

Title: Judgment of the Supreme Administrative Court, No. 2 Azs 71/2006 of 26/3/2008

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Well-founded fear of being persecuted, standard of proof

The *Ministerstvo vnitra* (Ministry of Interior) rejected an application for international protection as manifestly unfounded due to Article 16 para 2 of *Zakon c.325/1999 Sb., o azylu* (Asylum Act) on the ground that an applicant, a citizen of Nigeria, lodged the application with the aim to avoid a threatening expulsion, although he might have applied for granting international protection earlier.

The applicant lodged appeal against the decision of the Ministry. The *Krajský soud v Brně* (Regional Court in Brno) dismissed the appeal because the appeal was submitted with delay. Subsequently, the applicant raised objections against the decision of the regional court in his cassation complaint. The *Nejvyšší správní soud* (Supreme Administrative Court) examined whether the Czech Republic could not violate its obligations arising from Article 33 of the 1951 Geneva Convention or Article 3 of the ECHR given that its court rejected the applicant's appeal as delayed. The Court held that for this it would be necessary that in the case of returning to Nigeria the applicant would face "with a reasonable degree of likelihood" persecution for his membership in the MASSOB movement. A reasonable degree of likelihood of an undesirable consequence of return to the country of origin (in the appellant's case, in particular imprisonment, serious damage to health, or death, resulting from the suppression of demonstrations by MASSOB supporters) exists when such consequence is fairly commonplace rather than isolated in cases similar to the applicant's case. This does not mean that the probability that the undesirable consequence will occur must necessarily be higher than the probability that it will not occur (i.e., that the test of "a reasonable degree of likelihood" constitutes a lower standard of proof than in civil claims) [and even less does it mean that in the case of returning to the country of origin, the occurrence of the undesirable consequence must be virtually certain (i.e., that the test of "a reasonable degree of likelihood" also constitutes *a fortiori* a lower standard of proof than the "beyond reasonable doubt" standard in criminal prosecutions)], but that in cases similar to the applicant's case the undesirable consequence occurs frequently enough for the one who is facing such consequence to reckon with it as with a fairly commonplace phenomenon rather than an exceptional phenomenon. The Court noted that when it formulated the conditions under which the test of "a reasonable degree of likelihood" would be met as regards the threat of negative consequences for a refugee in the case of return to his/her country of origin, it took into consideration the views expressed by the UNHCR Office in the Note on Burden and Standard of Proof in Refugee Claims of 16 December 1998. The Court noted that the applicant was not even the less prominent MASSOB member. He was a common ordinary member whose position could be compared with that of an "anonymous sympathiser" as described by the report of the UK Home Office. Although the MASSOB membership can constitute a reason for arrest in Nigeria, the arrest of ordinary members on this ground cannot be regarded as having "a reasonable degree of likelihood". Ordinary members are sometimes arrested but only exceptionally. Their arrest is

not common and rather unlikely. If the Court decided that there is not reasonable degree of likelihood that the applicant would face the risk of persecution upon his return to Nigeria, the key phrase of the refugee definition – well founded fear of being persecuted - is not met and therefore it is not necessary to examine the other criteria of the refugee definition.