Neutral Citation Number: [2009] IEHC 448

THE HIGH COURT

JUDICIAL REVIEW

2008 622 JR

BETWEEN

AN. O., E. O., (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND AM. O.) L. O. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND AM. O.) AND

AE. O (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND AM. O.)

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY & LAW REFORM

RESPONDENT

JUDGMENT of Mr. Justice Cooke delivered on the 14th day of October,19th day of May, 2009 2009.

1. By order of Finlay Geoghegan J. of 20th October, 2008, the applicants were granted leave to apply for, *inter alia*, an order of *certiorari* to quash a deportation order dated 6th May, 2008, made by the respondent against the first named applicant. Leave was granted to apply for that order and related reliefs on the basis of the grounds set forth in s. 5 of the Statement of Grounds then before the court and dated 28th May, 2008 at subparagraphs A, B, D and E of paragraph 5.

2. The applicants have also brought a motion to amend that Statement of Grounds by the addition of a further ground. Upon the commencement of the hearing the court allowed the amendment with the result that the grounds now before the court are as follows:-

A. The respondent does not identify a substantial reason for the deportation of the first named applicant;

B. Error on the face of the record whereby the respondent states that allowing the applicant to remain in the State would inevitably lead to similar decisions in other cases where in the instant case a particular and unique set of circumstances apply;

C. The deportation of the first named applicant would interfere with the applicant’s right to respect for their private and family life and their home and accordingly, breach Article 8 of the European Convention on Human Rights and Fundamental Freedoms 1950. Such interference is:

(i) Not in accordance with laws governing its circumstances, that is the right of parents of European Union and Irish citizens;

(ii) Not shown to be 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.

D. The respondent has failed to have regard to the duration of the applicant's residence in the State; *ultra vires*, s. 3(6) of the Immigration Act 1999;

E. Error on the face of the record whereby the respondent states that the fifth named applicant is not an Irish citizen.

3. The background to the application is as follows and is unusual in that at the outset of the asylum process and before the Refugee Applications Commissioner, the first named applicant never claimed to be a refugee and did not assert that he had any fear of persecution if returned to Nigeria. As recorded in the Commissioner's Section 13 Report of 24th October, 2006, the first named applicant acknowledged that he had never been persecuted in Nigeria and had no fear for himself if returned there. He claimed that he had come to Ireland in October 2006 to be with the second named applicant (his then partner,) and his family and he did not want to return to Nigeria because he did not want to leave them. According to the second named applicant she met the first named applicant in the United Kingdom in "early 2004".

4. The second named applicant is also Nigerian and has been in the State since 2002 and currently has permission to reside here until 2010. She married the first named applicant on 8th March, 2007. The third named applicant who was born in the State on 2nd January, 2003 is her son by a former partner who is not named on the child's birth certificate. The fourth and fifth named applicants are the children of the first and second named applicants and were born in the State respectively on 6th July, 2005 and 3rd May, 2007.

5. In the Section 13 report of the Commissioner dated 24th October, 2006, the Commissioner understandably considered that the first named applicant's desire to remain in Ireland with his family was not sufficiently serious to constitute a severe violation of his basic human rights so as to amount to persecution. Nevertheless, a full examination of the background circumstances was carried out which led to the conclusion that the applicant showed no minimal basis for the contention that the applicant was a refugee. Section 13(6)(a) of the Refugee Act 1996 therefore applied.

6. Against this report the first named applicant appealed to the Refugee Appeals Tribunal. The notice of appeal as lodged by Messrs. Watters & Co., his solicitors, gave as a basis of the appeal "the appellant claimed asylum on the basis of fearing persecution in Nigeria from family members of his fiancé" and "we are instructed that the appellant faces the risk of being killed by his fiancé's parents if he returns to Nigeria".

7. The Refugee Appeals Tribunal decision of 12th December, 2006, rejected that appeal and held that the basis of the appeal namely, fear of the criminal intentions of his wife's family did not come within s. 2 of the 1996 Act.

8. With the covering letter of 15th May, 2008, from the Repatriation Unit of the Department's Irish Naturalisation and Immigration Service sending the first

named applicant the deportation order, a copy of the file note examining the applicant's case for the purpose of the order was included and constitutes, in effect, with that letter, the Minister's statement of his reasons for his decision to make that order. After reciting the accounts of their personal histories and reasons for leaving Nigeria as given by the first and second named applicants, the note examines the applicants' case in detail under a number of headings including:-

- The possible application of the prohibition on refoulement under s. 5 of the 1996 Act;
- Humanitarian considerations under s. 3(6) of the Immigration Act 1999 (as amended);
- Consideration of the positions of the children involved both as Irish citizen children and Irish born non-citizen children;
- Consideration of the rights of the applicant's family; and
- Consideration of the rights to private life and to family life under Article 8 of the European Convention on Human Rights.

9. The file note concluded by recommending to the Minister that a deportation order be made on the basis that any interference with any such rights as the applicants were entitled to assert would not be contrary to Irish law and would be lawful because it pursues the pressing social need and legitimate aim of maintaining the State's control of its borders and would be proportionate to that legitimate aim.

10. It is against these reasons for the making of the deportation order that the grounds to quash that order are now advanced.

11. So far as the applicant's personal position as an individual unlawfully in the State is concerned, there can be no doubt but that the Minister is perfectly entitled to order his deportation. He is not a refugee, never claimed to be one when he first applied and any arguments advanced on his behalf by his legal representatives subsequently and to contrary effect have been definitively rejected. In effect, the central thrust of the argument raised against the order in this case is that the deportation of the first named applicant as a non-national would constitute an unlawful interference with the personal and family rights of his wife and the three minor applicants in violation of their rights under Article 8 of the European Convention on Human Rights.

Ground E

12. It is convenient to deal first with the last of the grounds as added by way of amendment, as the rights which are invoked on behalf of the first named applicant are dependent to a degree on the nature of his relationship with the minor applicants and their status as children born in the island of Ireland.

13. Andre, the fifth named applicant was born in the State on 3rd May, 2007. As he was born after 1st January, 2005 and as neither of his parents is an Irish citizen, his claim to citizenship can only succeed if it is shown that one of his parents was, during the four years preceding the date of his birth, resident in the island of Ireland for a period, or for aggregate periods, of not less than three years as provided for in s. 6A(i) of the Irish Nationality and Citizenship Act 1956 (as amended). That provision is as follows:-

> "(1) A person born in the island of Ireland shall not be entitled to be a citizen unless a parent of that person has, during the period of four years

> immediately preceding the person's birth, been resident in the island of Ireland for a period of not less than three years or periods the aggregate of which is not less than three years."

Subsection (4) of s. 6B of that Act provides, in part, as follows:-

> "A period residence in the State shall not be reckonable for the purpose of calculating a period of residence under s. 6A if –
> (a) it is in contravention of s. 5(1) of the Act of 2004."

14. Section 5 (1) of the Immigration Act 2004 (which is the "Act of 2004" referred to in s. 6B above) provides:-

> "No non-national may be in the State other than in accordance with the terms of any permission given to him or her before the passing of this Act or a permission given under this Act after such passing, by or on behalf of the Minister."

Subsection (3) of s. 5 provides that the above provision is not to apply to, *inter alia*, a person whose application for asylum under the 1996 Act is under consideration by the Minister.

15. The first named applicant claimed asylum in the State on 4th October, 2006 and has not claimed to have been in the island of Ireland for any material time prior to that date. (The first named applicant has not sworn an affidavit in this proceeding.)

16. The second named applicant arrived in the State, as mentioned, on 6th September, 2002 and applied for asylum. That application was withdrawn on 24th January, 2003 and she applied to remain as the mother of her son, E., who had been born in the State on 2nd January, 2003 and was therefore an Irish citizen. In September 2005, the second named applicant was granted permission to remain on that basis and that permission is currently renewed until September, 2010.

17. In those circumstances it is clear that the second named applicant's period of reckonable, lawful residence in the State falls short of the three year period required by s. 6A(1) of the 2004 Act. The period from 20th September, 2005 until the date of birth amounts to one year and slightly more than seven months. Even if the five months during which the asylum application was under consideration are included, the total reckonable period on that basis would not exceed two years.

18. The applicants however submit that the further period from 24th January, 2003 until the grant of permission on 20th September, 2005 should also be treated as reckonable because, it is said, the applicant was lawfully resident while her application for leave to remain was under consideration. This submission is, however, unfounded. For a period to be reckonable for the purposes of s. 6A, it must not, as required by s. 6 B(4), be residence which contravenes s. 5(1) of the Immigration Act 2004 and that requires that, in effect, it be residence which was at the time pursuant to a permission given before the passing of the latter Act.

19. As from the withdrawal of the asylum application, the second named applicant had no permission to be in the State until 20th September, 2005. Furthermore and in any event, there is no evidence as to the length of the

applicant's residence in the State during 2003, 2004 and 2005. On the contrary, her own testimony is that she was in the United Kingdom in 2004 long enough to meet the first named applicant, to "form a relationship" with him and become pregnant by him. She says she met him in the United Kingdom in "early 2004". Her daughter, the fourth named applicant was born on 6th July, 2005.

20. It follows accordingly that it has not been established that the second named applicant had in fact resided in the State for an aggregate period of three years and that the fifth named applicant is entitled, as a result, to be treated as an Irish citizen. That being so, the remaining grounds fall to be considered upon the basis that the first named applicant is the spouse of the second named applicant and that they are the parents of the fourth and fifth named applicants who are not Irish citizens. The first named applicant is the stepfather of the third named applicant who is an Irish citizen.

21. In this regard it was expressly agreed in the course of the hearing by counsel on behalf of the respondent that so far as concerned the rights advanced on behalf of the applicants under the headings of grounds A and C, nothing turned on the fact that the first named applicant was the stepfather rather than the natural father of the third named applicant. It was accepted that insofar as the right to respect for family and private life was concerned, the applicants were entitled to be regarded as a "family".

22. So far as concerns the other grounds for which leave was granted, it is fair to say that the substantive submissions made both in the written legal submissions and in oral argument were directed almost exclusively at the issues raised in the context of grounds A and C indicated above. It is possible therefore to dispose relatively quickly of grounds B and D with a view to concentrating on those which received most attention at the hearing.

Ground B

23. Under the heading of this ground it is said that the decision is vitiated by an error on the face of the record in that the respondent states that allowing the applicant to remain in the State would inevitably lead to similar decisions in other cases when in the instant case a particular and unique set of circumstances apply. Insofar as the ground appears to suggest that the respondent has not had regard to the particular and unique set of circumstances of the first named applicant or of all of the applicants, the contention flies in the face of the actual content of the file note furnished in explanation of the reasons for the deportation order. The particular circumstance of each member of the applicant's family has been examined in detail over the lengthy note of analysis. In any event, the statement quoted does not assert a fact susceptible as being characterised as erroneous: it is an observation or conclusion offered as a reason for the decision. The court is accordingly satisfied that no such error has occurred.

Ground D

24. Under this heading it is submitted that the Minister failed to have regard to the duration of the applicant's residence in the State as required by s. 3(6) of the Immigration Act 1999. This ground too is manifestly unfounded in fact. The file note refers explicitly and in detail to the applicant's period of residence in the State giving the date of his arrival, the date of his marriage to the second named applicant and the dates of birth of the children. It refers to the fact that he cannot work because of his status as a failed asylum seeker and it describes the active role he takes in caring for the children while the second named applicant attends

a training course. Indeed, in the note of the Repatriation Unit of 26/02/08 which forms part of the statement of reasons for the decision, there is a specific heading directed at section 3(6)(b) "Duration of Residence in the State of the Person" with the following remark: "Mr. An. O.O. arrived in the State on 03 October 2006. He has been in the State for approximately one year and two months at the time of writing of this submission". There is no basis, accordingly, for stating that the Minister has ignored the duration of the applicants residence in the State. This ground fails for that reason.

Grounds A and C

25. As counsel for the applicant explained at the hearing, these grounds, taken together, are directed at the contention that the Contested Decision is flawed and unlawful in that it fails to comply with the law as to the rights of an Irish citizen child threatened with the deportation of a non-national parent as explained and settled by the Supreme Court in the judgments given on appeal on 20th December, 2007 and 1st May, 2008, in the group of eight cases *Bode, Oguekwe, Dimbo*, *etc*. *v. Minister for Justice*. (See *Bode* (*a minor*) *v*. *Minister for Justice* [2008] 3 I.R. 663; *Oguekwe v. Minister for Justice*, *ibid* 795; *Dimbo v. Minister for Justice* (Unreported, 1st May, 2008). Counsel relied in particular on the judgments of Denham J. in the *Oguekwe* and *Dimbo* cases.

26. In the submissions made by counsel for the applicants Mr. McMorrow, in support of these grounds the following essential points were made:

(a) The third named applicant is an Irish citizen and is part of a family unit with his non-national parents and siblings. The parent applicants are law abiding persons of good character who constitute no threat to the State but, on the contrary, may contribute to the common good.

(b) To deprive the Irish citizen child and this family of a father and husband, the potential primary carer and provider, is clearly unlawful as a gross interference with family life and private life within the meaning of Article 8 of the European Convention on Human Rights.

(c) The loss is particularly grave in the case of the third named applicant who has been deprived of his natural father and has a learning disability and the respondent does not indicate why such an interference with family life is necessary in a democratic society.

(d) The respondent has failed to consider or to consider adequately as required by the Supreme Court jurisprudence the effect of a deportation of the first named applicant upon the private and family life of the remaining applicants for the purposes of Article 8 aforesaid.

(e) Above all, no "substantial reason" in the sense outlined by the Supreme Court has been identified by the respondent as justification for the deportation and such reasons as have been given are not substantial.

27. In addition, counsel for the applicants advanced a somewhat nebulous argument to the effect that the respondent acted unlawfully in maintaining a "non-statutory scheme" for the grant of permission to parents of Irish born children to remain in the State when no legislation, statutory instrument or administrative circular had been enacted or published as a guideline for such a scheme and thereby failing to satisfy the tests of legal certainty, accessibility and foreseeability and thus infringing Article 8 aforesaid.

28. The court is satisfied that this further argument has no foundation. The Minister does not appear to operate a non-statutory scheme of the kind described. It is the practice of the Minister before making a deportation order to notify the prospective deportee of the intention to do so and to invite the addressee in accordance with ss. (3) and (6) of s. 3 of the 1996 Act, to put forward reasons or humanitarian considerations as to why the order ought not to be made. While this appears to be referred to as "leave to remain on humanitarian grounds" it appears to amount to a decision on the part of the Minister to exercise a discretion in postponing the possible making of a deportation order for a limited period of time on such humanitarian grounds including in some cases the fact that the person is a parent of an Irish born child. Insofar as it is claimed that such a practice may infringe a right to legal certainty, accessibility or foreseeability, as suggested, arising under the European Convention for Human Rights, the only statutory basis required to enforce such rights is that contained in s. 3 of the Act of 2003. If the rights exist no statutory instrument or administrative circular is necessary to give them effect.

29. In order to consider whether the principal arguments advanced under the heading of these grounds on behalf of the applicants are well founded it is necessary first to recall the precise effect of the law as stated by the Supreme Court in the *Dimbo* and other cases. It will be recalled that the group of cases came before the Supreme Court by way of appeal from judgments of Finlay Geoghegan J. which had been certified under s. 5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000, as involving a point of law of exceptional public importance. In the *Dimbo* case the Supreme Court had two issues to consider. The first was the appeal from the High Court's determination to quash a decision under the Irish Born Child Scheme 2005 (the "IBC 05 Scheme"). Secondly, there was an appeal from the judgment quashing the decision of the Minister to make a deportation order under s. 3 of the Immigration Act 1999. The Supreme Court allowed the Minister's appeal on the first issue, essentially upon the ground that the administrative scheme in question contained a requirement for continuous residence in the State of the parents of the Irish born child and the applicants in that case did not meet that criterion. The Minister was therefore entitled under the scheme to refuse the application and the grounds advanced against his decision by reference to alleged infringement of constitutional and Convention rights had been misconceived and premature. In effect, those were the considerations which arose to be determined in the context of the second issue, namely, the illegality of the deportation order.

30. On this second issue the Supreme Court dismissed the Minister's appeal and affirmed the grant of the order of *certiorari* to quash the deportation orders. The court upheld the approach which had been outlined by the High Court in the *Oguekwe* case which recognised that the discretion of the Minister under s. 3 of the Act of 1999 to make an order was constrained by the obligation to exercise it consistently with and not in breach of, constitutionally protected rights of those affected by the decision. The Minister's power was also recognised as being constrained by the provisions of s. 3 of the ECHR Act 2003. It affirmed the general proposition that the Minister must consider, amongst other factors, the facts relevant to the rights of the citizen child to live in the State and to be educated and reared with due regard for its welfare and have its welfare, including that of its best interests, taken into account in the decision making. This will depend to some extent upon the factual circumstances of the citizen child and his parent or parents in the State.

31. While the appeal of the Minister was dismissed on that basis, the Supreme Court gave reasons which differed slightly from those of the High Court judge in

some areas. In particular, the court confirmed that the Minister must consider the facts which are specific to the individual child, to his or her age, current educational progress, development and opportunities, together with considerations relating to the attachment of the child to the community and the other matters referred to in s. 3 of the 1999 Act. It held, however, that the Minister is not required to enquire in detail into the educational facilities of the country to which the deportation would take place, although an exceptional case might require more detailed analysis in that regard. The decision of the Minister is required to be proportionate and reasonable on the application as a whole and not on the specific factor of comparative educational systems (see paras. 66-69 of this judgment). Thus, the first reason for dismissing the Minister's appeal was the absence from the reasons for the Minister's decision to make the deportation order of a consideration of the rights of the applicants under the Constitution and the Convention.

32. The second reason related to the failure of the Minister to identify a sufficiently substantial reason for the deportation. At paragraph 23 of the judgment Denham J. says:

> "One of the objections to the validity of the decision to deport was that it fails to identify any 'grave and substantial' reason for the deportation. In *Oguekwe*, the learned High Court judge held that this objection was made out. I agreed in that case and I agree in this case. The documents do not expressly identify any interest in the common good which was stated to require the deportation of the parents of the Irish born child. The appropriate test is whether a <u>substantial</u> reason has been identified requiring a deportation order. The term 'grave' is tautologous and while it reflects the serious nature of a 'substantial' reason, it is not an additional factor to 'substantial' and there is a danger that it could be so construed. In circumstances such as this the Minister is required to give a substantial reason for the decision to make a deportation order."

33. In the light of the central argument advanced in the present case, a key question then obviously arises as to what is to be understood by the concept of "substantial reason" in this context? The concept is not defined or explained in detail in the judgment in *Dimbo* although, as mentioned below, the list of sixteen "relevant matters" set out in the judgment may give some guidance. The court also notes that, strictly speaking, the subject matter of the *Dimbo* case was not the reasons given by the Minister for making the deportation orders as such. What happened in that case appears to have been this. The second named applicant had been in the State since 1995 as a student and the first named applicant, her son, had been born in 1996. She was granted leave to remain on that basis in 1997. The third named applicant, her husband, had visited her while she was a student but all three had left the State in 2002 and 2003 and when they returned, they applied to renew the right to reside. This appears to have been refused and deportation orders were made in 2004. In 2005 the second and third named applicants applied for asylum but this was refused. In October 2005, the Minister indicated that the 2004 deportation orders remained in place and gave an opportunity to the applicants to make fresh representations as to why they should not be implemented. These were considered and the deportation orders then affirmed. It was the reasons given for this confirmation which were attacked in the subsequent judicial review proceedings. In the absence of any mention of them, it is to be assumed that the Supreme Court considered that whatever reasons were given for the original decision to make the deportation orders in 2004 were not regarded as substantial either. Presumably they were

somewhat similar to the reason given expressly in the *Oguekwe* case for the deportation order there and quoted at paragraph 29 of that judgment:

> "The reasons for the Minister's decision are that you are a person whose refugee status has been refused and having regard to the factors set out in s. 3(6) of the Immigration Act 1999 the Minister is satisfied that the interest 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 the State."

34. As already quoted above, at paragraph 61 of the judgment, Denham J. affirms the approach of the High Court as summarised in paragraph 59 saying "I am satisfied that the decision making process should identify a substantial reason which requires the deportation of a foreign national parent of an Irish born citizen." It must follow, therefore, that the Supreme Court did not consider that the explicit reason given by the Minister in that case and quoted at paragraph 29 of the judgment, amounted to a "substantial reason" for that purpose.

35. As already mentioned, at paragraph 85 of the judgment, Denham J. sets out a non-exhaustive list of matters which may assist when the Minister is considering the making of a deportation order. Some of these matters further explain what is to be looked for as a "substantial reason". Thus in item 11 in this list the court says:-

> "While the Irish born child has the right to reside in the State, there may be a substantial reason, associated with the common good, for the Minister to make an order to deport a foreign national who is a parent of the 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."

36. Further items in the list can be paraphrased as follows:-

12. "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".

13: "The Minster should be satisfied that there is a substantial reason for deporting a foreign national, that the deportation is not disproportionate to the end sought to be achieved and that the order of deportation is a necessary measure for the purpose of achieving the common good".

14: "The Minister should also take into account the common good and policy considerations which would lead to similar decisions in other cases".

15: "There should be a substantial reason given for the making of an order of deportation of a parent of an Irish born child".

37. It seems clear to this Court accordingly, from the repeated emphasis on the need for a substantial reason which must be one associated with the common good and be proportionate to the end sought to be achieved, that a mere reiteration of the right of the State to control the entry, presence and exit of

foreign nationals (which is expressly recognised by the court at item 10 in the list) is not of itself a substantial reason in any individual case.

38. It is necessary, therefore, to consider the actual reasons advanced in the present case with a view to assessing whether they fall short of the criteria thus outlined by the Supreme Court.

39. The deportation order in the present case was signed by the Minister on 6th May, 2008 and sent to the applicants under cover of a letter of 15th May, 2008, that is, after the delivery of the judgments in the *Oguekwe* and *Dimbo* cases on 1st May, 2008. The court notes, however, that the file examination analysis which was furnished by way of explanation of the Minister's reasons appears to have been signed off on 22nd April, 2008 and that the most extensive analysis note by the Repatriation Unit was dated 15/4/08.

40. In that covering letter the express reason given for the Minister's decision is in terms which appear very similar to that quoted at paragraph 29 of the judgment in the *Oguekwe* case and which, as already mentioned, appears to have been considered not to constitute a substantial reason by the court in that case. The Minister's reason here was as follows:-

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

41. However, as that précis of the Minister's reasons follows in the letter after the express reference to the enclosed copy of the full analysis in the file examination notes, it is clearly necessary to consider the grounds now advanced by reference to the full reasoning and consideration given to the case as disclosed by the content of the letter of 15th May, 2008, together with the enclosures when taken as a whole. The deportation order is signed by the Minister and given under his official seal and is accompanied by those file notes which bear the stamp "Approved by Minister".

42. As already indicated above, the Supreme Court held that the deportation order in the *Dimbo* case was invalid for two reasons: the failure to consider the impact of deportation of the parent on the personal constitutional rights of the Irish citizen child and on the rights to private and family life of that child together with the siblings and the resident non-national parent under Article 8 of the Convention.

43. The principal note of analysis in the present case made by the Repatriation Unit dated 15/4/08 is set out over twelve closely typed pages. It covers in detail the statutory considerations including the prohibition on refoulement in s. 5 of the 1996 Act and the various particular matters required to be considered under s. 3(6) of the 1999 Act. Thus, consideration is expressly given to the position of Emmanuel, the Irish citizen child and stepson of the first named applicant, both from the point of view of his constitutional rights and the possible application of the prohibition on refoulement. It is recognised that he could never be deported but that if the family decided to return to Nigeria he was entitled to Nigerian citizenship. So far as the child's constitutional rights are concerned, reference is

made to the *L*. and *O.* cases and observes that non-national parents of a citizen child do not enjoy an automatic entitlement to reside in the State. The note says that the Minister must consider the individual merits of the case but can take account of the consequences of similar decisions in other cases which might result. The note states:-

> "If the Minister is satisfied for good and sufficient reason that the common good requires that the non-national parent should be removed from the State, even if that means that in order to preserve the family unit the Irish citizen child must also leave the State, then that is an order he is entitled to make."

44. The analysis then looks at the positions of the Irish born non-citizen children and considers the position of the family. The family life since the arrival of the first named applicant in October 2006 is described with the dates of marriage, the birth of Andre and the grant of permission to remain to the second named applicant under the IBC/05 Scheme until 2010.

45. Finally, consideration is given to Article 8 of the ECHR and to the impact of deportation on the right to private and family life. It is recognised that deportation of the first named applicant would interfere with the right to private life of the first named applicant as well as of those of his wife and children and that this concerns their educational, work and social ties established in the State. Specific reference is made to the submission that the medical condition of Emmanuel must be taken into account because he suffers from global development delay, speech delay and attends a special playgroup. It is expressly accepted that the health of Emmanuel forms part of his private life for the purposes of Article 8. Nevertheless it is considered that the interference would be in accordance with Irish law, that it pursues a pressing social need and a legitimate aim namely, the maintenance of control by the State over its borders and the regulation of a system for control, processing and monitoring of non-nationals within the State. It is also observed that the deportation would be proportionate to the legitimate aim being pursued because the first named applicant has been given individual assessment and due process in all respects and there is "no less restrictive process available which would achieve the legitimate aim outlined".

46. The consideration then moves to that of the impact of deportation on their family life. The events in the family since the arrival of the first named applicant in the State are reiterated and it is pointed out that he did not take up family responsibilities as such until some three years and nine months after the birth of Emmanuel and one year and three months after the birth of his daughter. The options available to the family in the event of deportation are indicated and it is pointed out with reference to the United Kingdom decision in *Mahmood v. Home Secretary* that there would be no insurmountable obstacle to the family making a decision to return to Nigeria with the first named applicant in the event of deportation.

47. On that basis the note concludes by recommending to the Minister that the deportation order be made.

48. Thus, when the consideration given to the case is compared with the list of sixteen relevant matters defined by the Supreme Court in the *Dimbo* case it is clear that the exposé of the analysis demonstrate that explicit consideration has in fact been given to the following:-

(a) the circumstances of the case have been inquired into including the facts and factors affecting the family;

(b) the factual matrix relating to the personal rights of the citizen child have been addressed;

(c) the nature and history of the family unit are looked at;

(d) the personal rights and convention rights to private and family life of the Irish born children including the Irish citizen child are examined;

(e) the rights of the State itself are also considered including explicitly the right to control entry of foreign nationals and the aim of maintaining the integrity of an immigration system.

49. In the literal sense, therefore, it is clear that those "relevant matters" have been addressed. The issue is, accordingly, whether they have been addressed fairly with the result that a proportionate conclusion has been reached. In the court's judgment the Minister's decision could not be said to be obviously disproportionate in the circumstances. The Minister has weighed a series of factors relating to the personal circumstances of the Irish citizen child and of the family unit against the State's interest in the common good of pursuing the social need and legitimate aim of maintaining control of its borders and the integrity of its immigration system.

50. The citizen child was five years old at the date when that consideration was made. He attended a playgroup and had not yet entered formal schooling. It is expressly recognised that his mother could continue to reside within the State and with his siblings should they so decide. Equally, should they choose to preserve the family unit by moving to the country of which both parents and the siblings are nationals, Emmanuel, the Irish citizen child, would not be prevented from going with them as he would be entitled to Nigerian citizenship. The fact that the State is not bound by any such choice of residence made by the family as such is taken into account. It is also borne in mind that the citizen child was already three years and nine months old when the first named applicant joined his mother in the State prior to becoming his stepfather. Accordingly, insofar as ground C relies on the failure to consider and reach a fair and proportionate assessment of the right to respect for the private and family life under Article 8 of the Convention the court considers that the consideration given here as set out in the file note is radically different in scope, depth and detail than appears to have been the case in the *Oguekwe* and *Dimbo* cases. The court accordingly finds that the failure which vitiated the decisions in those cases is not present in this decision.

51. The remaining issue, accordingly, is whether in this case the Minister has identified a "substantial" reason for deciding to make the deportation order. Although the reason as summarised in the letter of 15th May is similar to that cited in the *Oguekwe* judgment at paragraph 29, it is significantly elaborated upon in the final analysis in this case and in a manner which does not appear to have been done in the *Oguekwe* or *Dimbo* cases. In particular it is said in this instance that maintaining control of the State's borders and monitoring the presence of non-nationals in the State is a pressing social need and a legitimate aim and that in giving effect to the order is proportionate to the aim being pursued because, in effect, the individual assessment of the case from the perspective of the various considerations reviewed in the analysis does not

disclose any less restrictive process which would enable the legitimate aim to be achieved in this case.

52. The argument advanced in the present case was to the effect that it is untenable to propose that the integrity of the immigration system could constitute a substantial reason for depriving a family of the presence and protection of a father and husband and thus interfering with the personal constitutional and convention rights of the applicants in question. It appeared to be implicit in this argument that a substantial reason would exist only if the Minister identified some reason relating to the person, character or conduct of the first named applicant himself which would, as it were, override the otherwise superior rights in question.

53. The court does not consider that this was intended by the Supreme Court namely that the State's rights as mentioned in item 10 of the list in the *Dimbo* case could not in itself constitute a substantial reason because they were abstract reasons of a policy of a political or social nature rather than specific factors relating to the individual personality of the proposed deportee. It seems to the court that the word "substantial" is used in its sense of a reason which has substance and thus as the antonym of "insubstantial" or "inconsequential". The very fact that such rights are enumerated at item 10 in the list demonstrates that the Supreme Court considered them capable of having such substance but that whether in any given case the State's rights will be sufficiently substantial to outweigh the rights of the deportee and his or her family members must depend, as the court indicated, on the full factual matrix of the particular case. Thus, the State will always have a substantial and serious interest in maintaining the integrity of its borders and the effectiveness of its immigration system. But whether that consideration is sufficient to prevail over the private or family rights of particular persons depends on the specific circumstances of the case. In that sense the substantial character of the State's reason for deporting is relative and will alter when assessed against the circumstances of the deportee and his or her family including, obviously, how long they have been in the State, what roots if any they have put down here, whether the minor children are at school and at what stage of schooling they may be and so on.

54. In this case those factors have been addressed in the analysis made by the Minister when formulating the conclusion reached in favour of making a deportation order. In the court's judgment the reasons outlined are reasons of substance and, as such, cannot be interfered with as being unlawful or invalid.

55. The court accordingly finds that grounds A and C are not made out and the application for judicial review will therefore be refused.