Neutral Citation Number: [2010] IEHC 83

THE HIGH COURT

JUDICIAL REVIEW

2009 373 JR

BETWEEN

OLUWABUNMI OLANIRAN, INIOLUWA "FAVOUR" OLANIRAN (A MINOR, SUING BY HER MOTHER AND NEXT FRIEND OLUWABUNMI OLANIRAN), ERIOLUWA "MARVELLOUS" OLANIRAN (A MINOR, SUING BY HIS MOTHER AND NEXT FRIEND OLUWABUNMI OLANIRAN) AND TEMILOLUWA OLANIRAN (A MINOR, SUING BY HIS MOTHER AND NEXT FRIEND OLAUWABUNMI OLANIRAN) [NIGERIA]

APPLICANTS

AND

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

RESPONDENTS

JUDGMENT OF MS JUSTICE CLARK, delivered on the 16th day of March, 2010

1. The applicants, who are a mother and her three minor children, are nationals of Nigeria. They seek leave to apply for judicial review of the decision of the Minister for Justice, Equality and Law Reform, dated the 23rd February, 2009, to make deportation orders against the second and third named applicants who were born in Ireland in 2005 and 2007 respectively. Deportation orders have already been made against the mother and her first son.

2. The hearing took place on the 3rd March, 2010. Mr Garry O'Halloran B.L. appeared for the applicants and Mr David Conlan Smyth B.L. for the respondents.

Background

3. The first applicant ("the mother") was six months pregnant when she applied for asylum on the 16th February, 2005. Her son T. (the fourth applicant), who was born in Lagos in 2003, was included as a dependent under her application. Although she submitted no identity documentation she presented as a well educated woman of Yoruba ethnicity, born in 1973 in Lagos where her parents continue to live. She claimed that she graduated in 1994 with a Higher National Diploma in Secretarial Studies from Federal Polytechnic in Ogun State and then two years later she passed the Final Examination of the National Diploma in Secretarial Administration, also in Ogun State. In November, 2000 she married her husband who has a BSc in Economics and his own travel agency business.

4. She claimed to fear persecution at the hands of her husband's family. Her account was that when pregnant with her second child, her second scan at the clinic used by the family confirmed that she was carrying a girl. It was the tradition within her husband's family that all mothers carrying a girl baby would be genitally circumcised. Her husband was on a business trip in a village in Calabar State for three months starting from the 1st January, 2005. She did not know the name of the village he was working but was aware that there was no phone contact available and that she was unable to contact him. One day ten men from her husband's family arrived together at her house, forcibly abducted her and took her to a shrine where they stripped her naked and chained her hands and feet. They then left to find her husband's uncle who, as the head of the family, would carry out the procedure. When alone, she removed the chains and walked to her Pastor's house where her son was staying. She did not contact the police nor did she attempt to relocate because she did not know where or to whom she should run. Tradition did not allow for a married woman to go back to her family and she did not know anywhere else in Nigeria. She had to go somewhere her husband's family could not trace her so the Pastor organised for her and her son to travel with him to Ireland via the Netherlands. He made all the arrangements.

5. The Refugee Applications Commissioner did not find this narrative convincing and a negative recommendation was made in March, 2005. That recommendation was affirmed by the Refugee Appeals Tribunal (Ms. Michelle O'Gorman). Both decision-makers made a series of negative credibility findings. Deportation orders were made against mother and son in September, 2005 which were not challenged. Meanwhile on the 19th April, 2005 the mother gave birth to her daughter, the second applicant, in the State. At an unspecified date later that year her husband joined them in Ireland. There are no details available of how and when he arrived or of his mode of entry into the State. He has never applied for asylum and has been illegally in the State since 2005. He is not a party to these proceedings. In September, 2007 the mother gave birth to their second son, the third named applicant. Both of the children who were born in Ireland have birth certificates which indicate that their father was in Nigeria at the time of their birth.

The Children's Asylum Applications

6. In December, 2007 the mother made individual applications for asylum on behalf of her daughter and younger son (the second and third applicants). She claimed to fear that she and her daughter would be subjected to FGM in Nigeria and that if she died, there would be no-one to look after her younger son. The infant children's questionnaires state that their father was in Ogun State, Nigeria but at their s. 11 interviews the mother disclosed that he was in fact in Ireland illegally. She said he was also being persecuted in Nigeria but had not applied for asylum because he did not want to be deported. The mother said that she and her daughter could die as a result of circumcision and her husband's family would not accept or take care of his younger son and would regard him as an outcast. They could not return to live with her parents in Lagos because in their culture, once a girl is married she must stay with her husband's family. In any event her in-laws know where her parents live and they could employ people to find her. NGOs could not help and she had no available options to stay with her siblings because they are young and still in school. She said "*Nigeria is a very small place. I fear that I would be located*".

7. The minor applicants' cases failed before ORAC and the RAT. Both of those statutory bodies relied on extensive country of origin information (COI) to the effect that the practice of FGM has declined steadily in recent years, that the federal government publicly opposed FGM but took no legal action to curb the practice, that individual states including Ogun State had banned the practice and that most women resort to relocating if they do not wish to undergo FGM. It was concluded that bearing in mind the COI, the mother

had not offered any credible evidence that it would be unduly harsh for her to go to a different region in Nigeria, far from her in-laws, that it would not be feasible for them to trace her in a country so vast and that the alleged threat could be avoided by severing contact with her in-laws.

8. The Commissioner's recommendations were affirmed by the Refugee Appeals Tribunal (Ms. Michelle O'Gorman) in April, 2008. By reference to COI the Tribunal Member gave extensive consideration to the measures undertaken to combat the practice of FGM. She assessed the possibility of internal relocation by reference to the size and population of Nigeria and the applicants' personal circumstances, particular their parents' educational qualifications and the husband's ability to travel within Nigeria without being contacted by his wife or family when she was in difficulty. The Minister refused to grant refugee status to the children and proposed to deport them.

The Leave to Remain Application
9. On the 8th September, 2008 the applicants' solicitors applied for leave to remain on behalf of the second and third named applicants. The representations in support of that application, being notably brief, merit quotation in full:-

> "Application for humanitarian leave to remain in the State pursuant to Section 3 of the Immigration Act 1999
>
> *Dear Sirs,*
>
> *We refer to yours of the 12th June and the 20th June last in respect of the above named. [I.F.O.] was born on the 19th April, 2005 and [E.M.O.] was born on the 10th September, 2007, both in Ireland. Copies of their Birth Certificates are attached herein.*
>
> *Medical Issues:*
>
> *[E.M.O.] was diagnosed with sickle cell anaemia in Cavan Hospital in late November, 2007 and we enclose herein a copy of a letter from The Berkley Clinic, dated the 27th November, 2007 as confirmation of same.*
>
> *Mother [O.O.]*
>
> *We would ask that you specifically consider the case of the children in the context of their mother's activities and position in the State at present.*
>
> *[O.O.] has been the voluntary secretary of the outreach centre of Epignosis Training in Galway and a letter from the Director of the Centre attest that he finds her honest, loyal and committed. Ms [O.O.] is the Chairperson of the Lisbrook Childcare Committee and a letter from the Community Development Worker of the Galway City Partnership confirms that Ms. [O.O.] is working hard to provide activities for their children and their mothers. The letter further opines that Ms. [O.O.] could contribute greatly to the community and society at large. A letter from The Childminder Advisory Committee also attests that with Ms. [O.O.]'s assistance training events and pre school services have been arranged. Ms. [G.] states that she has found Ms. [O.O.] to be a positive, energetic and accomplished woman who is volunteering on behalf of her community to enhance their current living situation for the adults and children within Lisbrook House.*
>
> *It is clear that Ms. [O.O.] is motivated, educated and has a will to be a valuable economic and social contribution to the State. She is held in very high regard within her local community. A wealth of references are attached to this end, including:*
>
> *1. Letter from Ms [S.K.] of the Galway Refugee Support Group;*
>
> *2. Letter from Ms. [S. Nic L.] who confirms that our client is a constant source of support to staff and residents;*
>
> *3. Letter from Ms. [K.D.], Manager of Lisbrook House, which states that our client has taken on a lot of responsibility regarding the children in Lisbrook House and is in charge of organizing meetings; that she has the zeal of contributing positively to the community.*
>
> *`Ms. [O.O.] has made every effort to further educate herself in Ireland which a view to obtaining viable employment here. To this end, we attach 3 Certificates which our client was awarded for participation in various Community Development workshops.*
>
> *It is submitted that, on the basis of the foregoing, that our client is of exceptional character and one to which the granting of leave to remain is warranted.*
>
> *Yours etc."*

10. Appended to the letter of the 8th September was a series of fulsome and complimentary letters testifying to the mother's voluntary activities which were indicative of a capable and caring organiser. A letter which had previously been before the Refugee Appeals Tribunal confirming the younger son's diagnosis of sickle cell anaemia was also appended together with certificates confirming various training programmes completed by the mother.

11. Additional supporting documentation was furnished on four different dates including a letter from a local T.D. indicating that the applicants were likely to make a contribution to Irish society, that the children's mother had already had an impressive record of volunteering and public service, that that the mother had a number of qualifications from Nigeria and was a member of the residents' association and children's committee at Lisbrook House, and that he had been very impressed by her and her children when he interviewed her at his advice centre. Also appended were letters of support from a HSE Community Welfare Officer and a Western Alliance Regional Development Officer.

The Leave to Remain Decisions
12. The files of the second and third named applicants, who were aged one and three respectively, were individually examined by different officers of the Repatriation Unit. In each case the child's biographical, family and domestic circumstances were summarised accurately. The submissions made and the supporting documentation was outlined. Under humanitarian considerations, it was noted that the children are entitled to citizenship of Nigeria and that the younger son had been diagnosed with sickle cell anaemia at 10 weeks of age. It was stated that having considered the humanitarian information on file, there was nothing to suggest that either

child should not be returned to Nigeria.

13. Under s. 5 of the Refugee Act 1996, the claim made to the asylum authorities by the mother and the children was summarised. In that consideration a number of extracts from a U.K. Home Office COI report on Nigeria (December, 2008) were summarised, addressing geography; the Constitution; the Police Force; human rights institutions; organisations and activists; FGM and internal relocation, children (including FGM), freedom of movement, exit-entry procedures, treatment of returned failed asylum seekers and citizenship and nationality. The section on FGM noted that Ogun State, among others, had banned the practice of FGM and that despite financial and logistical obstacles, public awareness projects to educate communities about the hazards of the practice were sponsored by the Ministry of Health, women's groups and NGOs. In relation to internal relocation the Home Office extract referred to a British-Danish Fact Finding Mission report (2008) which quotes women's NGOs as stating that internal relocation is possible for any adult woman irrespective of whether the case is about FGM, domestic violence or forced marriage and that UNIFEM stated that in theory, it is not difficult for a woman to relocate in Nigeria. While women prefer to go to friends or relatives than to a shelter when there are no other alternatives, women will seek protection in a shelter as a last resort and more than 50 organisations are able to refer a woman to an available shelter in Nigeria including specific shelters in Lagos and Abuja. In the extract dealing with children and FGM, reference was made to a 2005 OMCT report of the UN Committee on the Rights of the Child which noted the health risks attendant upon the practice of FGM and stated that a bill banning FGM was going through the houses of parliament but had not yet been adopted. While the ongoing existence of FGM is acknowledged efforts to combat it are undertaken and that due to public enlightenment and mobilisation efforts by groups of civil society, as well as increased enrolment of girls in schools, reported cases of FGM were diminishing but the practice remains widespread.

14. In the case of the son with sickle cell disease, an additional extract was quoted in relation to "medical issues" which addressed the availability of medical treatment and drugs. The extract refers to a *Physicians for Human Rights* report (2006) which outlined the public and private health systems in Nigeria and stated that there were regional disparities and inadequate funding and staffing. Reference was also made to the British-Danish FFM report (2008) which stated that hospitals suffer from poor funding, a lack of qualified medical staff, a lack of drugs and lack of medical treatment and that the governments do not provide free medical services but a new scheme started in 2007 would help to take care of medical expenses for many people. Despite the limitations of the health care system, a large number of diseases and conditions including sickle cell disease "can be treated". Medical care must be paid for and private hospitals exist which provide a higher standard of medical care than public sector hospitals.

15. Reference was also made to information on the treatment of sickle cell anaemia compiled from a search undertaken by the Refugee Documentation Centre. It was noted that 24% of the Nigerian population are carriers of a mutant gene and that the prevalence of sickle cell anaemia at birth is about 20 per 1000 births. In 2007 President Obasanyo expressed worry about the incidence and ordered the setting up of a committee to advise the government on what to do to reduce the scourge of the disease in Nigeria. Medical treatment for persons suffering from the condition was available and medical and nursing professionals were available who were training to administer medical care to people with the disease but few people had access to the treatment and there was a shortage of professionals. At least four million Nigerians were suffering from it and about 80% died before the age of five. About 40 million Nigerians were carriers and by 2008, about 100,000 new births every year are sicklers.

16. Having set out these COI extracts it was found in each case that having considered all the facts of the case, the officer was of the view that repatriating the child to Nigeria would not be contrary to s. 5 of the Refugee Act 1996. In each case consideration was also given to s. 4 of the Criminal Justice (UN Convention Against Torture) Act 2000 and Article 8 of the ECHR and in the case of the younger son, consideration was also given to Article 3 of the ECHR by reference to his sickle cell condition. No issue is taken in relation to the conclusions reached in that regard.

Delay

17. These proceedings were issued *24 days* after the expiry of the 14-day time limit set out in s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000. The mother says that that she immediately sought legal advice from her legal advisers and the delay was due entirely to the Court commitments of her solicitor and counsel. It was argued on behalf of the children that the delay arose through no fault of the applicants who therefore should not be penalised. The respondents resist the extension of time, relying on *Jolly v. The Refugee Appeals Tribunal* (Unreported, High Court, Finlay Geoghegan J., 6th November, 2003) where it was held that the Court may only consider extending time where a good and sufficient reason for the delay is averred to on affidavit. The explanation provided in the mother's affidavit is hearsay and while the affidavit states that she "immediately" sought legal advice, she gives no dates and the Court is therefore left ignorant as to whether she formed the intention to challenge the decision within the requisite time period. In relation to lawyer delay the respondents rely on the decision of Denham J. in *S v. The Refugee Appeals Tribunal* [2002] 2 I.R. 163.

The Challenges to the Validity of the Decisions to Deport

18. The applicants made two net arguments. First, the Minister gave insufficient reasons for his conclusion that refoulement was not an issue and that such reason as he provided and the conclusion he reached on refoulement was irrational in the light of the COI considered. It was argued that, applying *Meadows v. The Minister for Justice, Equality and Law Reform* (Unreported, Supreme Court, 21st January, 2010), the Minister's duty to consider refoulement is not diluted by the absence of representations on the subject as it is incumbent upon the Minister to take a holistic approach and consider the entire file before arriving at any conclusions.

19. Secondly, the Minister failed to consider best interests of the children as is required under the UN Convention on the Rights of the Child (CRC) to which Ireland is a signatory. This, it was contended, is a freestanding duty which exists even in the absence of representations on the interests of the children.

The Court's Assessment

20. This being a leave application to which s. 5 of the Illegal Immigrants (Trafficking) Act 2000 applies, the applicants are obliged to establish substantial grounds of the contention that the impugned decisions ought to be quashed. It is well established that this means that grounds must be shown that are reasonable, weighty and arguable as opposed to trivial or tenuous. As the applicants delayed by *24 days* after the expiry of the statutory time limit, it is also incumbent upon them to show good and sufficient reason for the Court to grant an extension of time.

21. The applicants' delay, though relatively short, is close to double the time allowed under s. 5 of the Act of 2000 and the reason provided by the mother puts the blame on her legal advisers, which they accept is inadequate as a basis for the Court to exercise its discretion to extend time. However, the Court notes that the three minor applicants are of tender years and were entirely dependent on their mother to seek legal advice and issue proceedings within the statutory time limit. In those circumstances, a degree of latitute may be exercised in their favour. While the time limit is strict and must be upheld, the interests of justice require that the Court should consider all of the circumstances of the case, including the merits, before making a determination on the extension of time.

The Refoulement Argument

22. It is undisputed that before considering a deportation order the Minister is obliged to consider whether that proposed deportation would breach the prohibition of refoulement set out in s. 5 of the Refugee Act 1996. What is disputed is the nature and extent of the Minister's obligation and whether the Minister's assessment of refoulement in this case was reasonable and rational.

23. There can be little doubt that the extent of the Minister's obligation to consider refoulement is, to a great extent, affected by the representations made on behalf of the failed asylum seeker. This principle was restated by Murray C.J. in *Meadows* when he stated:-

> "In cases where there is no claim or factual material put forward to suggest that a deportation order would expose the deportee to any of the risks referred to in s. 5 then no issue as regards refoulement arises and the decision of the Minister with regard to s. 5 considerations is a mere formality and the rationale of the decision will be self evident.
>
> On the other hand if such material has been presented to him by or on behalf of the proposed deportee, as the case here, the Minister must specifically address that issue and form an opinion."

24. Murray C.J. distinguished the decision of Keane C.J. in *Baby O v. The Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 169 on the following basis:-

> "Keane C.J. did not refer to any material specifically relevant to refoulement, as distinct from humanitarian grounds, which were relied upon by the applicant at that stage. If there was no such material then the Minister's decision on s.5 would have been one of form only and not required any rationale."

25. Denham J. agreed in *Meadows* with the rational expressed by Murray C.J. in relation to the distinctions between *Baby O* and *Meadows*.

26. The Court is fully aware that no case was made in the representations to the Minister that the deportation of the second and third named applicants would breach s. 5 of the Refugee Act 1996 or Article 3 of the European Convention on Human Rights. The application for leave to remain focussed entirely on the humanitarian considerations arising from the mother's undoubted contribution to Irish society by way of voluntary and community-based activities. An impressive series of warm and encouraging letters of support and recommendation was provided, attesting to the mother's positive characteristics. Those representations, which were in the nature of an *ad misercordiam* plea, were considered by the Minister who found, in his discretion, that there was nothing in the humanitarian considerations on file to suggest that the children should not be deported. Although the applicants are dissatisfied with that decision, they have not pointed to any deficiency which could support the contention that the decision ought to be quashed. As was held by Clarke J. in *Kouaype v. The Minister for Justice Equality and Law Reform & Anor* [2005] I.E.H.C. 380:-

> *"The weighing of the various matters which […] have been loosely described as "humanitarian grounds" is […] entirely a matter for the Minister. In the absence of evidence that the Minister did not give the person concerned an opportunity to make submissions in accordance with the statute or did not consider those submissions, it does not seem to me that that aspect of the Minister's decision is reviewable by the courts."*

27. It is accepted by the applicants that no representations were ever made where it was suggested that deportation of the children would expose them to a risk to their lives or freedom or to any form of serious attack nor was any country of origin information submitted suggesting such a risk. The fact of the younger son's sickle cell anaemia was set out without expansion or comment. No information was provided on any treatment being received, if any. It was not suggested that he would not have access to medical care in Nigeria nor was it suggested that his family would be unable to pay for such medicines or treatments as may be required. The claim that mother and daughter would be at risk of female genital mutilation in Nigeria was not repeated.

28. While the leave to remain applications relied solely on humanitarian considerations which were confined to the mother's valuable place in society, the Minister did address the refoulement issue. The details of the applicants' asylum applications which were summarised by the examining officer were clearly obtained from the children's asylum files. The Minister would, pursuant to s. 16(7) of the Act of 1996, have received the decisions of the Refugee Appeals Tribunal together with a copy of the Commissioner's s. 13 reports and thus would have the entire asylum files available to him. The basis of the children's asylum claims expressed through their mother that she and her daughter would be subjected to FGM and would die, leaving the younger son alone, was assessed by reference to up-to-date country of origin information reports sourced by the Minister. The Minister also referred to information compiled by the Refugee Documentation Centre on sickle cell anaemia in Nigeria.

29. The reasonableness of the Minister's decision on refoulement must be assessed in the context of the facts that were before the Minister. According to the information contained in the asylum files, the children's mother is well educated and worked in administrative positions before coming to Ireland in 2005. Her family live in Lagos, a good distance from the husband's family in Ogun State. She had access to a clinic where she had scans during her first and second pregnancies. She provided no reasonable explanation as to why the family could not relocate in Nigeria rather than coming to Ireland. The explanations she did provide were rejected by the Refugee Applications Commissioner and the Refugee Appeals Tribunal not only in her own case but also in the cases of the second and third named applicants and as has been noted, those decisions were before the Minister. The situation is that if the fear expressed was real, then the availability of internal relocation as an antidote to their fear was identified in each of those decisions by reference to COI. Those decisions were not challenged by way of judicial review.

30. The COI referred to by the Minister clearly indicates that although a degree of initiative may be required, internal relocation is a viable option for women who seek to avoid FGM in Nigeria. The mother in this case is clearly capable of initiative as the many letters sent to the Minister describe her as dynamic, disciplined, energetic, hard working, educated and dependable. One letter of support indicates that "*she will succeed in anything she may do in the future*". As the reasonableness of the Minister's decision on refoulement must be assessed in the context of the facts that were before him there is no basis to suggest that there was anything unreasonable or irrational about his decision that refoulement was not an issue in this case. Again, it is important to note that very little was furnished in the way of submissions. The Minister made himself aware of the applicants' personal history and claims from the files. He consulted up to date COI which supports the decision reached by the Commissioner and the Tribunal that if the applicants feared their father's family, then relocation within Nigeria was a solution. He ultimately formed the opinion that the children's lives or freedom would not be threatened in Nigeria on account of their race, religion, nationality, membership of a particular social group or political opinion and would not, therefore, breach s. 5 of the Refugee Act 1996.

31. The applicants have not established substantial grounds on the refoulement issue.

UN Convention on the Rights of the Child

32. The Court rejects the applicants' contention that the Minister failed to adhere to the obligations set out in the UN Convention on

the Rights of the Child (CRC). Ireland has signed and ratified the CRC but the Convention has not been incorporated into domestic law. Ireland has a dualist system under which international agreements to which Ireland becomes a party do not automatically become part of Irish law. This is clear from Article 29 of the Constitution which provides in its relevant part:-

> *"3. Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States. […]*
>
> *6. No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."*

33. The fact that Ireland is a signatory to the CRC confers no rights on individuals to rely on its provisions before the domestic courts nor does it impose any obligations on the Irish state to police the adherence of other states who are signatories to the same Convention to that instrument. As was stated by Fennelly J. in *Kavanagh v. Governor of Mountjoy Prison* [2003] 3 I.R. 97:-

> "The Constitution establishes an unmistakable distinction between domestic and international law. The government has the exclusive prerogative of entering into agreements with other states. It may accept obligations under such agreements which are binding in international law. The Oireachtas, on the other hand, has the exclusive function of making laws for the state. These two exclusive competences are not incompatible. Where the government wishes the terms of an international agreement to have effect in domestic law, it may ask the Oireachtas to pass the necessary legislation. If this does not happen, article 29, section 6 applies."

34. No representations were made to the Minister in this case that he ought to consider the provisions of the CRC or that he could not deport the children because it would be contrary to their best interests. The particular provision of the CRC that the applicants allege was breached was not identified in legal argument. As Clarke J. held in *Kouaype*, the Minister is obliged to consider the humanitarian and other factors set out in s. 3(6) of the Immigration Act 1999 only "*insofar as they are known to him*" and to have regard to any representations on those matters which are made by or on behalf of the person concerned. The Minister fully complied with that obligation in this case.

Conclusion

35. The Court is satisfied that the applicants have *not* established substantial grounds for the contention that the Minister's decision to make deportation orders against the second and third named applicants ought to be quashed. The extension of time is therefore refused and it follows that leave is refused.