Neutral Citation Number: [2010] IEHC 173

THE HIGH COURT

2009 882 JR

O.O.S.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

ATTORNEY GENERAL, IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Birmingham delivered the 12th day of May, 2010

The applicant is a Nigerian national and a failed asylum seeker. He states that he was born on the 1st January, 1991, and accordingly is nineteen years old. He claims to have entered the State no later than the 27th May, 2006, but did not submit an asylum claim until the 20th December, 2007. The claim for asylum related to the fact that he was alleging that in Nigeria he had to work as a child slave on the farm of a relative or family friend (he has described the farmer at different stages as a relation and as being just a family friend).

The claim for asylum failed at both the Office of the Refugee Applications Commissioner ("ORAC") and Refugee Appeals Tribunal ("RAT"). Subsequently, the applicant submitted a claim for subsidiary protection and for leave to remain in the State pursuant to s. 3 of the Immigration Act, 1999.

The claim for subsidiary protection was refused, as was the application for leave to remain. This latter aspect was the subject of a report dated the 19th June, 2009, prepared by an executive officer in the repatriation unit which was subsequently endorsed by more senior officials. On the 10th July, 2009, the Minister signed a deportation order. The applicant now seeks leave to challenge the decision to make the deportation order and to refuse leave to remain. A short extension of time was required if the application was to be permitted. In a situation where it appears that documentation furnished by the Department of Justice, Equality and Law Reform to the applicant and his advisors may have been incomplete, with pages missing, and where the applicant would seem to have formed the intention to challenge the decisions as soon as he became aware of them, I had no doubt that this was an appropriate case to grant an extension of time and I did so. The arguments advanced in support of the challenge relate to the claim that the Minister's decision to proceed to deport was disproportionate and that the decision violated the applicant's rights under Article 8 of the European Convention on Human Rights – the right to respect for private and family life.

The background to this challenge is that the applicant says he lived in Nigeria at two separate locations, Lagos and a rural village, along with his grandmother for approximately seven years in all. During this period it does not seem he was residing with his father. It is also the situation that, on the applicant's account, he has had no contact with his mother since he was a baby. The applicant's father came to Ireland and submitted a claim for asylum in September, 2003 and subsequently the applicant's father and step mother, [the applicant's father entered into a relationship], were granted residency in the State under the Irish Born Child Scheme (IBC/05) scheme. The couple have had three children who were born in the State, F. who was born on the 4th August, 2003, E. who was born on the 4th May, 2005 and M. who was born on the 9th May, 2007. F. is an Irish citizen but E. and M. are not citizens of Ireland.

Following his arrival in the State, the applicant made contact with his father, and since then, he has resided with him and with his stepmother, half brother and two half sisters. He has attended secondary school and has sat his Junior Certificate examination in 2007 and the Leaving Certificate in 2009.

The issues canvassed so extensively in argument relating to the right to family life, were not, it must be said, addressed in any very developed way in the course of the submissions to the Minister seeking leave to remain.

The question of family circumstances is dealt with at para. 2.9 of the submission made to the Minister and it may usefully be quoted in full:-

> "2.9 Section 3(6) (c) – Family and Domestic Circumstances: The applicant states that he currently resides with his father O.O.S. (his father has a stamp 4, his step mother (B.B.S.) who also has a stamp 4 and his stepbrothers and sisters F. (5), E. (3), and M. (1) all Irish born children. Furthermore, he has built up an extensive network of friends who act as an informal support network and to deport him back to the chaotic reality of the unstable political situation of Nigeria would be contrary to Ireland's international humanitarian obligation. We contend that our client's family are primarily based in this jurisdiction and that therefore any move to return him to his country of origin would in reality deprive him of his right to a family life as espoused in the jurisprudence of Article 8 of the ECHR now incorporated into Irish domestic law through the 2003 ECHR Act. Also, by virtue of our client's participation in school and football activities in the local community, any effort to remove his from the State would be detrimental to his emotional development at this particular stage in his life".

I should, for completeness, draw attention to two other references to family matters that are contained in the submissions. The first is in the context of the application for subsidiary protection and is in these terms:-

> "We set out the grounds as to why the applicant has substantial grounds to fear that his life would be in danger if he was returned to Nigeria because of the reality that the majority of his family unit currently resides in the Irish State and that if he was deprived of the support of his nuclear family in the context of the inherent political instability in his country of origin that he would face the inevitable prospect of serious harm, and furthermore because of his relative youth, he would be particularly susceptible to exposure to undesirable criminal elements within his country of origin."

The final reference to family issues is to be found in the "conclusions" section of the submissions. It is in these terms:-

> "In conclusion, we ask the decision maker to exercise their discretion in a compassionate manner given the specific facts of this particular case, where the applicant's family almost in its entirety is located in the State, and also where the applicant is in full-time education seeking to eventually sit the Leaving Certificate and ultimately contribute to the Irish economy and society".

While the decision has been subjected to detailed criticism, it must be said that the level of analysis conducted in the course of the present proceedings compares favourably to the rather scant treatment of the issue which is to be found in the representations actually made to the Minister before the decision was reached. No information was put before him as to how father and son have bonded after being apart for so long, no information whatever was offered as to the nature of the applicant's relationship with his stepmother, nor as to the nature of his relationship with his young half-brother and young half-sisters. There is no specific reference to any situation of dependency or any specific information about the family circumstances which would suggest that separating family members would be particularly harsh. So far as the question of dependency is concerned, the case is made on behalf of the applicant that the Minister could and, indeed, should have deduced that such was the case from the fact that at the time the representations were submitted, the applicant was a Leaving Cert student.

It is the case that there is likely to be a co-relation between the extent of the detailed information that is furnished, and the quality of the decision that emerges, and accordingly, it is incumbent on an applicant seeking leave to remain to submit a detailed and focused application specifically addressed to his own individual circumstances. That obligation is not met by reciting general principles and by submitting lengthy country of origin extracts.

In *Olaniran & Ors v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Clark J., 16th March, 2010), the issue was addressed in these terms at para. 23, pp. 11-12:-

> "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 v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, (Unreported, Supreme Court, 21st January, 2010) 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 risk 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.'"

The relevance of this to the present case is that where, as here, a complete dearth of information was provided, this will obviously influence what can be demanded of the decision maker.

Counsel on both sides researched with great industry the situations where rights to family life have arisen for consideration. The situations that have been referred to range from a Sri Lankan seeking to remain in Britain, whose mother and other relatives had been granted asylum in Germany as in the case of *Kugathas v. Secretary of State for Home Department* [2003] E.W.C.A. Civ.31, a Nigerian national married to a Norwegian national with whom he had a daughter, as in *Darren Omoregie v. Norway* (Application No. 265/07) Judgment of 31st July, 2008, a grandmother who had assumed the primary role in the care of her grandchildren in order to allow her daughter hold both a full time and a part time job, as in *G.O. v. the Minister for Justice, Equality and Law Reform* [2008] IEHC 190 and a very unusual international adoption case where the child believed his natural parents to be his aunt and uncle and his adoptive parents to be his natural parents, as in *Singh (Pawendeep) v. Entry Clearance Officer New Delhi* [2004] E.W.C.A. Civ. 1075 to mention just some of the situations that have been referred to.

However, the case which is closest by far to the facts of the present case would appear to be the decision of Dunne J. in *B.I.S., I.Z.* and *I.S. v. the Minister for Justice, Equality and Law Reform* [2007] IEHC 398 (Unreported, High Court, Dunne J., 30th November, 2007). That case too, concerned a young Nigerian man, who remained in Nigeria with his grandmother after his parents moved to Ireland, who then came to Ireland to join his parents as well as two of his siblings who were born in Ireland while he was living in Nigeria. In essence, the argument made on behalf of the applicant was that Article 8 of the ECHR rights were engaged in the case and that there was nothing to show that Article 8 rights were considered by the Minister. It will be noted that unlike the present case, there was no specific reference set out in the Ministerial decision as to the relevance of Article 8.

Having referred to the case of *Pok Sun Shun v. The Minister for Justice, Equality and Law Reform* [1986] ILRM 593, a decision of Costello J. (as he then was), and *P.F. v. The Minister for Justice, Equality and Law Reform* [2005] IEHC 9 a decision of Ryan J., 26th January, 2005, in which it was stated that it was necessary to consider the papers before the Minister overall, and to consider in these circumstances whether it could be said that the Minister was aware of the family circumstances of the applicant, and that he would have been aware of the effect of any order on those involved, Dunne J. stated that she was of the view that the family situation must have indeed been considered by the Minister.

In this case there is not the slightest room for doubt but that the Minister was fully aware of the family situation, but notwithstanding what he knew, he had decided it was appropriate to make a deportation order.

In *B.I.S.* Dunne J., having carried out a very extensive review of the jurisprudence of the European Court of Human Rights, identified the following principles:-

> (1) Family can include the relationship between an adult child and his parents (See for example *Boughanemi v. France* [1996] 22 E.H.R.R. 228).
>
> (2) Family life may also include siblings, adult or minor (See *Boughanemi and Olusen v. Sweden* [1989] 11 E.H.R.R. 259).
>
> (3) The relationship between a parent and an adult child does not necessarily constitute family life without evidence of further elements of dependence involving more than the normal, emotional ties. (See *Advic v. UK* [1995] 20 E.H.R.R. C.D. 125)
>
> (4) The existence or not of family life falling within the scope of Article 8 depends on a number of factors and the circumstances of each case.

Applying these principles to the facts of the case, she said that no case had been made to demonstrate that the first named applicant, the young man, was in any way dependent on his parents financially or otherwise. It will be noted that as in this case she was dealing with a young failed asylum seeker, the opportunity to surmise about financial dependence, which it is suggested should have been undertaken in the present case, was equally available there.

She was of the view that the facts and circumstances of the case had not established family life within the meaning of Article 8. I have reached a similar conclusion in the present case. It is true that the period of time that the applicant in this case spent with his relatives in Ireland was significantly greater than in *B.I.S.* but this is in part attributable to the fact that this applicant delayed making his asylum application for approximately eighteen months after his arrival in the State. What both applicants have in common was that they had no entitlement to be in the State and were permitted to be in the State only while an asylum application was being considered. In my view, no information was put before the Minister to support the view that the situation went beyond normal emotional ties. On the contrary, I cannot lose sight of the fact that the Minister was dealing with a young man who as a teenager had not accompanied his father to Ireland and who, on the basis of the answers that he gave during the ORAC interview, had lived apart from his father in Nigeria for some seven years.

Just as Dunne J. did in *B.I.S.,* I will now, lest I am incorrect in my view as to whether the relationship between the first named applicant and his relative amounted to family life, go on to consider the issue of whether what the State authorities are proposing to do is such as to interfere with the right to respect for family life.

The interaction of the State's right to control its borders and Article 8 rights was addressed by Lord Phillips in the well known case of *R. (Mahmood) v. Home Secretary* [2001] 1 W.L.R. 840, where he identified at para. 55 the following general principles under European Court of Human Rights case law:-

> (1) A state has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.
>
> (2) Article 8 does not impose on a state any general obligation to respect the choice of residence of married couples.
>
> (3) 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 there are no insurmountable obstacles to the family living together in the country of origin of the family members excluded, even where this involves a degree of hardship for some or all members of the family.
>
> (4) Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a state if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled.
>
> (5) Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8.
>
> (6) Whether interference with family rights is justified in the interests of controlling immigration will depend on (i) the facts of the particular case and, (ii) the circumstances prevailing in the State whose action is impugned.

The approach by Lord Phillips received the endorsement of Fennelly J. in *Cirpacci v. Minister for Justice, Equality and Law Reform* (Unreported, Supreme Court, 20th June, 2005).

This issue of the interaction of Article 8 rights with the immigration system was the subject of a very detailed and very careful consideration by Feeney J. in *Agbonlahor v. Minister for Justice, Equality and Law Reform* [2007] 4 I.R. 309. This was a case involving a mother and her two children who were refused asylum in Ireland and were the subject of deportation orders. One of the children was, following an assessment at a regional autistic clinic, diagnosed with Attention Deficit Disorder as well as an intellectual disability. Feeney J. commented at para. 13 that:-

> "Article 8 does not protect private or family life as such, it guarantees, in fact, a respect for these rights"…the notion of "respect" (and its requirements) are not clear cut; they vary considerably from case to case"

He pointed out that the ECHR has held that a State "had a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals".

He pointed out that in considering immigration law under Article 8, the ECHR has focused on an analysis of the individual facts in each particular case to ascertain whether the individuals asserting breach of rights are in truth asserting a choice of the State in which they would like to reside as opposed to an interference by the State with their rights under Article 8. His analysis was that the convention did not impose on the State an obligation to respect the choice of residence of any immigrant.

In a situation where the applicant entered the State, did not initially seek to regularise his position and delayed the submission of an application for asylum, it seems to me that this is a case in which the applicant is "in truth asserting a choice of the State in which he would like to reside, as opposed to an interference by the State with his rights under Article 8", to use the language of Feeney J. (at para. 14). In the circumstances, I do not accept that the State has interfered with the rights of the applicant to respect for family life.

Again, lest I am wrong in my view as to whether the applicant has established a right to respect for family life and in my view that the State has not interfered with the right of the applicant to respect for family life, I propose to consider whether such interference as there was is capable of being justified by reference to Article 8.2 E.C.H.R. In doing so, I recognise that this was not an exercise undertaken by the Minister whose decision was based on the view that Article 8.1 was not engaged. Consideration of this topic by the European Court of Human Rights has focused on the question of whether the interference with the right to respect for family life was necessary in a democratic society. In this case there can be no doubt that the decision was made in accordance with the law. Section 3(2)(f) of the Immigration Act 1999, specifically authorises the Minister to make a deportation order in respect of a person whose application for asylum has been refused. The question remains whether the interference was necessary in a democratic society. The starting point for consideration of that issue is that from the earliest times States have asserted the right to control entry to their territory. Failing to exercise effective control is inimicable to the public interest. In the course of his speech in the case of *R. (Razgar) v. Home Secretary* [2004] 1 A.C. 368, Lord Bingham commented as follows at (at para. 20):-

> "Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis."

That passage was approved by Feeney J. in *Agbonlahor and in B.I.S.*, Dunne J. was of the view that it correctly expressed the approach to be taken in considering this issue. I, too, expressed my agreement with the views expressed by Lord Bingham in the

course of my judgment in *G.O.,* [2008] IEHC 190. I acknowledge that Lord Bingham in *Huang v. Home Secretary* [2007] 2 A.C. 167, clarified that in *Razgar* he has been expressing an expectation, which remained his expectation but he was not purporting to lay down a legal test, and would simply observe that it would also be my expectation that in the majority of cases, decisions taken in the interests of immigration control will be found to be proportionate.

In my view, this is one of that large majority of cases where a decision taken pursuant to the lawful operation of immigration control will be proportionate and it is not one of the minority of cases where a decision taken could be regarded as disproportionate.

The applicant's submissions that the decision to deport was disproportionate rely heavily on the recent Supreme Court judgment in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3 (Unreported, Supreme Court, 21st January, 2010), and in essence they say that no balancing exercise was carried out for the purpose of assessing the proportionality of the decision to deport the applicant by reference to respect for right to family life. They accept that a weighing or balancing exercise would appear to have been undertaken in relation to the private life consideration and say that critically this exercise was not undertaken in relation to the more crucial family life rights. In *Meadows* Murray C.J. appeared to draw a distinction between the extent to which considerations of proportionality are relevant in the context of consideration of refoulement and humanitarian leave to remaining considerations. He did so in these terms:-

> "As regards the second aspect of the Minister's function under s. 3 namely, the requirement to take account of the so called "humanitarian" grounds advanced by an applicant I am of the view that the Minister has been conferred with a broad discretion in this regard. He has to balance, on the one hand, the personal circumstances and other matters referred to in ss. (6) of s. 3 and the common good, public policy including the integrity of the asylum system, on the other. In virtually every case there will be some humanitarian consideration and, unlike s. 5, even if he is of the opinion that there are humanitarian considerations which tend to support a claim that a deportee be permitted to remain, even temporarily he is not bound to accede to such a request since he has to balance those considerations with broader public policy considerations which may not be personal to the person concerned. It is evident from the terms of the decision that he took all the relevant considerations into account but explained that "the interests of public policy and the common good in maintaining the integrity of the asylum and immigration systems outweigh such features of your case as might tend to support your being granted leave to remain in this State. This is quintessentially a discretionary matter for the Minister in which he has to weigh competing interests and only the Minister, who has responsibility for public policy in this area, is in principle in a position to decide where that balance lies. One cannot rule out that there might be exceptional circumstances in which the principle of proportionality might arise but as a general rule the principle of proportionality would not arise for consideration in such cases and in any event the appellant has not shown that there is any basis for considering that there was any lack of proportionality in the decision taken by the Minister in this particular respect."

Denham and Fennelly J.J. who, with the Chief Justice made up the majority of the court were clear and specific in confining leave to the issue of refoulement.

The observations of the Chief Justice, that the weighing of competing interests in this case is quintessentially a discretionary matter for the Minister, reflect the approach taken in a number of High Court decisions. In *Kouaype v. the Minister for Justice, Equality and Law Reform* [2005] IEHC 380 (Unreported, High Court, 9th November, 2005) Clarke J., in a passage which has since been quoted with approval on a number of occasions observed as follows:-

> "The weighing of the various matters which might legitimately be taken into account under the section and which have been loosely described as "humanitarian grounds" is, in accordance with those authorities, 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 aspect of the Minister's decision is reviewable by the courts."

Notwithstanding indications from the Chief Justice that as a general rule the principle of proportionality will not arise for consideration when the court is asked to review a decision to refuse leave to remain on humanitarian grounds and instead proceed to deportation, I propose to consider the issue whether there is anything to indicate that the Minister's decision could be said to be disproportionate. In doing so, it is important to bear in mind that the onus of proving that the decision was disproportionate is firmly on the applicant and also to bear in mind that one of the matters which the Minister is required by statute to have regard to when considering whether to make a deportation order is the family and domestic circumstances of the person – s. 3(6)(c) of the Immigration Act 1999.

In this case as I have already indicated, counsel on behalf of the applicant subjected the Minister's decision to a careful analysis. He has, in effect, engaged in the exercise of dissecting the decision. Having done so, he contends that absent from the decision is any weighing or balancing exercise, or consideration as to whether the decision contemplated was proportionate when it came to the question of respect for the right to family life. In my view, it is necessary to consider the report that was approved by the Minister in the round. It is a report prepared in the first instance by a relatively junior official which is then endorsed by two more senior colleagues before ultimately finding its way to the Minister for approval. Insofar as the original report is the work of a relatively junior official, one cannot expect the elegance of style and precision of drafting that might be expected of the parliamentary draftsman. It seems to me that if the decision is read as a whole it is indisputable that the report is all about identifying and balancing competing considerations. The report states expressly that it is in the interests of the common good to uphold the integrity of the asylum and immigration procedures of the State. The report contains a specific statement that the decision to deport Mr. S. in pursuance of lawful immigration control does not constitute a breach of the right to respect for his private life. The report also contains a specific statement which follows on a review of some of the case law of the European Court of Human Rights, that the decision to deport O.O.S. does not constitute an interference with the right to respect for his family life. There is also a statement that while it is accepted that family ties exist between Mr. S. and his parents and siblings, it is also noted that he has only been living in the State for just over three years and that in the light of that it is not accepted that these family ties would be regarded as extensive relationships. Later, there is a specific statement that the situation of Mr. S. is not such as to suggest anything more than "normal emotional ties".

If the decision is read as a whole, it is abundantly clear that the author of the report was fully conscious of the fact that the decision to be made demanded consideration of Article 8 rights, and that he engaged in that exercise in a conscientious fashion. The fact that there is no recital along the lines of "weighing and balance the rights of the applicant under Article 8 against the public interest in maintaining the integrity of the immigration and asylum system" or "having considered the competing considerations I am satisfied that it would not be disproportionate to proceed to deportation" is in my view entirely immaterial. In that regard it will be recalled that in the *B.I.S.* case and the *P.F.* case, there was no express reference to Article 8 but that did not invalidate the decision and it did not mean that the Minister was not conscious of his obligations. The requirement is to give proper consideration to the decision that is to

be made and to give proper consideration to the material submitted rather than to engage in a long list of recitals of the matters considered. The issue is whether the decision is reasonable and proportionate rather than whether there is a recital that the decision is reasonable and proportionate. In the present case, I am satisfied that the Minister engaged fully with the submission that had been made to him and did all that could reasonably be expected of him. In the circumstances I am satisfied none of the arguments advanced establish substantial grounds and accordingly refuse the application for leave.