Neutral Citation Number: [2010] IEHC 89

THE HIGH COURT

JUDICIAL REVIEW

2009 114 JR

BETWEEN

MIRABEL OFOBUIKE (A MINOR ACTING BY HER FATHER AND NEXT FRIEND, CHUKS BASIL OFOBUIKE) AND CHUKS BASIL OFOBUIKE

APPLICANTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered on the 13th day of January, 2010

1. The second named applicant (hereinafter referred to as "the applicant") is a Nigerian national. He is the father of the first named applicant who was born in the State on the 21st September, 2002 and is an Irish citizen. (She is hereinafter referred to as "Mirabel"). Mirabel's mother, Helen Ofobuike, is married to the applicant and has had permission to reside in the State under the IBC 05 Scheme as the parent of an Irish citizen child. She is also the mother of their other daughter Zara Ofobuike, who is not an Irish citizen.

2. The applicant claims to have been in the State on a number of occasions in 2002, 2004 and 2005, although he says he was still living in Nigeria at the time. In July, 2007, he claims to have moved to Ireland to be with his wife and children and it appears that he entered the State illegally and claimed asylum here on 1st August, 2007.

3. A report of the Refugee Applications Commissioner dated the 2nd October, 2007, recommended that the applicant be not declared to be a refugee, essentially upon the ground that his claim to a fear of persecution if returned to Nigeria as a member and fundraiser for a separatist organisation, MASSOB (Movement for the Actualisation of the Separate State of Biafra,) was not credible. On appeal to the Refugee Appeals Tribunal this negative recommendation was affirmed by a decision of the 25th January, 2008. Again, the Tribunal member found the personal account given by the applicant of his flight from Nigeria in 2007 using false documents on a trip arranged for him by a trafficker, difficult to reconcile with the fact that he held a valid Nigerian passport and had obtained visas for several visits to the United Kingdom on business in the years from 2002 to 2005, given that he claimed that his problems with the Nigerian authorities had commenced in 2001 when he had been detained and questioned. In particular, he was disbelieved when he claimed to have fled Nigeria in February, 2007 having been warned by a friend who was an Assistant Police Commissioner that it was unsafe for him to remain in Nigeria, when he then returned from London to Nigeria to sort out financial issues prior to leaving again for Ireland in July, 2007.

4. Following the rejection of the appeal to the Tribunal, the applicant was notified of the Minister's intention to make a deportation order in respect of him and on the 24th April, 2008, an application was made on his behalf for subsidiary protection and for leave to remain in the State on humanitarian grounds. These applications were refused and on the 15th January, 2009, a deportation order pursuant to s. 3(1) of the Immigration Act 1999, was made in respect of him. This was notified to the applicant and to his legal representatives by a letter of the 15th January, 2009, which enclosed, by way of statement of the Minister's reasons for making the order, a memorandum of some 22 pages setting out the examination and analysis of the representations made on the applicant's behalf and the consideration given to the statutory matters required to be considered in making such an order.

5. The applicants now seek leave to apply for judicial review of the decision to make that order (the "Contested Decision",) and particularly for an order of *certiorari* to quash it. In the statement of grounds, nine grounds are proposed to be advanced as to the illegality of the order. None of these grounds is directed at the consideration given by the Minister to the individual position of the applicant himself. In effect, the grounds are directed at the proposition that the consideration given on making the order failed adequately to assess and to weigh proportionately and reasonably the impact of the deportation of the applicant on the rights of Mirabel and of the members of the Ofobuike family present in the State.

6. In particular, in grounds 5.1 and 5.2 it is alleged that the Contested Decision infringes Article 41 of the Constitution in that the Minister failed to make appropriate inquiry about and then to weigh properly and to consider the circumstances of Mirabel as an Irish citizen, her relationship with the applicant as her father and primary carer; and with her mother and sister who have permission to remain in the State; and fails to analyse the effect of separating that family by deporting the applicant in the event that Mirabel, her mother and sister decide to remain.

7. In grounds 5.3, 5.4 and 5.5 it is alleged, in effect, that Article 40.3 of the Constitution has been infringed by the failure to give any "fact specific consideration" to the welfare rights and best interests of the child applicant. The finding that Mirabel is of an adaptable age and could move to Nigeria is inadequate and gives no consideration to her position in Nigeria or to the fact that she has been doing well at school in Dublin. She has a fundamental right to grow up in Ireland and the Contested Decision identifies no compelling reason for refusing to permit the applicant to remain and play an active role in her upbringing here.

8. Under the heading of ground 5.8 it is alleged that the Contested Decision infringes Article 8 of the European Convention of Human Rights in that no substantive consideration has been given to the questions that Article requires to the

addressed and no reason is given as to why it is necessary to interfere with the life of this family by preventing the applicant residing in the State.

9. In ground 5.7 it is alleged that the Contested Decision fails to state any reason why it is proportionate in this particular case not to permit the parent of an Irish citizen child to reside in the State when residency has been granted to thousands of other parents in the same situation, including the applicant's wife as mother of Mirabel.

10. Ground 5.8 alleges that the Contested Decision is unreasonable and that it fails to vindicate the personal rights of each applicant. Ground 5.9 is concerned with the extension of time required for the present applicant for leave.

11. The grounds thus articulated in the statement of grounds were further developed both in the written legal submissions lodged and in oral argument, with particular reference to the recent case law of the High Court and Supreme Court relating to the issues that arise when a deportation order is made in respect of the non-national parent of an Irish citizen child. In addition, as appears below, counsel for the applicants took issue with the reference made in the analysis note to the decision of the United Kingdom Court of Appeal in *R. (Mahmood) v. Home Secretary* [2001] 1 W.L.R. 840. In relying upon that authority for the proposition that there were no insurmountable obstacles to this family living together in Nigeria, counsel submitted that the Minister had applied a wrong test and thereby erred in law in a manner which vitiated the validity of the Contested Decision.

12. The particular cases referred to in argument and upon which the issues raised in these grounds effectively turn included the following:-

> *Fajujonu v. Minister for Justice* [1990] 2 I.R. 151;
>
> *A.O. and D.L. v. Minister for Justice* [2003] 1 I.R. 1;
>
> *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795 and
>
> *Dimbo (A Minor) v. Minister for Justice* (Supreme Court, 1st May, 2008).

13. It is useful, therefore, to attempt to summarise the law thus stated as to the rights of the Irish citizen child in these circumstances and as to the consideration that must be given to those rights, both under the provisions of the Constitution and Article 8 of the ECHR, when a deportation order is to be made against a non-national parent.

14. In the *Fajujonu* case, Finlay C.J., referring to a non-national who had been residing the in the State and had become a member of a family that included children who were Irish citizens said:-

> "There can be no question but that those children, as citizens, have got a constitutional right to the company, care and parentage of their parents within a family unit. I am also satisfied that *prima facie* and subject to the exigencies of the common good that that is a right which these citizens would be entitled to exercise within the State."

15. In the *A.O.* and *D.L.* case, Murray J. (as he then was) described the rights of the citizen child in similar terms:-

> "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."

16. In the same judgment Murray J. said of the citizen child:-

> "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."

17. It clearly follows from this case law and the other judgments mentioned above that the fact that a minor child who is an Irish citizen has an entitlement to certain personal rights under the Constitution and to respect for private life and family life under Article 8 of the ECHR does not, as such, preclude the exercise by the State of its right to control the entry and presence in the State of foreign nationals including, where necessary, the right to expel from the State the non-national parent of such a child. The State is not bound by the choice of residence which a couple may make for themselves and their family by reason only of the fact that one or more of their children is an Irish citizen.

18. However, while the existence of these rights does not preclude the exercise of the power to make a deportation order under s. 3 of the 1999 Act in the case of the non-national parent of an Irish citizen child, it follows with equal clarity from the above case law and particularly from the two judgments of the Supreme Court delivered on the 1st May, 2008, in the cases of *Dimbo* and *Oguekwe* that the Minister must exercise the power consistently with and not in breach of the constitutionally protected rights of the child and of the family members, in a manner which is compliant with the obligations created for him under s. 3 of the ECHR Act 2003.

19. In giving the judgment of the Supreme Court in each of those cases Denham J. sets out a similar "non exhaustive list" of the matters which fall to be taken in to consideration by the Minister when considering the making of a deportation order under s. 3 of the 1999 Act. So far as necessary for the purpose of the present case it seems to the Court that the material points can be summarised or paraphrased as follows:-

> (a) The Minister should consider the circumstances of each case by due inquiry in a fair and proper manner as to the facts and factors affecting the family. (Point 1 of the non-exhaustive list.)

(b) Save for exceptional cases, the Minister is not required to inquire into matters other than those which have been put to him on behalf of applicants and are on the departmental file. He is not required to go outside documents furnished to him on behalf of the applicant except in exceptional circumstances. In particular, while the Minister should consider generally the situation in the country to which the parent may be deported, he is not required to carry out a specific analysis of the educational and development opportunities that would be available to the child there or to inquire in detail into its educational facilities. (Point 2 and See the *Oguekwe* case at para. 26)

(c) Where one parent of the Irish citizen child has residency in the State, the relevant factual matrix to be considered includes the facts relating to the personal rights of the citizen child and the family unit. (Point 3.)

(d) The specific factors listed in s. 3(6)(a) – (k) of the 1999 Act must be considered so far as they are known to the Minister. (Point 4.)

(e) The nature and history of the family unit should be considered from the perspective of the potential interference with the rights of the applicants. (Point 5.)

(f) The Minister must consider expressly the constitutional and personal rights of the citizen child and should deal expressly with them in the decision. These include the right of the child to reside in the State; to be reared and educated with due regard to its welfare; to the society, care and company of its parents and the protection of the family under Article 41. (Point 6.)

(g) The Convention rights of the applicants including those of the child must be considered. (Point 7.)

(h) Neither the Constitutional nor Convention rights are, however, absolute and the Minister is not obliged to respect the choice of residence of a married couple. (Points 8 and 9.)

(i) The rights of the State must also be considered including its right to control the entry, presence and exit of foreign nationals subject to the Constitution and to international agreements. Thus issues of national security, public policy, the integrity of the immigration scheme and its consistency and fairness to persons in the State may be considered. (Point 10.)

(j) These factors and principles must be weighed in a fair and just manner to achieve a reasonable and proportionate decision. Notwithstanding the child's right to reside in the State, there may be substantial reason associated with the common good for the making of an order to deport the non-national parent, even though this has the necessary consequence that the child will leave the State in order for the family to remain a unit. The decision should not, however, be disproportionate to the ends sought to the achieved. (Points 11 and 12.)

(k) The Minister should consider whether there is a substantial reason associated with the common good which requires deportation of the non-national parent and whether, in those circumstances, it would be reasonable to expect family members to follow the deported member to the country of origin. (Point 12.)

20. In summary, therefore, the Minister is obliged to take into account and to consider, all facts and factors relevant to the personal rights of the child and the family; to satisfy himself that there is a substantial reason for deporting the non-national parent and that it is necessary to do so for the purpose of achieving the common good; and that the deportation is not, in the circumstances, disproportionate to the end sought to be achieved. It is to be noted that in both the *Oguekwe* and the *Dimbo* cases the orders of the High Court quashing the decision to deport the non-national parents in question were upheld by the Supreme Court upon the basis that each decision in question had failed to give the necessary consideration to the facts and factors relating to the constitutional and Convention rights of the citizen children in question and failed to identify a substantial reason for the necessity of making the deportation orders in the circumstances of each case. It is also to be noted, however, that the judgments of the Supreme Court do not seek to identify the nature of the "substantial reason" which may justify the making of a deportation order, nor is it suggested that the reason must necessarily relate to the personal character or conduct of the parent who is the subject of the deportation order. Indeed, it seems clear from the factors identified in the above list that the substantial reason associated with the common good may, in principle, lie in the issues of public policy, the integrity of the asylum system and its consistency and fairness to persons and to the State including policy considerations which would lead to similar decisions in other cases. (Point 14.)

21. It is in the light of the principles thus set out in that case law that it is necessary to examine the consideration given by the Minister to the facts and factors relating to the circumstances of the applicants and their family unit in this case, and to assess the validity of the grounds raised as to the inadequacy of the Minister's analysis and appraisal prior to adopting the Contested Decision.

22. In the letter of the 15th January, 2009, forwarding the deportation order together with the memorandum of the Minister's analysis of the required considerations, the reason for making the order was stated in these terms:-

> "The reasons for the Minister's decision are that you are a person whose application for a declaration as a refugee has been refused. Having had regard to the factors set out in s. 3(6) of the Immigration Act 1999 (as amended), including the representations received on you behalf, the Minister is satisfied that the interest of the public policy and the common good in maintaining the integrity of the asylum and immigration systems outweighs such features of your case as might tend to support your being granted leave to remain in this State."

23. The memorandum of the examination then sets out the matters which were considered under a series of headings and extends over some 22 pages.

24. Firstly, each of the factors listed for consideration in s. 3(6) at headings (a) – (k) of the 1999 Act are addressed. These include particularly the following:-

(b) Duration of residence:

The applicant's visits to the State prior to seeking asylum are noted and it is observed that he had been in the State for approximately one year and four months at the date of the memorandum.

(c) Family and Domestic Circumstances:

The circumstances of the mother, the child applicant and of her sister are recorded; their entitlement to residence in the State until November, 2010 is noted as is the fact that the sibling would appear to be entitled to Nigerian citizenship. It is noted that the applicant's father is deceased but that his mother, brother and four sisters all live in Nigeria.

(d) Connection with the State:

It is noted that the applicant's connection with the State lies in his application for asylum and his parentage of the minor applicant.

(g) Character and Conduct:

It is noted that the applicant has not come to the adverse attention of the gardaí during his time in the State but that his character and conduct prior to that cannot be verified.

(h) Humanitarian Considerations:

The relevant information on the file in the case is said to contain nothing which suggests that the applicant should not be returned to Nigeria.

(i) Representations:

There is then listed and summarised a series of letters of representation made on behalf of the applicant and specific representations made by the applicant and his wife are then summarised. In particular, the applicant's claim to have taken on the role of primary career of his children while his wife is in full time employment is recorded as is his claim to have been supportive and part of his children's lives while he was living in Nigeria and separated from them.

(j) Common Good:

It is in the interest of the common good to uphold the integrity of the asylum and immigration procedures of the State.

(k) It is noted that considerations of national security and public policy do not have a bearing on the case.

25. The prohibition on refoulement in s. 5 of the Refugee Act 1996 is then considered. This involves a reiteration of the account given during the asylum procedure for the applicant's reasons for a flight from Nigeria. Country of origin information in relation to *MASSOB* as the source of his fear to a claim of persecution is examined. The implication of s. 4 of the Criminal Justice (U.N. Convention against Torture) Act 2000 is also considered. As indicated, neither of these two aspects of the analysis are relevant to the issues in the present application.

26. The remainder of the analysis note is then devoted to a detailed consideration of the acknowledged "engagement" of the rights to respect for private life and family life under Article 8 (1) of the ECHR.

27. Under the heading of "Private Life", it is accepted that a decision to deport could constitute an interference with the applicant's right to respect of private life namely to his work, educational and social ties formed since his arrival in the State. It is noted that the applicant claims to have made every effort to integrate into his new surroundings and that he is the primary carer to the two children. His regular attendance at church in Swords is also noted. It is concluded, however, that such interference will not have consequences "of such gravity as potentially to engage the operation of Article 8". It is concluded "as a result, the decision to deport Mr. Ofobuike in pursuance of lawful immigration control does not constitute a breach of the rights respect for his private life under Article 8".

28. Under the heading "Family Life" the circumstances of the applicant, his wife and two daughters are set out. It is accepted that the deportation of the applicant "will constitute an interference with the family's right to respect for family life" but it is submitted, that the proposed interference:-

(i) is in accordance with Irish law;

(ii) pursues a pressing need and a legitimate aim namely maintenance of control of its own borders by the State and regulating control, processing and monitoring of non-national persons in the State; and

(iii) is necessary in a democratic society, in pursuit of oppressing social need and proportionate to the legitimate aim being pursued within the meaning of Article 8(2).

29. The next heading is that of "Proportionality". As mentioned above, reference is first made to the U. K. Appeal Court decision in *Mahmood* to the effect that the removal or exclusion of one family member from a State where other members of the family are lawfully resident, will not necessarily infringe Article 8 provided that there are no "insurmountable obstacles" to the family living together in the country of origin even where this involves a degree of hardship for some or all members of the family. It is noted that Mirabel was then six years old and attending a national school at Swords. It is further noted that:-

> "Being six years of age [she] is therefore of an adaptable age. She has only recently commenced primary education in this State, therefore, it can be reasonably expected that [she] could reside with her parents and siblings in Nigeria and integrate into society there."

30. It is noted that under the Nigerian Constitution she would appear to be entitled to Nigerian citizenship. The note then states:-

> "Having taken into consideration the personal circumstances of the Irish citizen child and her father, in particular the young age of (Mirabel) there is nothing to suggest that there are any insurmountable obstacles to the family being able to establish family life in Nigeria."

31. Still under the heading "Proportionality", the further following factors are also considered:-

> - The applicant's wish to discharge his parental responsibilities to the best of his ability by being present in the State;
>
> - The child's constitutional right to the society of her father;
>
> - His anxiety to take up full time employment in Ireland.

32. In respect of these submissions the note observes that the Minister is not obliged to respect the choice of residence made by the applicant and his wife and that the State has a right compatible with the ECHR under international law to control the entry and presence of non-nationals on its territory notwithstanding the child's constitutional right to the society of its parent. It is considered that the applicant's prospect of obtaining employment in the current economic climate would be poor. Consideration is also given to the impact of permitting the applicant to remain on the health and welfare systems of the State and to how such a decision might lead to similar decisions in other cases. The note then continues:-

> "It is submitted that, notwithstanding Mr. Ofobuike's parental responsibilities and obligations, he did not take up these responsibilities in the State until July 2007, at which time his children Zara and Mirabel were one and four years of age respectively. His family existed without his presence in the State during this time, therefore, if Mr. Ofobuike's spouse were to decide to stay in Ireland with the children, the disruption of their family life would not have the same impact as it would if they had been living together as a family unit for such a long time."

33. This "Proportionality" heading then concludes:-

> "Having weighed and considered all of the factors outlined above relating to the position of the family, and in particular Ms. Mirabel Ofobuike who is an Irish citizen child, as well as factors relating to the rights of the State, it is submitted that if the Minister makes a deportation order in respect of Mr. Ofobuike, there is no less restrictive process available which would achieve the legitimate aim of the State to maintain control of its own borders and operate a regulated system for control, processing and monitoring of non-national persons in the State. This is a substantial reason associated with the common good which requires the deportation of Mr. Ofobuike."

34. The final matter considered in the analysis note is given the heading "Constitutional Rights of the Irish born Child". Here the personal circumstances of Mirabel are again recited and reference is made to the constitutional right of the Irish born child to be reared and educated with due regard to her welfare, to the society, care and company of her parents and as well as the protection of the family pursuant to Article 41. It is noted, however that the constitutional rights are not absolute and that they must be weighed against the rights of the State. Reference is made to the *A.O.* and *D.L.* case (see para. 12 above) as authority for the proposition that it does not flow from the rights of the child that the family or parents and siblings of Irish citizen children have a right to reside in the State. The concluding paragraph under this heading is as follows:

> "All factors relating to the position and rights of Ms. Mirabel Ofobuike, who is an Irish citizen child, have been considered above and these have been considered against the rights of the State. In weighing these rights, it is submitted that if the Minister makes a deportation order in respect of Mr. Ofobuike, there is no less restrictive process available which would achieve the legitimate aim of the State to maintain control of its own borders and operate a regulated system for control, processing and monitoring of non-national persons in the State. This is a substantial reason associated with the common good which requires the deportation of Mr. Ofobuike."

35. The memorandum then contains the following overall conclusion:

> "Having considered all of the above factors relating to the position of the family and in particular Ms. Mirabel Ofobuike, an Irish citizen child, there is nothing to suggest that there are any insurmountable obstacles to the family being able to establish family life in Nigeria."

The following paragraphs repeat, in effect, the observations already set out as to the absence of any less restrictive process which would achieve the legitimate aim of the State in maintaining control of its borders and that this is a substantial reason associated with the common good which requires the deportation order to be made.

36. It will immediately be apparent that the writer of this memorandum of analysis, writing some seven months after the handing down of the Supreme Court judgments in the *Dimbo* and *Oguekwe* cases, was clearly conscious of the matters outlined by Denham J. as requiring to be taken into account by the Minister when exercising his power under s. 3 of the Act of 1999. It is necessary, accordingly, to consider whether the grounds put forward on this application raise any substantial question as to the adequacy and validity of the manner in which the Minister has gone about that task.

The personal and family constitutional rights

37. As indicated in paras. 6 and 7 of this judgment, in the grounds based upon the personal constitutional rights of Mirabel under Article 40.3 and on the family rights under Article 41, it is argued that the Contested Decision is unlawful for failure to make proper inquiry into and then to consider and weigh, the personal and family circumstances of Mirabel and particularly Mirabel's relationship with her parents and sister in the event of a deportation taking place. It is submitted that there has been no true analysis of the effect of separating the family members. This ground was expanded upon in argument to cover the following assertions:

- o Relevant information put before the Minister as to the education of children in Nigeria had not been taken into account when considering whether Mirabel's best interests and welfare would be affected by a move to that country;
- o The four paragraphs in the memorandum devoted to her personal rights are inadequate by way of consideration having regard to the requirements of the above case law;
- o No substantial reason for interfering with her personal rights is identified in the memorandum;
- o The interests of the State in upholding immigration control cannot constitute an adequate justification in law for deporting the applicant; and
- o It is manifestly in the best interests of Mirabel to grow up and be educated in the State.

38. These arguments do not, in the judgment of the Court, raise any substantial issue as to the unlawfulness of the Contested Decision having regard to the actual reasons given in the analysis set out in the memorandum. Contrary to the submissions made, it is clear from the text of the memorandum that all of the facts and factors relevant to the personal and family circumstances of Mirabel have been identified, addressed and considered in the light of the representations made on behalf of the applicants.

39. It must be borne in mind that those personal circumstances are relatively straight-forward. Mirabel was born in the State in September, 2002 and was six years and two months old when the memorandum was written. She had lived with her mother since birth and with her sister since she was born in 2005. She has lived with her father since his arrival in February, 2007. She had commenced the first year of primary school in September, 2007.

40. These factors are all expressly mentioned and considered in the memorandum and a judgment is made that because the family members are all entitled to move to Nigeria if they so decide in order to preserve the family as a unit, Mirabel's young age and her recent start in education here mean that she could readily adapt to education in Nigeria and readily integrate into society there. It is acknowledged, on the other hand, that Mirabel is entitled, as an Irish citizen, to remain in the State and to be reared and educated here and that her mother is entitled to continue to reside with her should the parents make that choice. Thus, the personal rights of Mirabel are expressly recognised and are weighed against the rights of the State to maintain a regulated system for control of non-nationals in the State. Nevertheless it is concluded that the latter constitutes a prevailing substantial reason for deporting the applicant. It cannot tenably be argued in these circumstances, in the view of the Court, that the analysis has failed to consider the facts and factors relevant to Mirabel's personal constitutional rights or that there has been any obvious error in the manner in which they have been considered and weighed.

41. It is argued that the reason given, namely "the legitimate aim of the State to maintain control of its own borders and operate a regulated system for control, processing and monitoring non-national persons in the State" cannot constitute a "substantial reason" in the sense intended by the Supreme Court in the *Oguekwe* and *Dimbo* judgments. The Court does not consider that authority for such a proposition can be found in those judgments. The rights of the State are mentioned at item 10 in the "non-exhaustive list" of relevant matters to be considered as given in the *Dimbo* case. It is expressly recognised that "the State may consider issues of national security, public policy, the integrity of the immigration scheme, its consistency and fairness to persons and to the State". The very fact that such a reason is enumerated amongst those set out in the list necessarily implies that, in appropriate circumstances, such an interest on the part of the State can be sufficiently compelling and substantial to prevail over the private or family rights of particular persons. Whether that is so in any given case, will depend upon the full factual matrix as indicated by Denham J. The substantial character of the State's reason for deporting an individual will alter when assessed against the circumstances of the person in question and those of his or her family including, clearly, how long they have been in the State, what roots, if any, they have put down here and whether any minor children are at school and at what stage of the schooling they may be at the time.

42. In this regard it is important to bear in mind the particular history which the Minister had before him when considering this case. As mentioned elsewhere in this judgment, (see paras. 2 and 3 above) the applicant remained in Nigeria when his wife came to Ireland in 2002. Having obtained visas for business visits to the United Kingdom he made clandestine entries to the State in 2002, 2004 and 2005 in order to visit her and then returned voluntarily to Nigeria. In his grounding affidavit in the present application he admits that he "remained living in Nigeria where I was actively involved in politics until July, 2007 when I moved to Ireland to reunite with my wife and be with my children".

43. He has given no explanation of how or when he entered the State in 2007 and claimed to have travelled on false documents supplied by a trafficker although he is apparently the holder of a passport which is valid until 2012. He made an application for asylum on the basis of the claim described in para. 3 above and pursued it to appeal before the RAT. The application was rejected because his account could not be believed. In other words, having regard to his free movements between Nigeria and the United Kingdom over several years it was judged that his story of being at risk of persecution as a Massob fundraiser and activist was untrue. In those circumstances, there was a clear basis upon which the Minister could form the view that the applicant had repeatedly flouted the State's immigration controls and had misused the asylum process. That being so, this Court could not interfere with a conclusion reached by the Minister that this was a case in which there was a substantial, indeed a compelling reason, to uphold the integrity of the immigration laws of the State.

44. It is argued that there was no consideration given to the educational facilities available to Mirabel in Nigeria. The Court does not consider that the Minister was under any obligation to conduct a comparative examination of Irish and Nigerian educational facilities or that the case law implies the existence of any such obligation. Indeed, it is to be noted

that in the *Oguekwe* and *Dimbo* cases, Denham J. explicitly disagreed with the learned High Court judge whose judgments were under appeal when the latter held that the Minister was required to inquire into the educational facilities and other conditions available to an Irish born child of a proposed deportee in the country of return in the event that the child accompanied the deportee. Denham J. said:

> "I am satisfied that while the Minister should consider in a general fashion the situation in the country where the child's parent may be deported, it is not necessary to do a specific analysis of the educational and development opportunities that would be available to the child in the country of return. The Minister is not required to inquire in detail into the educational facilities of the country of the deportee. This general approach does not exclude a more detailed analysis in an exceptional case."

45. That judgment thus acknowledges that the degree of consideration will vary from case to case and more detailed inquiry may well be called for in the case of, say, a teenage child who has been in the Irish education system for many years and whose secondary education may be nearing completion. In the present case, however, Mirabel had only just completed the very first year at infant level of primary school.

46. It is submitted also that the analysis does not refer to Mirabel's educational progress in school here. The analysis report simply records that she is at school and it is complained that: "It does not state what year the child is in, how the child is progressing, or deal with any development opportunities for the child in this State." An argument to this effect might have some force had any representations in this regard been made. That has not been done. Indeed, it might have been expected that the person best placed to make such representations as to Mirabel's state of educational development would be the principal of the national school she attended in Swords. That principal has in fact provided a letter dated 10th April, 2008, which is included amongst the representations made. Significantly, however, its three sentences are limited to confirming that the applicant is known to the principal since September, 2007; that Mirabel is a junior infant pupil in the school and that the applicant is the principal carer of Mirabel and her younger sister. Nothing whatsoever is said as to the progress she is claimed to have made in that school.

47. As has been pointed out, the fundamental obligation of the Minister is to make the appraisal in the light of the facts known to him and the representations made on behalf of the proposed deportee. In this case, although direct personal, handwritten representations were submitted by both the applicant and his wife, no indication was given by them or on their behalf as to what their intentions might be as regards Mirabel's remaining with her mother in the State or leaving for Nigeria if a deportation order was made. Given that the mother had left the applicant when pregnant in 2002 for the apparent purpose of giving birth to Mirabel abroad and had lived here without him (apart from his illegal visits) until 2007, it could not be said, in the Court's view, that the Minister had any particular obligation of inquiry in relation to education facilities other than that actually made as indicated in the memorandum. In view of the absence of any indication from the parents and of the stress laid by the mother on her full-time employment in a bank here, the clear inference was that Mirabel would remain in the State and that Mirabel would continue her schooling here. Thus, the argument that it is manifestly in the best interests of Mirabel that she be educated in this country is, in effect, beside the point. Mirabel cannot be deported and it is recognised that her mother is entitled to continue to reside in the State with her. That being so, the Minister's obligation was to satisfy himself by reference to Mirabel's age and stage of education that in the event a decision was made to move the family unit to Nigeria, she could continue to receive education and that the interruption of the education she had received to date in this country would not be so obviously detrimental to her interests as to be disproportionate and unreasonable in the circumstances.

48. For these reasons the Court does not consider that any substantial ground is thus raised for interfering with the assessment made by the Minister in the memorandum under this heading.

Convention rights

49. As indicated in paras. 8 and 9 of this judgment, the grounds raised in relation to Article 8 of the Convention overlap to a certain degree with the arguments and submissions made in respect of the constitutional rights but are primarily directed, in effect, at the alleged disproportionality of the interference with the right to respect for private and family life, the absence of any substantial reason for such interference and the application of a wrong test of "insurmountable obstacles" in the consideration of these rights.

50. It is simply incorrect to assert that the memorandum contains no substantive analysis and consideration of the rights protected by Article 8 of the Convention in this case. As already summarised in paras. 26 to 33 of this judgment, at least two pages of the memorandum are devoted to the identification, consideration and analysis of the factors relevant to the private life and family life of the applicants in this case. It is expressly acknowledged that deportation of the applicant will interfere with the existing circumstances of the private life of both applicants and the family life of all four family members. Both there and elsewhere in the consideration of the statutory factors covered by s. 3 (6) of the 1999 Act, the memorandum records all relevant features of the circumstances of Ofobuike family and its members as made available to the Minister both through the representations made and the documents submitted and more generally in the asylum file. These cover their own personal histories, their length of time in the State, the social contacts they have made here, the mother's employment and their wider involvement in the community in which they live. It includes the fact that the applicant's mother, brother and four sisters all live in Nigeria and the fact that, prior to 2007 the applicant appears to have had substantial business interests in Nigeria and a career which involved him travelling on business between Nigeria and the United Kingdom. These factors are explicitly weighed in the balance by reference to the principle of proportionality. It is concluded that the interest of the State in maintaining immigration control as already cited above, effectively prevail and while there is an admitted interference with the Article 8 rights, it is not in the circumstance so grave as to constitute an infringement of that Article.

51. Both in the written submissions and in oral argument, much emphasis has been placed by counsel for the applicants upon the fact that under the heading "proportionality" in the memorandum, reference is made to the *Mahmood* case as the basis for the conclusion that "there is nothing to suggest that there are any insurmountable obstacles to the family being able to establish family life in Nigeria". It is submitted that this is a flaw in the analysis because it amounts to the application of a wrong test namely that of "insurmountable obstacle" rather than the true test defined by the Supreme Court which requires the Minister to be satisfied that there is a substantial reason for the deportation associated with the common good and that the pursuit of that objective does not produce a disproportionate and unreasonable result in the

specific case.

52. In the Court's judgment this submission is misconceived and is effectively based upon a misreading of the memorandum. The analysis does indeed consider whether there are any insurmountable obstacles in this case to the family unit being maintained, should the parents so decide, by relocating to Nigeria. Quite clearly, however, the analysis does not do so by way of applying that criterion as an exclusive test in disregard of the need to achieve a proportional result. Whether or not there is an insurmountable obstacle to the family moving as a unit to Nigeria is manifestly a relevant consideration. Deportation of one parent necessarily interferes with family life. Under the Convention the issue that arises is whether the interference is so serious as to amount to an infringement of the right protected by Article 8. It is undisputed that, as a matter of law, Article 8 does not in that regard require the Minister to respect, as if it was absolute, the choice made by a couple as to the place of residence of their family. It is clearly relevant to the reasonableness and proportionality of the assessment to know that such a choice does in fact exist. For example, it is not unknown for States to maintain prohibitions on entry and refusals of residence to individuals of certain nationality, of certain religion or of political affiliation. Thus, if the country to which one parent was to be deported was one which would refuse entry or residence to the spouse who is not to be deported, there would be an "insurmountable obstacle" to the unity of that family being maintained should they decide to accompany the deported parent. In that event the substantial or compelling character of the reason for deporting the parent would take on an entirely different dimension as compared with the situation in which the family unit has the genuine choice of relocating to the country of origin in question. Thus the "insurmountable obstacle" concept of the *Mahmood* case is a relevant and necessary consideration but it is not an exclusive test which replaces the test of proportionality and clearly has not done so in this case having regard to the manner in which the mention of that criterion is subsequently followed under the "proportionality" heading by the consideration given to a number of other factors relevant to the circumstances of the family.

53. In that regard it is particularly important to point out that the analysis pays particular attention to the particular history of this family as already mentioned earlier in this judgment.

54. Prior to 2002 the applicant and his wife had a married life together in Nigeria. When she was already pregnant and seemingly with the applicant's agreement, she left Nigeria with a view to giving birth to Mirabel in this country. She has remained here since and, prior to the applicant's arrival here in February, 2007, was apparently in receipt of financial assistance from the applicant in Nigeria. Thus, the agreed domestic arrangements of the applicant and his wife were such that they were content to be separated by several thousand miles when their first child was born and to remain so separated (apart from the visits) until the applicant's arrival here in February, 2007. It is against that background that the memorandum, in assessing proportionality, makes the following assessment:

> "It is submitted that, notwithstanding Mr. Ofobuike's parental responsibilities and obligations, he did not take up these responsibilities in the State until July, 2007 at which time his children Zara and Mirabel were one and four years of age respectively. His family existed without his presence in the State during this time, therefore, if Mr. Ofobuike's spouse were to decide to stay in Ireland with the children, the disruption to their family life would not have the same impact as it would if they had been living together as a family unit for a much longer period of time."

55. In the Court's judgment there is no stateable case to be made that the weighing up of the family circumstances in question in this case could be said to be in any sense unreasonable or disproportionate having regard to those undisputed facts of the family history. The argument advanced is to the effect that the deportation of the applicant would unreasonably and disproportionately compel the other family members to choose between living in Ireland and moving to Nigeria in order to maintain the family unit. That, however, is precisely the same type of choice which the applicant and his wife appear to have been prepared to make of their own volition in 2002.

56. The Court's reasons as stated in respect of these grounds effectively dispose also of the supplementary grounds raised at paragraphs 5.7 and 5.8 of this Statement of Grounds. (See paras. 9 and 10 above). Helen Ofobuike was granted permission to reside in the State with Mirabel under the terms of the "IBC 05 Scheme". Such other parents as may have been permitted to reside were also dealt with by reference to their own individual circumstances. The applicant did not qualify under the IBC 05 Scheme and cannot therefore assert any unequal or discriminatory treatment. Whether or not a decision to deport is disproportionate is to be judged by reference to the impact of the removal of the deportee on the immediate family and not by reference to the circumstances of others, however numerous, to whom residence has been granted.

Conclusion

57. In the light of the foregoing the Court considers that this application for leave does not meet the threshold required by s. 5 (2) (b) of the Act of 2000. All of the facts and factors relevant to the personal and family circumstances of the applicant and his daughter Mirabel have been identified and considered by the Minister in the memorandum of analysis upon which the Contested Decision is based. No factor pertinent to Mirabel's personal or family rights under the Constitution or her right to respect for private and family life under the Convention has been distorted, exaggerated or omitted from consideration in the Court's judgment. Having regard to those circumstances and to the personal history of the family members it cannot be tenably maintained that the Contested Decision is either unreasonable or disproportionate. As Denham J. emphasises in the *Oguekwe* and *Dimbo* judgments, it is for the Minister to make the assessment which is required when a decision on deportation is being made. This Court reviews that assessment to ensure that it has been lawfully made and that the discretion accorded to the Minister has been lawfully exercised; but the Court does not substitute its own assessment or exercise any alternative discretion.

58. The Court is accordingly satisfied that no stateable legal defect in the Contested Decision has been made out which would warrant the grant of leave in this case. It is unnecessary, therefore, to consider the question of the extension of time.

59. The application must therefore be refused.