
> (iii) Is the proposed interference necessary in a democratic society i.e. is it in pursuit of a pressing social need and proportionate to the legitimate aim being pursued.

45. See in particular the assessment carried out by the E.C.H.R. in *Boultif v Switzerland* (2001) 33 EHRR 50 at paragraphs 39-56 in accordance with the above scheme.

Application of above principles to decision to deport first named applicant

46. The personal decision of the respondent is simply reflected in the deportation order signed by him and a stamp appearing on the examination of the file under s. 3 of the Act of 1999, as amended, prepared by the clerical officer on the 28th September, 2005. As already stated it is accepted that this examination must be considered to contain the consideration of the rights of the citizen child by the respondent and his reasons for the decision to deport. The subsequent recommendation from an Executive Officer of the same date and of an Assistant Principal Officer of the 29th September, 2005, do not add any substantive consideration or reason.

47. The submissions at the hearing, on the reasons given for the decision to deport were confined to the examination of the Clerical Officer. I have noted in preparing this judgment that the letter of the 16 November, 2005, to the first named applicant sending the deportation order, states a purported reason for the respondent's decision which might be considered to go beyond those appearing in the examination on file. No reliance was placed on this at the hearing. This was a correct position to have taken in my view. The letter post dates the making of the deportation order and is not signed by the respondent. There is no evidence that when he made the deportation order the respondent did so for any reason other that those in the examination on file.

48. The recommendation of the Clerical Officer at the end of the examination is in the following terms:

> "Mr. Oguekwe's case was considered under Section 5 of the Refugee Act, 1996, as amended, and under Section 3(6) of the Immigration Act 1999, as amended. Refoulement was not found to be an issue in this case. In addition, no issue arises under Section 4 of the Criminal Justice (UN Convention Against Torture) Act, 2000. Therefore, on the basis of the foregoing, I recommend that the Minister, having also had regard to Section 3(1) of the European Convention on Human Rights Act, 2003 in making his decision, signs the deportation order in the file pocket opposite."

49. The recommendation made must be considered in the context of the prior analysis. I have so considered it. There are no additional reasons for the deportation of the first named applicant contained in the prior analysis.

50. One of the objections made to the validity of the decision is that it fails to identify any grave and substantial reason favouring the deportation of the first named applicant. I have concluded that this objection is made out. The only reasons given are "*Refoulement* was not found to be an issue in this case. In addition, no issue arises under Section 4 of the Criminal Justice (UN Convention Against Torture) Act, 2000."

51. Neither of these reasons could in my view constitute the type of reason contemplated by the Supreme Court in *A.O. and D.L. v. Minister for Justice* as permitting the deportation of the parent of an Irish citizen child with the probable consequence (as was presumed in the analysis conducted) that the citizen child would also have to leave the State notwithstanding his prima facie and constitutionally protected qualified personal right to live in the State.

52. Accordingly for this reason alone I have concluded that the decision to deport the first named applicant is invalid and in breach of the third named applicants rights under Article 40.3 of the Constitution. It follows that the applicants are entitled to an order of certiorari of the decision to deport.

53. As the matter must now be remitted for further consideration and decision by the respondent it appears appropriate that I should also consider the other objections referred to above.

54. Another objection made to the validity of the decision is that, as disclosed by the examination of file of 28th September, 2005, there was no adequate consideration by the respondent of the facts and factors affecting the citizen child and his family in relation to his personal rights, in accordance with the principles as already stated.

55. Counsel for the respondent submitted that the facts which the Minister is required to consider, in relation to a citizen child and his family in a consideration conducted under s. 3(6) of the Act of 1999, will depend upon the nature of the representations made to the Minister under s. 3 of the Act of 1999. For the reasons already given I do not consider that the representation on behalf of the applicant will be determinative of the consideration, which must be given by the Minister to the position of the citizen child and the facts and factors affecting his family. Whilst the representations should be taken into account, the nature of the consideration required will depend upon the overall factual circumstances in which the decision under s. 3 comes to be taken.

56. Counsel for the respondent also submitted on the facts herein that the respondent was only obliged to carry out "the most cursory analysis" of the rights of the citizen child and so described the analysis in the examination on file in this case.

57. It does not appear that an analysis or consideration which is described as a "cursory analysis" could constitute the type of consideration contemplated by the Supreme Court in A*.O. and D.L. v. Minister for Justice* or comply with the State guarantee in Article 40.3 to the citizen child.

57. In this examination the only consideration given to the position of Prince Roniel Oguekwe is that he is a citizen of Ireland; he cannot be deported, and it is presumed that his father will take him to Nigeria thereby preserving the child's right to the care and protection of his family under Article 41 of the Constitution. Even on the facts then known to the respondent from the representations and correspondence from the second named applicant, this sole presumption was not reasonable in the legal sense.

The representations made by the first named applicant on the supplied form gave the factual information in relation to his wife and child in the country and the fact that his child was born on 9th June, 2005. He also stated in relation to his connection with the State:

> "I am the father of an Irish born child Prince Roniel Oguekwe. Before I came in to stay I have been contributing to the upbringing of my son. Enclosed are some evidence of my contributions. I have been sending money through Western Union money transfer and have been sending him clothing and shoes through EMS. Now if I am granted leave to remain in the State I will take proper care of my family because I will be working."

58. In response to the query as to humanitarian considerations he wished to bring to the Minister's attention, he stated:

> "Sending me back will make my son not to be brought up in a proper family setting which will deny him of his right as an Irish citizen. And he will lack the father care and going to Nigeria will not be healthy for the family. We will be happy staying together."

59. Finally, in relation to the prohibition of refoulement he stated:

> "If I am sent back that will make our family to be divided or we all both my Irish son will be forced to leave his country and that will be denying him his right as a citizen and Nigeria is not safe for him and my wife. That's why I have come to stay with them to play my fatherly role."

60. That submission was made on 8th March, 2005. Subsequent to that date Mrs. Oguekwe was granted leave to remain under IBC/05. Notwithstanding, even at the earlier date it appears clear that no decision had been taken by Mr. & Mrs. Oguekwe as to whether or not Prince Roniel Oguekwe would accompany his father to Nigeria. Subsequent to the decision in favour of Mrs. Oguekwe under IBC/05 the position of the citizen child and the family was altered in the sense that Mrs. Oguekwe could now decide to remain in Ireland lawfully and continue to bring up her son in his country of citizenship. The letter she wrote in May 2005 in support of her husband' application indicates she envisages shortly getting a job in the State.

61. In September, 2005, when the Clerical Officer conducted the examination of this file there were clearly two possibilities for this family if the Minister decided to deport Mr. Oguekwe:

> 1. Mrs. Oguekwe and their citizen child would accompany Mr. Oguekwe to Nigeria; or
>
> 2. Mrs. Oguekwe would continue to live in Ireland (at least for the next two years as she was then entitled to do) with the citizen child and Mr. Oguekwe would return on his own to Nigeria with the consequent separation of the citizen child from his father.

62. The fact that Mrs. Oguekwe could lawfully determine to continue living in Ireland with her citizen child, significantly distinguishes the factual position of the Oguekwe family, from the families the subject matter of the Supreme Court decision in *A.O. and D.L. v. Minister for Justice* which is heavily relied upon in the analysis conducted.

63. The analysis conducted on behalf of the Minister does not even entertain option two above, as a possibility for the citizen child and this family or the impact of such a factual situation on the rights of the citizen child and his family acknowledged in Article 41 of the Constitution.

64. The examination does not contain any fact specific considerations relevant to the welfare rights of the citizen child or the probable impact of the proposed decision to deport on such rights.

65. Accordingly I have also concluded that the consideration undertaken by or on behalf of the Minister prior to making the decision to deport, was also in breach of the third named applicant's rights as a citizen of Ireland protected by Article 40.3 of the Constitution, in that it fails to consider relevant facts relating to the personal rights of the citizen child, Prince Roniel Oguekwe protected by Article 40.3 of the Constitution;

66. I have separately concluded that the decision taken was invalid as it was in breach of the Minister's obligation under s. 3 of the European Human Rights Act 2003. The consideration given in the examination on file contains no substantive consideration of the questions which are required to be addressed, in accordance with article 8 of the Convention as set out above. Whilst the decision contains a reference to article 8, it is only in the context of an analysis of what is perceived by the Clerical Officer as having been determined by the Supreme Court in relation to the application of that article in the decision in *A.O. and D.L. v. Minister for Justice*.

67. Counsel for the respondent submitted that as the first named applicant had only been in the country with his wife and child for approximately seven months prior to the examination on file no consideration of the rights of the applicants to respect for their family and /or private rights was required by article 8 of the Convention.

68. This does not appear to me correct. Rather the position appears as follows.

69. All three applicants together had as a matter of fact a family life in the State in September 2005. As one member of the family is a citizen of Ireland with a constitutionally protected right to live in the state that family life, of at least the citizen child, is one which demands respect from the respondent as an immigration authority.

70. The citizen child also had a private life in the State which for the reasons set out in the Bode judgment also demands respect from the respondent.

71. *Prima facie* the decision to deport the father is an interference with the right of at least the citizen child to respect for either his private or family life. If the result of the deportation of the father is that the citizen child has to leave the state to maintain his family life with his father then the interference is with the citizen child's private life in the State. If on the other hand the citizen child and mother remain in the State the interference is with the child's family life.

72. This *prima facie* position does not of course mean that a decision to deport the first named applicant will necessarily be in breach of article 8 of the Convention. It does however mean that the applicants have discharged the onus of establishing that the respondent was obliged by article 8 of the Convention to consider and determine the questions set out earlier in this judgment if the decision is to be justified under article 8(2). Those questions were not addressed in the examination on file and accordingly the decision taken must be considered to be in breach of the citizen child's right to respect for his private /or family life under article 8 and the respondent in breach of s. 3 of the Act of 2003.

73. I would wish to add two further observations. Firstly whilst I have considered the position as at September, 2005, as that is the date at which the substantive examination of the file was conducted, I do not wish to be taken as determining that that is the relevant date. The Minister took the decision to sign the deportation order on the 9th November, 2005. No submission was made as to any material change of circumstance of the Oguekwe family in the intervening period, nor any submission as to which was the appropriate date at which the court should consider the validity of the decision taken.

74. I have separately analysed the respondent's obligations having regard to the constitutional rights of the citizen child and those guaranteed by article 8 of the Convention by reason of the submissions made. However I do not wish to be taken as deciding that in practice that those separate obligations necessarily require separate and distinct consideration by the respondent. There is considerable overlap between the matters which are required to be considered and determined under each set of obligations such that the respondent and his officials could devise a decision making approach which would comply with both sets of requirements.

75. By reason of the above conclusion it appears unnecessary to consider the remaining grounds relied upon, to challenge the validity of the decision to deport. Likewise it is unnecessary to consider, on the facts of this case, the challenge to the alleged rule of law set out *in O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39.

Relief

76. The applicants are entitled to

> (i) An order of *certiorari* quashing the decision of the respondent dated the 10th March, 2005, to refuse to grant residency in the State to the first named applicant under IBC/05 and an order remitting the application for consideration and determination by the respondent in accordance with law.
>
> (ii) An order of *certiorari* quashing the deportation order in respect of the first named applicant dated the 9th November, 2005.