Neutral Citation Number: [2008] IEHC 385

THE HIGH COURT

2008 434 JR

BETWEEN

**F. U., C. U. (A MINOR, SUING BY HIS MOTHER AND NEXT FRIEND, F.U.),
T. U. (A MINOR, SUING BY HIS MOTHER AND NEXT FRIEND, F.U.),
I. U. (A MINOR, SUING BY HIS MOTHER AND NEXT FRIEND, F.U.), AND
S. U. (A MINOR, SUING BY HIS MOTHER AND NEXT FRIEND, F.U.).**

APPLICANTS

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

RESPONDENTS

AND
HUMAN RIGHTS COMMISSION

NOTICE PARTY

Judgment of Mr. Justice Hedigan, delivered on the 11th day of December, 2008.

1. The applicants are seeking leave to apply for judicial review of two decisions of the Minister for Justice, Equality and Law Reform ("the Minister"):

(i) The decision to make deportation orders in respect of them, and

(ii) The decision not to grant subsidiary protection to them.

2. They are also seeking interlocutory relief restraining their deportation pending the determination of the within proceedings.

3. The Minister's decision to make deportation orders is one to which section 5 of the Illegal Immigrants (Trafficking) Act 2000 applies. In order to obtain leave, therefore, the applicants must show substantial grounds for the contention that the said decision should be quashed. The somewhat lower threshold set out in *G v DPP* [1994] 1 IR 374 applies, however, to the subsidiary protection decision.

Background

4. Each of the applicants is a national of Nigeria. The first named applicant is the mother of the second, third, fourth and fifth named applicants, who are minors aged between four and nine years of age. The family arrived in the State on 6th July, 2005. The following day, the first named applicant applied for asylum, and gave consent for the minor applicants to be included under her application. The application was given priority and the Office of the Refugee Applications Commissioner (ORAC) made a negative recommendation later that month; that decision was upheld by the Refugee Appeals Tribunal (RAT) in October, 2005. In November, 2005, the Minister informed the applicants that he was proposing to make deportation orders in respect of them and invited them to make representations seeking leave to temporarily remain in the State. In December, 2005, they issued judicial review proceedings challenging the RAT decision; leave was refused by Hanna J. in March, 2007.

5. By letters dated 28th June, 2007, 19th July, 2007 and 27th November, 2007, representations seeking leave to remain were made on behalf of the applicants. The Minister was informed *inter alia* that the two of the minor applicants were in school and the other two were in pre-school, that the applicants would be forced to live in poverty if they were returned to Nigeria, and that there would be very few prospects of obtaining employment.

6. In July, 2007, the Minister acknowledged receipt of the first of the above letters and informed the applicants of their entitlement to apply for subsidiary protection under the European Communities (Eligibility for Protection) Regulations 2006 (S.I. 518 of 2006). A short period of delay ensued and an application for subsidiary protection was eventually made on 11th September, 2007; the minor applicants were included as dependents therein. The applicants were informed by letter dated 23th October, 2007 that their application had been rejected.

7. In January, 2008, the applicants' file came to be considered pursuant to section 3 of the Immigration Act 1999 and section 5 of the Refugee Act 1996. The applicants have not pursued any complaints in respect of the section 3 or section 5 analysis; instead, they have focused on the analysis of their rights under Article 8 of the European Convention on Human Rights. The analysing officer accepted that the deportation would engage the Article 8 rights of the first named applicant and her children. She found, however, that although the deportation may constitute an interference with their right to respect for private life, it would be proportionate to the legitimate aim of the State to maintain control of its borders and therefore necessary in a democratic society. As to the family life aspect of Article 8, she noted that the first named applicant does not know her husband's whereabouts and has no other family ties in the State, and she found that the proposed deportation would not interfere with her right to respect for her family life. The Minister made deportation orders in respect of the applicants on 26th February, 2008; those orders were notified to them by letter dated 11th March, 2008.

Extension of Time

8. The within proceedings were not issued until 17th April, 2008 and so, the applicants were outside of the 14 days allowed under 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000 for the bringing of an application for leave in respect of the making of the deportation orders. Nevertheless, I am satisfied that there is good and sufficient reason to extend time, and I propose to do so.

The Applicants' Submissions

9. The applicants' primary complaint with respect to the making of the deportation orders is that the Minister acted in breach of his obligations under section 3(1) of the European Convention on Human Rights Act 2003 by failing to take account of the best interests and well being of the minor applicants when assessing the proportionality of their deportation under Article 8(2) of the European Convention on Human Rights, in circumstances where the social and economic difficulties that would be faced by them if returned to Nigeria were properly before the Minister. Reliance is placed in this regard on the decision of the European Court of Human Rights in *Üner v The Netherlands* (App No. 46410/99, judgment of 18th October, 2006). The applicants contend that the Strasbourg Court therein established guiding principles as to how the proportionality of an interference with Article 8 rights is to be assessed, and it is submitted that the Minister's failure to abide by those guiding principles renders the decision to make deportation orders irrational.

10. The applicants also complain that by failing to provide a guarantee that the first named applicant and her children would not be separated during the deportation process, he made a decision that could give rise to a breach of the applicants' right to respect for

their family life under Article 8. That submission is made in the specific context of the applicants' present circumstances, namely that since 4th December, 2008, the first named applicant has been detained in Mountjoy women's prison and her sons have been placed in temporary foster care by the HSE.

11. A secondary challenge is made in respect of the Minister's decision to refuse subsidiary protection: it is argued that there was no real consideration of the risk of serious harm faced by the minor applicants if returned to Nigeria; it is submitted that their case was, in effect, subsumed into their mother's case.

The Respondent's Submissions
12. The respondents contend that it is clear on a plain reading of the Minister's decision that there was extensive consideration both of the rights of the first named applicant and of the rights of her four children; it is argued that there are numerous and extensive references to the rights of the children, and that consideration was clearly given to the social and economic difficulties that may be experienced by the minor applicants if returned to Nigeria. Reliance is placed in this regard on the decisions in *Dada v The Minister for Justice, Equality and Law Reform* [2006] IEHC 140, *Sanni v The Minister for Justice, Equality and Law Reform* [2007] IEHC 398 and *Spasojevic v The Minister for Justice, Equality and Law Reform* (unreported, Edwards J., High Court, 29th July, 2008). It is noted in particular that the fears and difficulties expressed on behalf of the children were, in each instance, based on the fears and difficulties of their mother.

13. With respect to the applicants' arguments with regard to their family rights, it is submitted that it is pure speculation that the State would separate the mother from her children and it is argued that no such intention is present on the part of the State.

14. The respondents further complain that a period of delay elapsed between the subsidiary protection decision and the issue of the within proceedings, during which time the applicants took no action in respect of the subsidiary protection decision.

The Court's Assessment
15. The applicants' primary contentions centre upon the obligations of the Minister following from the judgment of the Grand Chamber of the European Court of Human Rights in *Üner v The Netherlands* (App no. 46410/99, judgment of 18th October, 2006 [GC]). That was one of a number of cases that have been heard by that Court in respect of the proportionality of the expulsion of long-term migrants who have established families in their host State but also been convicted of serious crimes in the State. The applicant in *Üner* was a national of Turkey who moved to the Netherlands with his family at the age of 12. His residence permit was renewed annually until he reached the age of 18, when he was given a permanent residence permit. He entered a relationship with a national of the Netherlands, with whom he fathered a son. Between 1989 and 1993, he was convicted of several offences, including manslaughter. In 1996, while the applicant was in prison, his partner gave birth to their second son. The applicant remained in close contact with his partner and children. In 1997, his residence permit was withdrawn and a ten-year exclusion order was imposed on him. He was released from prison in 1998 and deported.

16. The applicant in *Üner* alleged a violation of Article 8 on the basis that the State had failed to take into account the interests of his Dutch partner and Dutch children. In its judgment, the Grand Chamber of the European Court of Human Rights referred (at § 57) to the eight criteria set out in *Boultif v Switzerland* (App no. 54273/00, ECHR 2001-IX) which the Court considered it appropriate to use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. The Court then stated (at § 58) that it wished to make explicit two criteria which, it stated, may already have been implicit in the criteria identified in *Boultif*. The first of the two criteria identified was:-

> "[…] the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled".

17. I would have my doubts as to whether the principle set out at § 58 of the *Uner* judgment applies in a situation such as the present where the family members are not migrants well established in the country but, rather, have entered the State as asylum seekers and have an entitlement to remain here only until their status is determined. In my view, the Strasbourg Court in *Üner* was not aiming to set out a principle to be followed in cases such as the present; rather, it was setting out the matters to which regard must be had when considering the proportionality of the expulsion of a long-term migrant who has established a family in the expelling State and has then been convicted of a criminal offence. This, in my view, is borne out by the discussion that followed at § 59 in *Üner* as to the suitability of the *Boultif* criteria alone "in all cases concerning the expulsion and/or exclusion of settled migrants following a criminal conviction", and the statement made at § 60 that all of the factors set out in §§ 57-59 should be taken into account "in all cases concerning settled migrants who are to be expelled and/or excluded following a criminal conviction". It is also noteworthy that notwithstanding the applicant's long-standing ties to the Netherlands, the Strasbourg Court found that his expulsion was proportionate to the aims pursued in the light *inter alia* of the serious offences of which he had been convicted, the young age of his children and their adaptability to life in Turkey, and the fact that the applicant had spent sufficient time in Turkey so as to have some social, cultural and linguistic ties with that society.

18. Even if it was accepted that the matters set out at § 58 of the *Uner* judgment are to be taken as a guideline to be followed by national authorities in all cases when assessing the proportionality of an expulsion under Article 8 where there is the potential that a child will be affected, I am satisfied that the Minister did, in fact, take the best interests of the children into account before making the deportation order. It is true that the analysing officer did not expressly state "I will now turn to the consideration of the best interests of the minor applicants", but it is not necessary, in my view, to proceed in that fashion. The analysing officer acknowledged that the deportation of the first named applicant and her children would engage their Article 8 rights, and may constitute an interference with their right to respect for their private life within the meaning of Article 8(1). She noted the representations made on behalf of the applicants, and went on to find that the interference would be justified under the Article 8(2) proviso. With respect to proportionality she noted that the first named applicant and her children had been given an individual assessment and due process in all respects, and that there was no less restrictive process available than deportation which would achieve the legitimate aim of the State to maintain control of its borders. She then made express reference to the difficulties that would be faced by the first named applicant and her sons if returned to Nigeria, and expressly addressed those difficulties by referring to the case-law of the courts with respect to the absence of any entitlement to remain in the State purely to benefit from medical, social or other forms of assistance provided by the State. It is, in my view, untenable to suggest that this does not amount to consideration of the interests of the children.

19. My findings in this regard apply equally to the applicants' complaints in respect of the Minister's decision not to grant them subsidiary protection. It is important to note with respect to that decision in particular that it does not appear that the applicants adverted to any new or altered facts or circumstances in their application for subsidiary protection other than the facts and circumstances grounding their earlier claim for asylum. Thus, their subsidiary protection application was, in substance, the same as their asylum application, which had already been advanced and rejected before the statutory asylum bodies (i.e. ORAC and the RAT).

Moreover, the High Court thereafter found that there were no substantial grounds for the contention that the affirmation by the RAT of the negative recommendation made by ORAC should be quashed. In those circumstances, the role of this Court in reviewing the decision of the Minister not to grant subsidiary protection is, of necessity, limited. Referring to rights (such as the right to subsidiary protection) which have not previously been considered during the asylum process, Charleton J. in *Fr N. v The Minister for Justice, Equality and Law Reform* [2008] IEHC 107 summarised the position as follows (at paragraph 46):-

> "Where, as a matter of substance … a contention as to the factual basis for such rights is the same as that which is already being processed under the Refugee Act, 1996, then the case law clearly establishes that the Minister is entitled to place some degree of weight on the failure of the applicant to succeed in persuading the Refugee Applications Commissioner and the Refugee Appeals Tribunal as to their entitlement to refugee status and as to their credibility."

20. With respect to the applicants' complaints in regard to the potential breach of their right to respect for their family life under Article 8 in the event of the separation of the mother and her sons, I am satisfied that although there may be a genuine subjective basis to this fear, it is not well founded and is based purely on speculation. Deportation orders have been made in respect of each of the five applicants; there is no evidence of any nature that the State intends to separate the family unit on a permanent basis, albeit that the first named applicant is currently separated from her children. Indeed, I would go so far as to say that it is appropriate to proceed on the assumption that in circumstances where the protection of the family is enshrined at the heart of the Constitution, the State would never seek to split up a family unit in circumstances such as the present.

21. Finally, I would also note that I have given consideration to the respondents' submissions with respect to the lapse of five and a half months between the date of the subsidiary protection decision (23th October, 2007), and the issue of the within proceedings (17th April, 2008). As the relief sought is certiorari, the relevant period prescribed by Order 84, Rule 21 RSC is six months. The applicants were not, therefore, out of time. I do not consider it appropriate to make any findings on the applicants' tardiness in the present case, but I would note that the time limits set out in Order 84, rule 21 are outer limits and the requirement to act "promptly" within those outer limits is not to be disregarded; failure to do so may be accorded due weight in appropriate cases.

Conclusion

22. In the light of the foregoing, I am not satisfied that the applicants have established substantial grounds and I therefore refuse to grant leave. The application for injunctive relief does not, therefore, arise.