

THE HIGH COURT
JUDICIAL REVIEW

2008 1145 JR

BETWEEN

M. A.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

THE REFUGEE APPLICATIONS COMMISSIONER,

ATTORNEY GENERAL AND IRELAND

RESPONDENTS

AND

HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 26th day of May, 2009.

1. This is the substantive hearing of an application for judicial review of the decision of the Minister for Justice, Equality and Law Reform ("the Minister") to make a deportation order in respect of the applicant. The applicant seeks an order of certiorari quashing that decision. Leave was granted by O'Keeffe J. on 9th December, 2008 on two grounds:-

"1. The first named respondent acted ultra vires and in breach of natural and constitutional justice in making the deportation decision in

(a) finding that the rights residing with the Applicant, her family and her step-brothers' foster family, pursuant to Article 8 of the European Convention on Human Rights were not actively engaged;

(b) failing to make a considered assessment of the proportionality of the decisions.

2. The first named respondent failed to express in clear and unambiguous language that he had sufficient consideration of the relevant criteria, namely the Article 8 rights of the family in this jurisdiction."

2. The hearing took place at the King's Inns, Court No. 1, on 12th and 13th May, 2009. Ms. Rosario Boyle S.C. and Mr. Garry O'Halloran B.L. appeared for the applicant and Ms. Emily Farrell B.L. appeared for the respondents.

Factual Background

3. The applicant is a national of Nigeria who was born in Lagos in June, 1989 and she is now almost 20 years of age. According to her narrative, until 2004 she lived with her mother and her sister F. in Lagos. Relevant to these proceedings is the situation pertaining to her father who did not live with the applicant and her sister but seems to have had three separate families. The applicant has two half brothers who have different mothers and all three children lived at separate addresses with their respective mothers. These two half brothers, who are L. born in March, 1991 and T. born in July, 1997 are living in the State as is the applicant. The applicant is of the Islamic faith.

4. The applicant tells a quite extraordinary story. She claims that when she was fifteen her father decided that she and her two half brothers should come to Ireland for a better education. She first went to the U.K. with a step mother and her two half brothers. She says that they stayed in the U.K. for four months without any schooling but on 8th February, 2005, her father brought her and her half brothers to Ireland and simply left them outside the Office of the Refugee Application Commissioner (ORAC) with instructions to seek asylum and then left. The applicant claims to have had no knowledge of the travel and passport arrangements and claims that they travelled through Dublin airport where her father handled the immigration formalities. She says that she has had no further contact with either her father or her mother since then. The applicant and her half brothers were taken into the care of the Health Service Executive (HSE) as unaccompanied minors.

5. For a time the applicant and L. were housed in the Riversdale hostel. When the applicant turned seventeen she had to move into different accommodation where she remains. No information was furnished as to who pays for this accommodation or how the applicant supports herself. T. was placed in foster care in November, 2006 and shortly afterwards he was joined by L. who although now over eighteen remains with his half brother in the care of the same family. T. is considered to be in the permanent foster care of that family. He is now almost twelve.

6. The applicant's grounding affidavit is thin on current details or of any information relating to her brothers' immigration status. There is no explanation for why the same solicitor is not representing the whole family. The applicant's asylum file reveals that she had ambitions to be a doctor and was happy to be in this State where she could study in peace without being made to do housework as had happened with her mother in Nigeria. During the course of the hearing Counsel for the applicant obtained instructions and informed the Court that the applicant completed her Leaving Certificate last year in 2008 and is now undertaking a pre-nursing course. No information was received as to who pays the fees for that course. Her two half brothers are in secondary education. L. made an application for asylum which failed but T. has not made any application. No information was available in relation to the current status of L.'s asylum application.

Procedural Background

7. The applicant made an application for asylum on 12th February, 2005. The basis for her application was that if she returned to Nigeria, her mother would force her to do housework and she would have no time to study. A negative recommendation was made by ORAC. A finding was made under s. 13(6) of the Refugee Act 1996, as amended, which meant that any appeal to the Refugee Appeals Tribunal ("RAT") would be determined without an oral hearing. No appeal was brought and the applicant's legal advisers (the Refugee Legal Service, RLS)

took the route of making an application for humanitarian leave to remain in the State.

8. While this application was still being considered the RLS made an application for subsidiary protection in August, 2007 on behalf of the applicant where it was claimed that the applicant's father is a member of the Ogboni people and that he brought his children away as they were at risk of human sacrifice. That application was unsuccessful and the credibility of the claims was rejected.

The Application for Leave to Remain

9. The application for leave to remain was made by the RLS on behalf of the applicant on 13th April, 2006. The submissions made in support of the application contain the material and facts on which the applicant relies for this judicial review although the submissions are now three years old and were made when the applicant was only sixteen years old. Her immigration history was set out and it was submitted that she has had no contact with her mother or her father since February, 2005. Detailed submissions were then made under the various headings of s. 3(6) of the Immigration Act 1999 and in particular the Minister's attention was directed to a letter from the applicant's Social Worker stating that she is in a close relationship with her half brothers and that she was very involved in their care. The Minister was informed that she was in secondary school and preparing to take her Junior Certificate examination. Her school records and testimonials as to her usefulness as a member of her hostel and school were furnished. It was submitted that she is a young, amiable, outgoing, extremely active girl of exceptional character who has not come to the attention of the authorities since arriving in Ireland.

10. Under the hearing "Section 3(6) (h) – Humanitarian Considerations", it was submitted that it is not safe for the applicant to return to Nigeria as she is a separated child and a vulnerable and very traumatised young girl. Various submissions were made with respect to her status as a child and the State's international obligations to children under the UN Charter on the Status of Children and under Article 41 of the Constitution and the requirement to take the best interests of the child into consideration. As the decision to make a deportation order was not made until after the applicant was over eighteen, that aspect of the Minister's decision was not strictly applicable.

11. The applicant particularly relies on the submissions made relating to her right to respect for her private and family life under Article 8 of the European Convention on Human Rights. In particular the applicant relies on a letter from her Social Care Manager (Ms. Nolan), indicating that the applicant had taken over a parent role in respect of her half brothers, that she finds it difficult with them living in different places, that she has attended a meeting in respect of their care and that her input was of great benefit to the professionals. Ms Nolan said the applicant had been "a tower of strength" for her brothers. The RLS further submitted as follows with respect to the applicant's right to respect for her family life under Article 8 of the Convention:-

"If our client should be deported, the Irish State would interfere with the exercise of this right, as she would be separated from the rest of her family. The Irish State would destroy the family unit. The essential ingredient of family life is the right to live together so that family relationships may 'develop normally' (Marckx v. Belgium, 1979, ECourHR) and that members of the family 'may enjoy each other's company' (Olsson v. Sweden, 1988, ECourHR). None of the reasons stated in Article 8(2) which would allow for an interference are given in our client's case."

12. It was also stated that the applicant has gone through "a significant process of cultural integration", had begun to form a sense of "Irishness" as part of her identity, and had developed an attachment to Ireland, its people and its culture. To uproot her would have unsettling effects on her person and she had much to lose if returned to Nigeria.

13. At a later stage a handwritten letter was also forwarded to the Minister from the foster mother of the applicant's half brothers, saying that the applicant and her half brothers treat one another as full siblings and that the applicant was treated as a member of their family. She stated that the applicant visited her brothers at least every two weeks and she feared that there would be adverse effects if their sister were removed.

The Examination of the Applicant's File

14. It is not clear whether there was a deliberate and compassionate decision on the part of the Minister's agents not to consider the file until after the applicant had completed her Leaving Certificate exams. In any event, it was not until September, 2008 after the applicant exams were over and three and a half years after her arrival in the State that her file was considered by the Minister. This followed the usual procedure of examining the file first under s. 3(6) of the Immigration Act 1999 and then under s. 5 of the Refugee Act 1996 and s. 4 of the Criminal Justice (UN Convention Against Torture) Act 2000, as amended. No complaint is made in respect of those elements of the examination on file.

15. The consideration given to the Applicant's rights under Article 8 of the European Convention on Human Rights is the subject of the challenge to the deportation order. In that consideration, the analysing officer stated that if a deportation order was signed, it may engage the applicant's right to respect for her private life and family life under Article 8(1) and then went on to find that such deportation would not have such grave consequences as to engage the operation of Article 8. A deportation order was made in respect of the applicant in September, 2008. No application for revocation of that deportation order has been made and its validity is challenged.

THE APPLICANT'S SUBMISSIONS

16. The applicant did not dispute the right of the Minister to make deportation orders but complained that when deciding to make the deportation order in her case the Minister only considered the effect of potential breach of Article 8 of the European Convention on Human Rights on her without reference to the effect on her brothers who were part of the family unit. The applicant contends that the Minister thereby acted in breach of s. 3 of the European Convention on Human Rights Act 2003, which requires him to exercise his functions in a manner compatible with the State's obligations under the Convention provisions. It is argued that having accepted that a "family life" exists, the wrong question was asked and an incorrect test was applied. In concentrating solely on the applicant's Article 8 rights the Minister failed to consider the effect of her deportation on the Article 8 rights of her half brothers. It is not argued that there would be any breach of the applicant's Article 8 rights but rather that her half brothers' Article 8 rights may be breached.

17. It is submitted that the Minister should have considered the consequences of the proposed deportation on the family unit as a whole and should have considered the half brothers as potential victims. The applicant relied on the judgment of the House of Lords in *Beoku-Betts v. Secretary of State for the Home Department* [2008] 3 W.L.R. 166 as authority for this proposition. In that case, the applicant was from a prominent Creole family in Sierra Leone who had fled

the civil war. He came to the U.K. at age nineteen His older sister was a British citizen; his father came from Sierra Leone and registered as a British citizen; his mother and sister were granted leave to remain indefinitely in the U.K. on the basis of the father's British citizenship. The applicant was granted leave to enter the UK as a student and when this leave expired he sought asylum which was refused on the basis that the danger which he feared during the civil war had passed. He then sought leave to remain in the U.K. on the basis of his Article 8 rights. The evidence was that his mother had an emotional dependency upon him since the death of his father. The House of Lords found that when a breach of Article 8 is alleged, the appellate authorities are to consider the complaint with reference to the family unit as a whole and if the proposed removal would be disproportionate, in that context each affected family member was to be regarded as a victim.

18. Counsel for the applicant also sought to rely on the decision of the House of Lords in *EM (Lebanon) v. Secretary of State for the Home Department* [2008] 3 W.L.R. 931 and the decision of the Supreme Court in *Oguekwe v. The Minister for Justice, Equality and Law Reform* [2008] I.E.S.C. 25.

THE RESPONDENTS' SUBMISSIONS

19. Ms Farrell B.L., counsel for the respondents, submitted that it is clear on the face of the examination of the file that the Minister was aware of the existence of the applicant's half brothers and their dates of birth. She pointed out that the Minister expressly stated that he had considered the representations made on behalf of the applicant which included reference to her supportive role vis-à-vis her half brothers. The Minister did not have to repeat the facts considered to establish that he had regard to them; counsel relied on *B.I.S. (Sanni) v. The Minister for Justice, Equality and Law Reform* [2007] I.E.H.C. 398, where Dunne J. held that:-

"The respondent had all the information in relation to the circumstances of the first named applicant. He knew the nature and extent of the family unit. It does not seem to me to be necessary to specifically recite that the Minister considered the impact of the deportation on either the first named applicant or the second and third named applicants or indeed his parents or to state expressly that he considered Article 8."

20. Counsel also referred to the decisions of *Pok Sum Shun v. The Minister for Justice, Equality and Law Reform* [1986] I.L.R.M. 595 and *P.F. v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Ryan J., 26th January, 2005), both of which were relied on by Dunne J. in *Sanni*. Counsel argued that the manner in which the Minister considers Article 8 rights is a matter for him and it is not necessary for him to expressly write down in the course of his consideration that he has had regard to the Article 8 rights of each member of the family. She submitted that the situation of the half brothers was considered insofar as they were made known to the Minister. She also pointed out that the half brothers are not joined as parties in these proceedings.

21. The respondents argued that the family life that exists in this case is more comparable to that which existed in *Sanni* than to that which existed in *Beoku-Betts* where the adult applicant was considered to have a "family life" that attracted the protection of Article 8 because his mother had a particular emotional attachment or dependence upon him and the whole family apart from the applicant were legally in the UK. The applicant in *Sanni* was not found to have a "family life" for the purposes of Article 8 as he had entered the State illegally and had remained there illegally and effectively attempted to assert a choice of

residence. Counsel submitted that in this case, the applicant's father attempted to assert a choice of residence on behalf of his three children by effectively abandoning them in the State.

22. The respondents also relied on the decision of Charleton J. in *Y.O. v. The Minister for Justice, Equality and Law Reform* [2009] I.E.H.C. 148. Counsel pointed out that the situation of the siblings in this case is more tenuous than the siblings in *Y.O.* who were Irish citizens and whose mother and father (upon whom the applicant was not dependant) had leave to remain temporarily in the State. The three siblings in this case lived only lived together for a period of three months after they arrived in Ireland and thereafter the youngest brother was taken into foster care and was later followed by the other brother. The brothers' entitlement to remain in the State is uncertain. Counsel also pointed out that in *Y.O.*, Charleton J. found that the *Oguekwe* principles apply only to the situation where the deportation of a parent of an Irish citizen child is proposed.

23. In addition counsel relied on the decisions of the European Court of Human Rights in *Sezewn v. The Netherlands* (2006) 43 E.H.R.R. 621 and *Mason. v. The Austria* (App. No. 1638/03, decision of 23rd June, 2008 [GC]). Reference was also made to *A. and Family v. Sweden* (1994) 18 E.H.R.R. CD 209. The applicants in that case were a Lebanese mother and children who had travelled to Sweden. The mother's parents and siblings were lawfully resident in Sweden. They had an extended family relationship with cousins and other relations. The children's father was thought to be dead and they had no family left in Lebanon. The European Commission of Human Rights found that the applicants' relationship with their extended family did not oblige the Swedish government to grant a residence permit to the applicants. No breach of Article 8 was found and the case was deemed inadmissible.

24. Counsel for the respondents pointed out that the applicant's mother and sister, with whom she lived until brought to Ireland, remain in Nigeria. She argued that there is no basis for the applicant's submission that her half siblings would be unable to travel to Nigeria to visit her; she submitted that there is nothing to prevent them from travelling to visit her.

THE COURT'S ASSESSMENT

25. The applicant argues that the question for the Court in this case is a very net one - whether the Minister's decision to deport the applicant breached the terms of the European Convention on Human Rights Act 2003 by confining his consideration to the applicant's Article 8 rights without reference to the rights of her half-brothers. Another way of looking at the issue is whether the decision is invalid because inadequate consideration was given to the whole family of three siblings. While it is a net point, the consideration has two parts. Did the Minister as a matter of fact consider the rights of the remaining members of the family when deciding to deport the applicant? If he did, was the consideration in compliance with the ECHR Act?

26. In considering the facts relevant to the decision to deport I have had regard to the documents and information available to the Minister by way of the application for leave to remain temporarily in the State. In arriving at his decision, the Minister had the entire asylum file which was not particularly voluminous as there had been no appeal from the ORAC recommendation. He also had the applicant's submissions in support of her application for subsidiary protection received on 15th August, 2008. This was barely mentioned during these proceedings but those submissions had relevance in the subsequent consideration of her file prior to the making of a deportation order. The applicant

made a rather desperate plea for subsidiary protection based on a fear of human sacrifice. That claim, not surprisingly, was found not credible and it does no favours in establishing merit in the applicant's case. While the applicant, through her counsel, quite understandably sought to distance herself from the allegations, the suspicion remains that those submissions may have detracted from the consideration of whether or not her proposed deportation could breach Article 8. In any event, the Minister had the subsidiary protection application in front of him but he also had the applicant's submissions, school reports, letters and testimonials furnished in support of her application for leave to remain furnished over four dates being 19th April, 2006, 25th October, 2007 (with enclosures), 19th December, 2007 and 10th March, 2008.

27. The Court has considered all those documents as they constitute the full extent of what was before the Minister. This has been done in an effort to determine whether there is any evidence that the Minister was aware or should have been aware of the applicant's family circumstances and whether he considered the effect of any order on the members of that family.

28. The submissions made to the Minister seeking leave to remain consisted of 14 individual documents:

1. Submissions prepared by the RLS outlining how the applicant and her half brothers came as children to Ireland together with details of the applicant's date of birth, the duration of her stay, the fact that prior to being brought by her father to the U.K. and then to Ireland she lived with her mother and sister and that since her arrival in the State she is close to and very involved in the care of her two half siblings. Her excellent character was outlined and the humanitarian considerations related to the risks facing her as a separated child were she to be returned to Nigeria and the Minister was reminded of his duties to unaccompanied children being returned to their country of origin. Material parts of the contents of a letter from the applicant's social care manager where the applicant's relationship with her brothers was highlighted. The applicant was stated to "have taken over a parent role in the care of her two brothers and that it was difficult for her with them living in different places but that she will always put their needs first." The letter was appended. It was further stated with respect to Article 8 that should the applicant be deported "the Irish State would interfere with the exercise of this right, as she would be separated from the rest of her family. The Irish State would destroy the family unit. The essential ingredient is the right to live together so that family relationships may develop normally (*Marckx v. Belgium*, 1979 ECourHR) and that members of the family may enjoy each other's company (*Olsson v. Sweden* 1988 ECourHR). It was submitted that "she had gone through a significant process of Irish integration and that generally neither the common good nor national security or public policy would be offended by her staying in the State."

2. A social work report for the purpose of an application for temporary leave to remain in Ireland which referred to her involvement and support in the care of her younger brothers who were at that time in HSE Homes;

3. Her school reports;

4. A letter from the social care manager of the HSE Home where the applicant was staying, outlining her role with her brothers and her general positive qualities;

5. Three further school reports referring to her integration and involvement with extracurricular activities;

6. A letter from her project worker dated 30th August, 2007 describing her good behaviour and the fact that "it would be in [M]'s best interest to be allowed to stay in Ireland, where she has siblings and a great deal of friends."

7. Two further letters dated 25th September and 5th October, 2007 from her secondary school describing her good behaviour and involvement in student activities;

8. An undated letter from the Dunlaoghaire Refugee Project relating to her involvement in that organisation and her academic ability as she was taking six subjects at higher level in her Leaving Certificate exams;

9. A letter dated 8th October, 2007 from her chemistry teacher attesting to her good character;

10. An undated letter - presumed to be from 2007 as it refers to her leaving certificate "next year" - from the foster mother of her two brothers stating that the boys love her a lot and miss her when she is not around and that as they have no other family they are very close to each other.

11. A letter from her outreach youth worker dated 31st January, 2007 attesting to her character and ability and urging the Minister to allow her to remain and fulfil her potential.

29. These submissions indicate that the Minister was made aware that many people in authority who had contact with the applicant held her in high regard and were prepared to reduce that regard to writing. Although the purpose of the letters was clearly to induce the Minister to permit the applicant to remain on humanitarian grounds and therefore they concentrated on the attributes of the applicant, there were at least three references to her role in her brothers' life. There can be no doubt that the Minister was aware of the unusual family circumstances, that the family lived in two venues and that the applicant was the older sister and only relative of the younger boys present in Ireland.

Did the Minister consider the impact of the deportation order on the applicant's brothers when he made the deportation order?

30. The examination of the applicant's file under s. 3(6) of the Immigration Act 1999, which took place on 9th September, 2008 when the applicant was 19, recites the dates and documents relevant to the applicant and notes the representations made on her behalf and the letter from the foster mother of the applicant's "step-brothers". The examination was conducted by an Executive Officer in the Repatriation Unit and signed off by the First Supervisor six weeks later on 20th August, 2008. That s. 3 assessment found that it is in the interest of the common good to uphold the integrity of the asylum and immigration procedures of the State. I assume that this indicates a first stage negative recommendation on leave to remain.

31. The next level assessment noted that the applicant had claimed that if returned to Nigeria she would be in danger of sacrifice to the Ogboni society and then went on to review country of origin information relating to the role of the police and the authorities in protecting its citizens against such dangers and

concluded that by availing of this protection or by relocating, repatriation to Nigeria would not offend s. 5 of the Refugee Act 1996 or s. 4 of the Criminal Justice (UN Convention against Torture) Act 2000, as amended.

32. The consideration then went on to deal with Article 8 of the ECHR. This portion of the examination merits citation in full:-

"If the Minister signs a Deportation Order in respect of [the applicant], this decision would engage her rights to respect for private and family life under Article 8(1) of the ECHR.

Private Life

It is accepted that the proposed decision to deport [the applicant] may constitute an interference with her right to respect for private life, within the meaning of Article 8.1 of the ECHR. This relates to the applicant's work, educational and social ties that she has formed in the State as well as any matters relating to her personal development since her arrival in the State. However, it is not accepted that such interference will have consequences of such gravity as potentially to engage the operation of Article 8. As a result, the decision to deport [the applicant] in pursuance of lawful immigration control does not constitute a breach of the right to "respect" for [the applicant]'s private life under Article 8 of the ECHR.

Family Life

[The applicant] claims to have two half-brothers residing in the State. It is accepted that the proposed decision to deport [the applicant] may constitute an interference with her right to respect for family life, within the meaning of Article 8.1 of the ECHR. However, it is not accepted that such interference will have consequences of such gravity as potentially to engage the operation of Article 8. Therefore, it is submitted that a decision by the Minister to deport [the applicant] would not constitute interference in her right to respect for her family life under Article 8(1) of the ECHR."

33. This consideration was signed off by a second supervisor on 21st August, 2008 who in a handwritten addendum under "humanitarian considerations" noted that the applicant has a role in supporting her two stepbrothers who are in foster care at present. However – he found – "this role does not warrant the granting of leave to remain." He also placed his approval comments at the top of the file which was then sent to the Minister. The note observes that the applicant had "failed the asylum process having previously admitted that her father brought her here for study purposes" and "I do not believe that leave to remain is warranted in this case."

34. The Minister signed the deportation order on 9th September, 2008.

35. From a full review of the documents before the Minister I do not believe that it could be said that the Minister was unaware of the circumstances of the arrival of the three siblings in the State or that he was unaware that the applicant had two half brothers in foster care, that she was of good character and that she played a role in supporting her two brothers. These facts are referred to in the consideration of the applicant's file before signing the deportation order. I am satisfied that the examining officers made several references to the relationship between the brothers and their sister and that the Minister was aware of the role the applicant played in the welfare of her brothers when he was giving consideration to "Family Life".

36. As the answer to the first part of the question is yes I will go on to consider whether that consideration for his decision was adequate and in compliance with s. 3 of the ECHR Act 2003.

37. The actual facts of this case as presented are bizarre in the extreme in that three children who were not brought up together but who apparently shared the same father were brought to Ireland and then abandoned to the State to provide them with the necessary shelter, care and education appropriate to orphaned citizen children. There are so many unanswered questions and a huge information deficit. Nevertheless, it must be assumed that the children were incapable of coming here without adult instruction, intervention and assistance. The information before the Court is that the applicant has had no contact with either her mother or father.

38. There is no dispute that the State can deport members of a family even if such deportation can and frequently does rupture family relationships and that such deportations will generally be in compliance with Article 8 of the ECHR. The arguments made in this case have been rehearsed many times previously as the same issues arise in many cases where Constitutional rights of family members under Article 41 and Article 8 rights under the Convention are measured against the right of the State to deport foreign nationals, even if such deportations interfere with family rights.

39. Many of the previous decisions relevant to this question were reviewed by Dunne J. in *Sanni v. The Minister for Justice, Equality and Law Reform* [2007] I.E.H.C. 398. In particular, she addressed the level of consideration which the Minister must give to the impact of a deportation order on other family members if one of the family is deported. She first considered the seminal decision of Costello J. in *Pok Sun Shum v. The Minister for Justice, Equality and Law Reform* [1986] I.L.R.M. 593 where it was unsuccessfully argued that the effect of deportation of the plaintiff who was married to an Irish citizen was invalid because inadequate consideration had been given to the rights of the family pursuant to the Constitution. Dunne J. also considered *P.F. v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Ryan J. 26th January, 2005) where a similar issue arose. To some extent the issue in *P.F.* was whether the wording of the Minister's decision reflected the necessary consideration. Dunne J. paraphrased the decision of Ryan J. in *P.F.* when she said:-

"It does not seem to me to be necessary to specifically recite that the Minister considered the impact of the deportation on either the first named applicant or the second and third named applicants or indeed his parents or to state expressly that he considered Article 8."

40. In *Sanni* Dunne J. followed the previously decided cases in relation to the degree of detail to be provided by the Minister, and found the requisite degree of consideration to be as in was stated in *Pok Sun Shum*, which she summarised as:-

"It seems to me that it is not necessary for the Minister to spell out specifically that he has considered the impact of the making of an order in circumstances where on the stated facts it must be abundantly clear that there would be an impact."

41. These decisions make it clear that no inference can be drawn from the style of the written consideration relied upon by the Minister in support of the contention that he did not have regard to all the information before him on the

possible impact of a deportation order on other members of the applicant's family.

42. Following on from those decisions I would have no criticism of the actual wording, although somewhat formulaic, of the consideration given in this case. However it is not the style but the content which is under consideration in the context of the unusual circumstances of the case. I believe that the facts of this case required something more to indicate that the impact of the deportation on the brothers' right to respect for their family life pursuant to Article 8 was ever actually considered.

43. I accept totally that the decisions of the European Court of Human Rights make it clear that not all interferences with the Article 8(1) right to respect for family life will be unlawful. Article 8(2) allows for interference with the right within the following confines:-

"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."
(emphasis added)

44. The jurisprudence of the European Court of Human Rights makes it clear that in order to assess whether the proposed deportation of one or more member(s) of a family will breach Article 8, it is necessary to ask whether the proposed deportation is

(a) In accordance with law;

(b) In pursuance of one of the legitimate aims set out in Article 8(2); and

(c) "Necessary in a democratic society" – that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.

45. Thus, the assessment of whether a deportation order might breach Article 8 involves a complex balancing of the rights of the individual against the rights of the State and the community as a whole. That assessment is to be carried out on a case-by-case basis and will depend on the facts and circumstances of the case.

46. The facts of Sanni are of relevance to the type of assessment that is required. The applicant there was a nineteen year old man who lived in Nigeria and sought to join his parents and two siblings in the State. His parents had leave to remain in Ireland on the basis of their parentage of two Irish citizen children. The applicant in Sanni was refused leave to land and then sought asylum and was admitted on that basis. Ultimately, a deportation order was made within three months of his arrival at a time when he was beginning to form a relationship with his very much younger siblings. When seeking to judicially review the deportation order, the Irish citizen siblings were parties with the older brother in arguing that their Article 8 rights were breached. They argued that as the protection afforded by Article 8(1) of the Convention extends to familial relations between siblings both as minors and as adults as well as to the relationship between adult children and their parents, the making of the deportation order constituted an unjustified interference with their private and family life. Of particular relevance to this case

is that the Court was also asked to consider the nature of the consideration required of the Minister in similar situations.

47. The rights relied upon in Sanni to invoke an asserted breach of Article 8 derived from decisions of the European Court for Human Rights and in particular in *Berrehab v. Netherlands* (1988) 11 E.H.R.R. 328, *Olsson v. Sweden* (1989) 11 E.H.R.R. 259, *Moustaquim v. Belgium* (1991) 13 E.H.R.R. 802, *Boughanemi v. France* (1996) 22 E.H.R.R. 228, and *Radovanovic v. Austria* (App. No. 42703/98, judgment of 22nd April, 2004). Those cases were considered by Dunne J. who decided that the following principles can be noted:

“1. Family can include the relationship between an adult child and his parents (see for example *Boughanemi*).

2. Family life may also include siblings; adult or minor (see *Boughanemi* and *Olssen*).

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. (See *Advic [v. United Kingdom]* (1995) 20 E.H.R.R. CD 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.”

48. Dunne J. found in the case before her that family life had not been established but she went on nevertheless to consider whether the deportation proposed was capable of interference with the right to respect for family life. In particular she referred to the now frequently quoted findings of Lord Philips in *R.(Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840 where the general principles applicable to the approach of the European Court of Human Rights to the potential conflict between the respect for family life and the enforcement of immigration controls were stated as follows at p.861:-

(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 a married couple.

(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 member 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."

49. These are very helpful principles but as the facts of this case differ enormously from other cases to which the principles are applicable the applicant's case falls to be considered on its own facts within the general guidelines. At the time the Minister was considering his decision to deport the applicant, she and her half brothers were to all extents and purposes orphans. There is nothing in the considerations of the file to indicate that those special facts were appreciated and thus I have concluded that the Minister did not fully consider the effect on the younger brothers' separation from their sister should she be deported notwithstanding that the applicant's relationship with her brothers was referred to on a number of occasions.

50. The special features of this case are that the applicant has now spent one third of her life in this State and her two brothers have proportionately spent a longer period here. If I accept the applicant's averments that she has had no contact from or with her parents since her arrival and abandonment in 2003, then I must accept that this lack of contact and absence of parental nurturing also applies to her brothers. As to the nature of her family ties with her brothers, I find guidance in the decision of the House of Lords in *EM (Lebanon) v. Secretary of State for the Home Department* [2008] 3 W.L.R. 931, where the applicant was a Muslim woman from Lebanon who divorced her husband as a result of his sustained violence towards her. In accordance with Muslim custom she was granted custody of their child until he was seven years of age. When he was approaching his seventh birthday she feared that her husband would try to take the child away from her and she fled Lebanon and went to the U.K. with her son. Her asylum claim failed and she and her son sought to prevent their deportation from the U.K. on the basis of their Article 8 rights. Lord Bingham held:-

"It seems likely that, following her marriage, the appellant's immediate family consisted of herself and her husband. It would have been the life of that family which would have fallen within the purview of article 8 had the Convention applied in Lebanon, which it did (and does) not. But there has been no familial contact between the appellant and her husband since the birth of AF, and AF has never seen his father since the day he was born. Nor has he had any contact with any of his father's relatives. Thus, realistically, the only family which exists now or has existed for the last five years at least consists of the appellant and AF. It is the life of that family which is in issue."

51. Applying those principles to the facts of this case, the applicant's "family life" for the purpose of Article 8 is the family life that she has enjoyed with her half brothers in this State for the past four years. If her averments are accepted, the applicant and her brothers have had no contact with their respective mothers their father whose whereabouts are not known. The siblings were abandoned in a strange country at a young age. They have therefore already suffered a particularly invidious disruption to the family lives that they individually enjoyed up to that time. The deportation of the applicant would constitute a further grave interference with the family life that they now enjoy with one another which, even if it did not exist before 2005, must have been one of the few sources of comfort and strength available to them during their initial years in Ireland.

52. It is very likely that the applicant had no choice in her being brought to Ireland and even less so her brothers. The likelihood is that if the applicant is deported she will be permanently separated from her brothers as she will not be

permitted to return here. The effect on her brothers will be that they will rely solely on their foster mother for any familial nurturing, having neither the means nor the real choice of following the applicant to Nigeria. It seems to me that there is a real possibility that the deportation of the applicant at this stage of her brothers' development may violate paragraph 4 of Lord Philips' helpful summary of the applicable principles in Mahmood when he stated that:-

"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."

53. Much depends on the particular facts of each individual case where breaches of Article 8 are asserted and my belief is that this particular case, given the special facts involved, required a more specific examination and consideration than is apparent in the consideration of the file in circumstances where the Article 8 family rights of young abandoned children were being assessed. While it may have been preferable for the Minister to have been provided with hard evidence or information from the brothers themselves or from their social workers or any person who could furnish objective information of the relationship between them and their sister, it has to be remembered that all the members of this "family" were very young and without parental presence or guidance. I reiterate that special and peculiar facts prevail in this case which required special consideration. They do not apply to the vast majority of cases where the Minister makes decisions to deport even if that decision separates a family. In this case, I am not satisfied that it can be inferred from the somewhat pro-forma consideration given to Article 8 rights in the examination of the applicant's file that any such special consideration was afforded to the family rights in this case.

54. Finally, I believe that it is appropriate for me to express a view on the decision of the House of Lords in *Beoku-Betts* which played such a part in the legal submissions. I do not believe that the case has any real relevance to Irish law as the statutory provision that was being interpreted by the House of Lords in that case has no equivalent in Ireland. In *Beoku-Betts*, which had a long and involved history through the courts, the issue to be determined was the interpretation to be applied to s. 65 of the Immigration and Asylum Act 1999, which provides:-

"(1) A person who alleges that an authority has, in taking any decision under the Immigration Acts relating to that person's entitlement to enter or remain in the United Kingdom, acted in breach of his human rights may appeal to an adjudicator against that decision [...].

(2) For the purposes of this Part, an authority acts in breach of a person's human rights if he acts, or fails to act, in relation to that other person in a way which is made unlawful by section 6(1) of the Human Rights Act 1998 [...]."

55. Section 6(1) of the Human Rights Act 1998 prohibits public authorities from acting in a manner that is incompatible with the European Convention on Human Rights. Thus, s. 65 makes provision for an appeal to be taken from the decisions of the Secretary of State, an immigration officer or an entry clearance officer, on the basis that the adjudicator acted in a manner incompatible with the ECHR. It is clear that no such appeal is envisaged in this jurisdiction. Nevertheless, the interpretation of Article 8 rights in this jurisdiction has, I believe, already been given the interpretation finally arrived at by the House of Lords in *Beoku-Betts*. In this jurisdiction, when the rights of one member of a family facing deportation are

being considered there has never been any statutory inhibition to confining the consideration to the applicant. It has been the norm to consider the rights of all the members of what is presented as the constituent parts of the applicant's family. This is quite evident from a number of decided cases before our courts and where the necessary consideration of the relevant files revealed that the Minister does have regard to the effect of a deportation on those members of the family left behind as well as the effect on the family member being deported. Sanni is one such example where first it was established whether family life existed and then whether a deportation of a family member effected an unwarranted breach of Article 8.

Conclusion

56. In the light of the foregoing, I am satisfied that the applicant is entitled to the reliefs sought and I therefore grant an order of certiorari quashing the deportation order made on 7th September, 2008 on the grounds that the Minister failed to make a sufficiently considered assessment of whether the proposed deportation would breach Article 8 of the European Convention on Human Rights.