**THE HIGH COURT**
**JUDICIAL REVIEW**

**2008 1236 JR**

**IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000, IN THE MATTER OF THE IMMIGRATION ACT 1999, IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003**

**BETWEEN**

**Y. O.**

**APPLICANT**

**AND**
**MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM**

**RESPONDENT**

**AND**
**IRELAND AND ATTORNEY GENERAL**

**NOTICE PARTIES**

**JUDGMENT of Mr. Justice Charleton delivered on the 11th day of March, 2009**

**1.** This case concerns a 22 year old Nigerian woman who wishes to remain in Ireland with her Nigerian mother, on whom she is not dependant, and with her two much younger sisters who are Irish citizens. The respondent Minister has decided to deport her. She seeks leave to commence a judicial review challenge to that decision. Her two Irish sisters were born in October, 2000 and February, 2005. I understand that both became citizens of Ireland by virtue of section 6 of the Irish Nationality and Citizenship Act 1956, as amended by ss. 3 and 4 of the Irish Nationality and Citizenship Act 2004. On this there is no dispute and so I think it is right to simply refer to them as Irish children. Shortly before the birth of her first Irish sister, when she was then fourteen years of age, her mother left the applicant behind in Nigeria and came to Ireland. Her mother has been granted leave to stay in Ireland as a foreign national until the year 2012 to take care of the two Irish children. The Nigerian father of the family was granted temporary leave to remain in the State from October, 2001 on the same basis. This was renewed annually until 2004. As he was then discovered to be no longer living with his children and was, therefore, no longer covered by the terms of the administrative scheme allowing temporary residence to foreign nationals who are the parents of Irish children, the respondent Minister signed a deportation order in respect of him in June, 2004. He has evaded this.

**2.** In April, 2007 the applicant arrived in the State, not having lived with her mother since the year 2000. She then made an application for asylum claiming that she was being persecuted in Nigeria. Since the facts upon which she based her failed application were not the subject of any adverse credibility finding by the Refugee Applications Commissioner or by the Refugee Appeals Tribunal, the relevant statutory bodies, I make no comment on them. Her claim related to a matter that could not, in any event, have been described as state-sponsored persecution. It was a private matter. The statutory bodies decided that there was no evidence of any failure in Nigeria to provide an adequate criminal justice system to which she could have chosen to have resort.

**3.** The applicant is the subject of a deportation order dated the 18th September, 2008. This deportation order was made by the Minister following an analysis, by two officials, and in two separate documents, of the circumstances of the applicant within the State. Section 3(6) of the Immigration Act 1999, as amended, requires that before the Minister decides to deport someone from the State, particular issues should be considered and these include the humanitarian considerations whereby leave to remain in the State may be granted at his discretion. In addition, prior to deporting a person the Minister must consider the prohibition on refoulement and the bar on a return to a place where there is a reasonable possibility of a deportee being tortured; s.5 of the Refugee Act 1996, as amended and s.4 of the Criminal Justice (UN Convention Against Torture) Act 2000, as amended. Further, a deportee may also assert that a deportation would breach their rights under the European Convention on Human Rights or the Constitution of Ireland. This last claim is what is at issue here. The relevant statutory procedure was followed in this case. Briefly, on the failure of the applicant's claim for political asylum in the State, the Minister wrote to her seeking reasons as to why she should not be deported. This letter also pointed out that she could leave the State and could thereafter apply for a visa to visit here but that if a deportation order was made, she would not be entitled to re-enter the State while it continued in force. The applicant sought permission to remain in Ireland. She claimed rights pursuant to Article 8 of the European Convention on Human Rights and Article 41 of the Constitution. She argued that a factual matrix of family circumstances sufficient to assert such rights existed between her Nigerian mother, resident in the State, and her two Irish sisters. This was rejected by the Minister.

**The Minister's Analysis**

**4.** Two separate analyses of the applicant's file, including her representations seeking leave to remain in the State on family and on compassionate grounds, were conducted by officials within the Department of Justice, Equality and Law Reform before the Minister made the deportation order. To my mind, this analysis was conducted fairly and accurately. An objection is taken to the applicant's father being described in that analysis as being, as it is put, "deportation evaded". The claim is that such a statement puts an objective outsider on warning that bias against this applicant might be unconsciously operating. This description to me to be no more than the recitation of a fact. There is nothing to suggest any form of prejudice. Failure to deal with a fact is more often argued as a ground for judicial review in these cases and it is prudent to recite the circumstances of an applicant in broad outline.

**5.** It is also complained that an incomplete picture was given as to the applicant's connection with the State, and with her family, who include her two young Irish siblings. What is said in the analysis is that the applicant's "connection to the State lies in her application for asylum in the State". Both officials recommended deportation because this was regarded by them as being "in the interest of the common good to uphold the integrity of the asylum and immigration procedures of the State". A lengthy analysis was also conducted to ensure that returning the applicant to Nigeria was not contrary to s. 5 of the Refugee Act 1996, as amended, which prohibits refoulment to any country where the returnee will be subject to violence or other persecution.

**6.** The argument advanced most strongly is that which attacks the consideration of the family unit conducted on behalf of the respondent. In particular, it is claimed that it is wrong to recite that there are "no exceptional reasons" why this entire family could not reside together in Nigeria; that no reference is made to Article 41 of the Constitution; and that the applicant's entitlement to family life under Article 8 of the European Convention on Human Rights is incorrectly rejected as a valid ground to be weighed in the balance against the entitlement of the State to deport failed asylum seekers. Under the heading "family life", the following appears in the relevant analysis document:-

> "Ms. Y. O. is single and resides with her mother, Ms. T. O. and two Irish siblings in the State. Ms. Y. O. arrived in the State on 05/04/2007 and has been residing with her mother and siblings for approximately one year and four months. It is noted that Ms. O.'s Irish citizen siblings, Ms. O. A. O. (DOB 04/10/2000) and Ms. O. O. O. (DOB 08/02/2005), have resided in the State since

they were born, without the company of the applicant and that the children have been raised by their mother Ms. T. O.. While the applicant has only been involved in the children's lives for a short period of time, it cannot be said that she is acting in *loco parentis* to these children and therefore, it is not accepted that family life arises under Article 8 of the ECHR.

Case law has established that without further elements of dependency involving more than normal emotional ties, family ties between adults do not necessarily attract the protection of Article 8 *Üner v. Netherlands* – No. 46410/99 (5th July, 2005). In this regard it is submitted that further elements of dependency involving more than normal emotional ties between the applicant and her mother do not exist in this case, therefore, family life which demands the respect of Article 8 of the ECHR does not arise between the applicant and her mother. It is further noted that Ms. Y. O. is 21 years old and resided in Nigeria for all of her life before she came to Ireland, therefore, she would still have strong ties with her country or origin and there is nothing to suggest there any are insurmountable obstacles to her returning to Nigeria."

**Family Life**

**7.** The judgment of Denham J., the other members of the Supreme Court concurring, in *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] I.E.S.C. 25, sets out a non-exhaustive list of factors which need to be considered by the respondent Minister when making a decision to deport either foreign parent of an Irish child, by which I mean any child who is a citizen of Ireland. At para. 31 of the judgment, Denham J. observes that the Minister has to consider the circumstances of each such case "in a fair and proper manner as to the facts and factors affecting the family". Among the rights that exist under Article 41 of the Constitution, on her analysis, are the rights of the Irish child to reside in the State; to be reared and educated with due regard to his or her welfare; to have the society, care and company of his or her parents; and the general protection afforded to the family pursuant to Article 41. While these rights are not absolute, it is clear on the case law opened to this Court that they are manifestly strongest as between an Irish child and his or her foreign parents who genuinely seek to stay in Ireland to nurture him or her. Denham J. stated that there had to be a substantial reason given for making an order of deportation in respect of the foreign parent of an Irish child.

**8.** This State is not obliged to respect the choice of residence of a foreign married couple. It is clear, however, that it is a serious matter to interfere with the family rights that arise as between an Irish child and the foreign parent of that Irish child. In that specific circumstance, the rights that will be interfered with by the deportation of a nurturing mother or caring father are those in favour of that child being educated and nurtured in this State as an Irish person by his or her parents. It must be carefully considered by the Minister that the deportation of a non-Irish parent will often inevitably result in the Irish child being brought away as well and thus effectively loosing all that membership of this nation involves and, in the case of those countries that do not allow joint nationality, their Irish citizenship as well. I do not accept that the analysis conducted by the Supreme Court in *Oguekwe* is capable of being extended, save in the most exceptional circumstances, involving perhaps the death of a mother or genuinely nurturing father or very serious disability of an Irish child, circumstances where the family naturally looks to its own for nurture, to aunts, uncles, grandparents, siblings or cousins. Were I to hold otherwise, it would involve an extension of the law beyond the precise tests set down by the Supreme Court in *Oguekwe.* These are specifically geared to an analysis of a decision to deport either parent of an Irish child. In G. *O. & Ors v. Minister for Justice, Equality and Law Reform* [2008] I.E.H.C. 190, Birmingham J. notes with approval previous rulings of this, and other, courts that indicate that decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of cases. He was not there dealing with a deportation order against the foreign parent of an Irish child. I am bound by the analysis conducted by the Supreme Court in *Oguekwe* applying, as it does, only to the deportation of the foreign parent of an Irish child. I note that at para. 41 of his judgment Birmingham J. refers, and does so humanely and correctly in my respectful view, to "the deportation of parents of citizen children with all that implied" as a contrast to the decision to deport a more remote family member which he was dealing with in that case.

**9.** None of the entitlements of an Irish child that are enumerated by the Supreme Court as arising under Article 41 of the Constitution apply to a newly-discovered sibling whose only connection with the State is that she followed her mother from a foreign land to Ireland after an absence of seven years with a view to establishing ties here on the basis of asserting a right to family life. I cannot see how, in ordinary circumstances, such family contacts cannot be nurtured from a distance, as has been the case throughout centuries of emigration from Ireland. I cannot see that having an Irish sister or brother gives a foreign citizen any constitutional or statutory right to come and live in Ireland.

**Family Rights under International and European Law**

**10.** The family rights that are asserted here are claimed to arise as between an independent adult woman and her mother and her two much younger sisters who were born in the course of her seven year absence from a shared home. With a view to obtaining persuasive guidance from sources that set appropriate norms as to legal rights arising from family ties, it seems to me to be useful to consider European and other sources of law. I start with United Nations norms and then move on to statutory rights derived from refugee law, often pursuant to international treaties, and entitlements under the European Union law.

**11.** Paragraph 185 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees provides:-

"As to which family members may benefit from the principle of family unity, the minimum requirement is the inclusion of the spouse and minor children. In practice, other dependants, such as aged parents of refugees, are normally considered if they are living in the same household. On the other hand, if the head of the family is not a refugee, there is nothing to prevent any one of his dependants, if they can invoke reasons on their own account, from applying for recognition as refugees under the 1951 Convention or the 1967 Protocol. In other words, the principle of family unity operates in favour of dependants, and not against them."

**12.** Section 18(1) of the Refugee Act 1996, as amended, provides that a person in relation to whom a declaration of refugee status is in force may apply to the Minister for permission to be granted to a member of the refugee's family to enter and reside in the State. Section 18(3)(b) provides that a "member of the family" of the refugee means:-

(i) in case the refugee is married, his or her spouse (provided that the marriage is subsisting on the date of the refugee's application under s. 18(1)),

(ii) in case the refugee is, on the date of the application under s. 18(1), under the age of 18 years and is not married, his or her parents, or

(iii) a child of the refugee who, on the date of the refugee's application under s. 18(1), is under the age of 18 years and is not married.

**13.** Section 18(3)(a) of the Act provides that if the Minister is satisfied that the person who is the subject of an application under s. 18(1) is a member of the family of the refugee, he "shall" grant permission to the person to enter and reside in the State. The Minister also has discretion to grant permission to enter and reside in the State to "dependant" members of the refugee's family under s. 18(4)(a). Dependant family members are defined under s. 18(4)(b) as:-

"any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully."

**14.** Section 18(5) of the Act provides that the Minister may refuse to grant permission to enter and reside in the State to a family member or dependant family member, and may revoke any permission granted to such a person "in the interest of national security or public policy."

**15.** Article 4(1) of Council Directive 2003/86/E.C. of 22 September, 2003 on the right to family reunification, O.J. L251 03.10. provides that Member States "shall" authorise the entry and residence (pursuant to the terms of the Directive) of the following family members of a "sponsor", i.e. a third country national residing lawfully in a Member State:-

"(a) the sponsor's spouse;

(b) the minor children of the sponsor and of his/her spouse, including children adopted in accordance with a decision taken by the competent authority in the Member State concerned or a decision which is automatically enforceable due to international obligations of that Member State or must be recognised in accordance with international obligations;

(c) the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement;

(d) the minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement."

**16.** The Directive also provides in Article 4 that minor children "must be below the age of majority set by the law of the Member State concerned and must not be married." Article 4(2) further provides that Member States "may" authorise (by law or regulation) the entry and residence of the following family members:-

"(a) first-degree relatives in the direct ascending line of the sponsor or his or her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin;

(b) the adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health."

**17.** As there is no national law giving effect to this Directive in Irish law I am using it as an aid to discovering the generally accepted norms to recognise family ties that give rise to legal rights.

**18.** Directive 2004/38/E.C. of the European Parliament and of the Council of 29 April, 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, O.J. L229 29.06.04 regulates the right of entry, exit, residence and permanent residence of EU citizens and their family members in "host" Member States. Article 2(2) provides the following definition of "family member" for the purpose of the Directive:-

"(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)."

**19.** Article 3(2) of the Directive provides that, without prejudice to the right of freedom of movement and residence of such persons in their own right, Member States "shall" facilitate the entry and residence of the following persons in accordance with its national legislation, namely:-

a. any other family members, irrespective of their nationality, who do not fall within Article 2(2) who are dependents or members of the household of the Union citizen or where serious health grounds strictly require the person care of the family member by the Union citizen;

b. the partner with whom the Union citizen has a durable relationship, duly attested

**20.** Article 3(2) further provides that the Member State "shall" undertake "an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

**21.** The European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006) were enacted to give effect in Ireland to Directive 2004/38/E.C. The Regulations came into operation on the 1st January, 2007. Regulation 2(1) provides that "family member" includes a qualifying family member and a permitted family member. It goes on to set out the definition of a "permitted family member" and a "qualifying family member" as follows:-

"permitted family member", in relation to a Union citizen, means any family member, irrespective of his or her nationality, who is not a qualifying family member of the Union citizen, and who, in his or her country of origin, habitual residence or previous residence –

(a) is a dependant of the Union citizen,

(b) is a member of the household of the Union citizen,

(c) on the basis of serious health grounds strictly requires the personal care of the Union citizen, or

(d) is the partner with whom the Union citizen has a durable relationship, duly attested

'qualifying family member', in relation to a Union citizen, means -

(a) the Union citizen's spouse,

(b) a direct descendant of the Union citizen who is –

(i) under the age of 21, or

(ii) a dependant of the Union citizen,

(c) a direct descendant of the spouse of the Union citizen who is -

(i) under the age of 21, or

(ii) a dependant of the spouse of the Union citizen,

(d) a dependent direct relative of the Union citizen in the ascending line, or

(e) a dependent direct relative of the spouse of the Union citizen in the ascending line.".

**22.** Regulation 4 sets out the free movement rights of qualifying family members and Regulation 5 sets out the free movement rights of permitted family members.

**23.** This brief survey makes it plain that a child who is not dependant, for instance by reason of serious illness or handicap, and who is of an age where he or she may properly be described as an adult has no entitlement under these legal norms to follow his or her family and to establish residence in any county other than their own. I now turn to the State's obligations under the European Convention on Human Rights.

**European Convention Rights**

**24.** Article 8 of the European Convention on Human Rights provides:-

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

**25.** The right to family life under Article 8(1) is not absolute. Under Article 8(2), it may be interfered with pursuant to the entitlement of any of the contracting states to control their borders and to declare and pursue a rational immigration policy. Statutory rights do not arise in favour of a national outside the European Union who asserts the right to family unity based on having a relative in Ireland.

Such rights may arise under the Convention. When such rights genuinely arise as a matter of law they must be considered in determining whether to make a deportation order as part of the balance between this State's entitlement to control the presence of non-European Union citizens within its borders and the Convention rights that are asserted.

**26.** Particular objection is taken by the applicant to the analysis conducted on behalf of the Minister because it states that family life does not arise as between this applicant and her mother, whom she had not seen for seven years prior to coming to Ireland, and her two young sisters, whom she had not seen at all before coming here to unsuccessfully claim asylum.

**27.** It is clear, first of all, that unlike the family under Article 41 of the Constitution, which is based on marriage, that the duty of the State to respect family life under Article 8 of the European Convention is not solely confined to relationships based on marriage. In that respect, the Convention mirrors the other international norms which I have set out above. At least one authority decided under the Convention extends those rights to ties based on blood generally and declares that it is not confined to formal relationships recognised in law; *Pawandeep Singh v. Entry Clearance Officer* [2005] 2 W.L.R. 325. Examples of this might include family ties that have been forged through formal or informal adoption or the long-term fostering of children who are young, vulnerable and who are otherwise not protected. Further, in *Marckx v. Belgium* (1980) 2 E.H.R.R. 330, the European Court of Human Rights, at para. 45 stated:-

> "In the Court's opinion, 'family life', within the meaning of Article 8, includes at least the ties between near relatives, for instance, those between grandparents and grandchildren, since such relatives may play a considerable part in family life."

**28.** When one analyses the relevant judgments, the qualified nature of entitlement to respect for family life under Article 8 of the Convention becomes evident. In this regard I draw heavily on the judgment of Dunne J. in *S. & Ors. v. Minister for Justice, Equality and Law Reform* [2007] I.E.H.C. 398, as well as the judgment of Birmingham J. in *G. O. & Ors. v. Minister for Justice, Equality and Law Reform* [2008] I.E.H.C. 190. Neither judgment concerned the deportation of a parent of an Irish child and, further, the *S.* decision was delivered before the specific judgment of the Supreme Court in *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] I.E.S.C. 25 which dealt with that particularly strong family tie. On this issue, that of an Irish child and the deportation of a relative who is not a mother or a father, I cannot find good reason to depart from these precedents.

**29.** In the field of asylum law, consistency of approach is essential to the rational disposal of these difficult cases. Strong reasons would have to be shown to justify departure from carefully considered authorities. A practice has grown up of the citation of multiple authorities based on the facts of previous cases as an apparent aid to the interpretation of the many points that can be argued in asylum law cases. While the industry of counsel is admirable, the principle underlying any decision is what is to be discerned from precedent. Applicants are entitled to be clearly advised as to any prospect of any particular challenge on any point of law succeeding. The statutory bodies dealing with refugee applications require guidance as to the correct approach by them to administrative procedures. The respondent Minister and his officials are in no lesser position. Where precedent has identified a principle, therefore, it should be followed in all subsequent cases unless a clear reason is found as to why an authority should not be regarded as persuasive.

**30.** In *S. & Ors. v. Minister for Justice, Equality and Law Reform,*, clear principles were identified by the High Court for the disposal of these cases and that is much more important than the similarity as to facts that incidentally arose between that case and this. The application in *S.* involved a nineteen year old Nigerian man coming to Ireland and seeking to establish family life as a right under Article 8 of the Convention with his parents. They had come to Ireland five years before, having left him behind in Nigeria at the same tender age as this applicant, and with his younger sister and brother who were born here and at least one of whom was a citizen. Dunne J. noted that where rights to respect for family life under Article 8 are asserted "the nature of the link that exists between the relatives concerned has to be considered. Even the relationship between a parent and an adult child, she said, does not necessarily invoke the protection of Article 8 unless there are elements of dependency that go beyond ordinary emotional ties. Having analysed all of the relevant case law, she stated the following:-

"Looking at the cases referred to above the following principles can be noted:

> 1. Family can include the relationship between an adult child and his parents.…
>
> 2.Family life may also include siblings, adult or minor…
>
> 3. The relationship between a parent and an adult child does not necessarily constitute family life without evidence of further elements of dependency involving more than the normal, emotional ties…
>
> 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.
>
> …
>
> As has been made clear in the cases referred to above the issue as to whether Article 8 rights have been engaged [depends] on the facts and circumstances of each and every case."

**31.** Having identified these principles, Dunne J. noted that the relationship of the applicant in that case did not involve more than the normal emotional ties between a parent and a grown-up child. She stated that it was impossible to argue that the applicant had established such a relationship as to constitute family life, as protected by the Convention in Article 8, in the short time in which he was in the State.

**32.** *G.O. v Ors. V. Minister for Justice, Equality and Law Reform* [2008] I.E.H.C 190 involved rights asserted by a grandmother of an Irish child. In that decision, Birmingham J. followed the *S.* decision and distinguished the entirely different circumstances of non-Irish parent and Irish child on which the *Oguekwe* decision is founded. At paras. 51 to 53 of his judgment he stated:-

> **"**In my view, the facts of the case have much in common with *S & Anor* and are clearly distinguishable from the *Oguekwe* and

*Dimbo* cases, where what was in issue was the extent of consideration given to the position of those who fell outside of the terms of an administrative scheme [on Irish children with foreign parents]. Adverse decisions on their applications as a matter of practice meant that citizen children could not exercise their rights to reside in the State and be educated with due regard to their welfare and enjoy the society, care and company of their parents.

In contrast, in the present case, and this was the situation also in *S. & Anor.* the citizen children will continue to reside in the State, will be entitled to avail of the opportunities and benefits available to all other citizen children, and will have access to the society, care and company of their parents. It is true that this may involve a degree of reorganisation of lifestyle on the part of their mothers, the fifth and sixth applicants, but those are the kind of decisions and compromises that countless families across the State make on a daily basis.

…I cannot accept that it is open to individuals to arrive in the State on what is essentially a false basis, as indicated by the rejection of their claim to asylum status, and then proceed to so organise their family affairs as to frustrate the operation of the immigration system."

**33.** These remarks by Birmingham J. are directly applicable to the circumstances of this case. As a matter of principle this case differs not at all. The right to assert family life entitlements in favour of this applicant, as a grown and independent adult, do not arise under Article 8 of the Convention.

**Balance**

**34.** I am not entitled to seek to review the decision of the Minister to deport the applicant save in circumstances where that decision was founded on an error of fact so serious that it undermines it, or was made pursuant to a misstatement of legal principles or is unreasonable. It is clear from the decision of the Supreme Court in *Oguekwe* that the separation of powers doctrine does not permit of any other form of analysis by the Court and, in particular, the substituting of the Court's own views for those which the respondent Minister has arrived at. The situation of the foreign parent of an Irish child is very different from the claim argued here. The test to be applied to the deportation of a relative who is not the mother or father of an Irish child is the ordinary test in judicial review cases; namely that just stated. That test is not the same when it comes to the Court being asked to review the deportation of a genuine and nurturing foreign parent of an Irish child. I feel that I have to use these because a person who asserts that they are a father, or more rarely a mother, may not genuinely have that relationship with an Irish child and in the knowledge that it can unfortunately happen that a parent may have minimal interest in a child beyond using that child as a vehicle for the assertion of rights of residence. In the case of the foreign parents of an Irish child, as a matter of principle, the Supreme Court added a test of proportionality to the ordinary test for judicial review and indicated the kind of careful analysis that was required before the deportation of a parent in such a case. At para. 31 of her decision Denham J. said the following:-

"The Minister should weigh the factors and principles in a fair and just manner to achieve a reasonable and proportionate decision. While the Irish born child has the right to reside in the State, there may be substantial reasons, associated with the common good, for the Minister to make an order to deport a foreign national who is a parent of an Irish born child, even though the necessary consequence is that in order to remain a family unit the Irish born child must leave the State. However, the decision should not be disproportionate to the ends sought to be achieved. The Minister should consider whether in all the circumstances of the case there is a substantial reason associated with the common good which requires the deportation of the foreign national parent."

**35.** In contrast to that specific situation, this case does not involve any balance between the rights of Irish children and their foreign parents. Instead, the analysis conducted by Dunne J. in *S. & Anor. v. Minister for Justice, Equality and Law Reform* [2007] I.E.H.C. 398 is that which as a matter of principle is applicable in this case. That decision sets out the principles to be applied and therefore I quote it:-

"In the course of argument on this issue, counsel on behalf of the respondent referred to the case of *R. (Mahmood) v. Home Secretary* [2001] 1 W.L.R. 840 at 861 where Lord Philips stated the general principles under European Court of Human Rights case law as follows:

'(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 that 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.'

Reliance was also placed on the judgment in *Agbonlahor v. Minister for Justice,* (Unreported, High Court, Feeney J. April 2007) in which he stated at p. 8 as follows:

> 'In considering immigration law under Article 8 the European Court 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.'

He also went on to say at p. 19:

> 'It is also of significance that in considering the issue of family life that it is appropriate to have regard to the lawfulness and length of stay as being significant factors in seeking to identify the exceptional cases where a State might be prevented from exercising the State's unquestioned entitlement to impose immigration control.'"

**36.** I have quote this judgment at length because to clearly reiterate the principles declared by precedent. I respect that judgment as an applicable precedent of highly persuasive authority because it is an accurate statement of the principles that apply to the judicial review of any decision of the Minister to deport any relative of an Irish child who is not that child's mother or father.

**37.** I do not feel that there are any substantial grounds for arguing that there is any entitlement to assert family life rights under Article 8 of the European Convention in the particular circumstances of this case. It is clear that a choice of residence was made in favour of Ireland, and against Nigeria, by this applicant. She never had any genuine ground on which to seek asylum. She had been, through no fault of her own, absent from her family at a vulnerable time. She is now of an age where she is clearly an independent adult. What is regrettable about this case is that now an order has had to be made which will remove her from, and bar her from any further entry into, the State. The ordinary emotional ties that exist between her and her Irish siblings will have to be expressed in the future by them visiting her in Nigeria.

**Result**

**38.** The analysis conducted on behalf of the respondent Minister was not incorrect. The principles that apply as between an Irish child and a foreign relative who is not a genuine and nurturing mother or father were correctly stated. Therefore, the decision to deport the applicant is not amenable to review by this Court. In consequence, I must refuse leave to commence judicial review proceedings.