Neutral Citation Number: [2009] IEHC 8

THE HIGH COURT

2008 1130 JR

BETWEEN

S. I. AND D. I. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND, S.I.)

APPLICANTS

AND

THE REFUGEE APPEALS TRIBUNAL,

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,

THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

AND

HUMAN RIGHTS COMMISSION

NOTICE PARTY

JUDGMENT OF MR. JUSTICE HEDIGAN, delivered on the 16th day of January, 2009.

1. The applicants are seeking leave to apply for judicial review of:-

a. The decisions of the Refugee Appeals Tribunal (RAT) to affirm the earlier recommendations of the Refugee Applications Commissioner (ORAC) that the applicants should not be granted declarations of refugee status;

b. The decisions of the Minister for Justice, Equality and Law Reform ("the Minister") to refuse their applications for subsidiary protection; and

c. The decisions of the Minister to make a deportation orders in respect of them.

Factual Background

2. The first named applicant was born in Nigeria in 1986. According to her account of events, she married in 2001 and suffered a miscarriage in 2002 as a result of pressure to undergo genital circumcision. She refused to undergo the procedure and claims to have been beaten up as a result. She travelled to the UK in 2003 when she fell pregnant again but was immediately deported. She returned to live with her husband in Lagos but miscarried again. Three years later, when she fell pregnant for a third time, her husband paid an agent to arrange her travel to Ireland; she was seven months pregnant when she arrived in Ireland in June, 2006. She gave birth to a daughter, the second named applicant, on 14th September, 2006; the child is a national of Nigeria.

Procedural Background

3. The first named applicant applied for asylum in July, 2006. She opted to make a separate asylum application on her daughter's behalf, after her birth. In her own ORAC questionnaire, she claimed to fear that she would be forcibly subjected to genital circumcision if returned to Nigeria; when filling out her daughter's ORAC questionnaire, she asserted the same fear on behalf of her daughter. Separate ORAC interviews were conducted in respect of mother and daughter. The first named applicant was notified by letter dated 3rd November, 2006 that a negative recommendation had issued from ORAC; her daughter was notified likewise one week later. Each applicant appealed to the RAT. Oral hearings took place on 2nd July, 2007, at which each applicant was represented by counsel. The RAT decisions to affirm the ORAC recommendations were notified to the applicants by letters dated 28th August, 2007.

4. Each applicant was notified that the Minister was proposing to make a deportation order in respect of her, and that the usual options were available. Representations seeking leave to remain and an application for subsidiary protection were made on behalf of each applicant; the RLS submitted representations on behalf of the second named applicant on 28th January, 2008 while her mother's then-legal representatives submitted theirs on 8th February, 2008. Country of origin information (COI) and various references were attached to each of the applications. Each applicant was notified by letter dated 26th June, 2006 that her application for subsidiary protection had been refused. Further representations were made on behalf of the first named applicant by a new firm of solicitors on 8th July, 2008. Each applicant was notified by letter dated 24th September, 2008 that a deportation order had issued in respect of her.

Extension of Time – The RAT Decisions

5. The within proceedings were issued on 13th October, 2008. Section 5(2)(a) of the *Illegal Immigrants (Trafficking) Act 2000* sets a 14-day time limit, commencing on the date of notification, for the bringing of judicial review proceedings in respect *inter alia* of RAT decisions. The applicants are outside of that time limit by roughly 13 months with respect to the RAT decisions that were notified to them on 28th August, 2007.

6. With regard to this delay, the first named applicant states in her grounding affidavit that she was distressed when the RAT dismissed the appeals and discussed matters with the RLS, but was told that nothing could be done. She says she was advised that she could go to a private solicitor, but that "the only income I have is a weekly payment of nineteen euro for me and nine euro for my child." She also says that she contacted a new solicitor once notified about the deportation orders, and received an immediate appointment. She says that upon receipt of counsel's opinion, instructions were given to her new solicitor to institute the within proceedings. She also says she has difficulty in understanding legal matters and is of limited means.

7. The respondents submit that it would be contrary to legal certainty to grant an extension of time in circumstances where the Minister relied on the RAT decisions in good faith a year after they were notified to the applicants. They have also applied, without prejudice to the foregoing, for the proceedings against the RAT to be struck out on the basis that the RAT decisions have been subsumed into those of the Minister.

8. As this Court has indicated on several occasions (see e.g. *K.A. & Anor v The Refugee Applications Commissioner* [2008] IEHC 314; *O.S.T. v The Minister for Justice, Equality and Law Reform* (unreported, Hedigan J., High Court, 12th

December, 2008); *E.O. & Ors v The Minister for Justice, Equality and Law Reform* (unreported, Hedigan J., High Court, 18th December, 2008)), the Court will be satisfied that there is good and sufficient reason for extending time only where reasonable, clear and credible reasons of some weight are proffered in explanation of the delay. This is because the 14-day period that is set out in the Act of 2000 must be regarded with the utmost seriousness.

9. The applicants have delayed by more than 26 times the length of time allowed by the Act of 2000. It is my view that in cases involving such inordinate periods of delay, the reasons proffered in explanation of the delay must be quite exceptional indeed, and that no such reasons have been advanced in the present case: the matters set out in the grounding affidavit are insufficient to explain the delay, and could not be considered in any way exceptional. Accordingly, I am not satisfied that there is good and sufficient reason to extend time. In the circumstances, it does not arise for consideration whether the proceedings against the RAT should be struck out on any other basis. This application proceeds, therefore, with respect only to the subsidiary protection and deportation order decisions; no time issues arise with respect to those decisions. That being so, it is helpful to examine those decisions in greater detail.

The Subsidiary Protection Decisions

10. In the subsidiary protection decision relating to the first named applicant, the analysing officer sets out the facts of the 'serious harm' claimed, i.e. her fear of being forcibly subjected to circumcision. He goes on to assess the facts relevant to her country of origin and the availability of protection against serious harm, in accordance with Regulations 2(1) and 5(1)(a) of the *European Communities (Eligibility for Protection) Regulations 2006.* In that context, he notes that all of the COI submitted in support of the application had been considered. In particular, he quotes extensively from a *UK Home Office COI Report on Nigeria* dated 13th November, 2007, citing the following sections in full: 23.21-23.25 (FGM), 7.06-7.07 (persecution from non-state agents and internal relocation), 8.17-8.18 (avenues of complaint), 17.01-17.02 (human rights institutions, organisations and activists), 36 (internally displaced persons), 37.01-40.01 (foreign refugees; citizenship and nationality; employment rights; extended family and other community support networks); and section 5.01 (FGM) of a Landinfo Report entitled *Fact-finding trip to Nigeria (Abuja, Lagos and Benin City)* 12-26 March 2006. From this COI, the officer concludes that although FGM is prevalent in Nigeria, the authorities are aware of the problem and endeavouring to tackle it; that there are groups against the practice and avenues of complaint and a variety of sources of protection, including NGOs; and that internal relocation is an option for women who wish to avoid FGM. He also notes that the first named applicant is entitled to move freely throughout the country and to live in any part of Nigeria with her husband and child. He points out that ORAC and the RAT have established that the first named applicant did not seek police protection, and that the COI lists a number of measures that might have been taken by the NPF if protection had been sought. He concluded that "state protection is available to and accessible by the applicant were she to seek it." The officer went on to consider the matters set out in Regulation 5(1)(b)-(e) of the Regulations of 2006. In sum, he found that the first named applicant had not already been subject to serious harm, and that because of doubts in the earlier decisions of ORAC and the RAT surrounding her credibility, she did not warrant the benefit of the doubt.

11. The subsidiary protection decision relating to the second named applicant is virtually identical to that relating to her mother, amended only so as to reflect the personal details of the second named applicant and to indicate that there are no

doubts surrounding the child's credibility. The same provisions of the *UK Home Office COI Report* are quoted and the same conclusions are drawn therefrom.

The Deportation Orders

12. The applicants' files were analysed at the deportation order stage by the same officer of the Minister's Department who had analysed their applications for subsidiary protection. With respect to section 5 of the *Refugee Act 1996* (i.e. non-refoulement), the analysing officer again quotes extensively from the *UK Home Office Report on Nigeria* of 13th November, 2007. On this occasion, in addition to the sections quoted in the subsidiary protection decisions, he also quotes in full sections 1.01-1.02 (geography), 5.01-5.02 (Constitution), 23.05-23.19 (women and poverty; violence against women; state protection for victims of violence; rape and the law; state protection for victims of rape; prosecution of rape cases), 23.21-23.25 (FGM, as above), 33.01-33.02 (freedom of movement), 34.01 (exit-entry procedures), and 35.01-35.02 (treatment of returned failed asylum seekers). From this, he concludes that "It is very clear from this report that the State of Nigeria does take action to protect its citizens. Equally the applicant's fear of the alleged threat could be addressed by relocating to another part of Nigeria." He again notes that ORAC and the RAT had established that the applicant had failed to seek the protection of the police. He goes on to assess the State's obligations under section 4 of the *Criminal Justice (UN Convention Against Torture) Act 2000*, as amended, and the applicant's rights under Article 8 of the *European Convention on Human Rights*.

13. There is little difference of any note between the analysis conducted with respect to the second named applicant's file when compared to that conducted with respect to her mother's file. Considering section 3(6) of the Act of 1999, the officer notes that the second named applicant had been born in the State to the first named applicant one year and nine months earlier, and that her father resides in Nigeria. The same COI sections are cited with respect to section 5 of the Act of 1996, and the same conclusions are reached with respect to section 4 of the Act of 2000 and Article 8 of the Convention.

THE SUBMISSIONS

14. The applicants' intended complaints with respect to the subsidiary protection decisions were primarily linked to their complaints as to the alleged invalidity of the RAT decisions. As the RAT decisions are no longer subject to challenge, their remaining complaint with respect to the subsidiary protection decisions relates to the treatment of COI with respect to state protection.

15. Their primary complaints in respect of the deportation order decisions relate to:-

a. Flawed treatment of COI with respect to state protection;

b. Breach of s. 3, *European Convention on Human Rights Act 2003*; and

c. Failure to consider the best interests of the minor applicant.

(a) Treatment of COI

16. It is submitted that the Minister's reliance on the *UK Home Office COI Report on Nigeria* of 13th November, 2007 at both the subsidiary protection and deportation order stages was irrational, insofar as he failed to assess the adequacy of state protection in Nigeria. The Court's attention is drawn, in particular, to the statement contained in section 24.01 that "The government

seldom enforced even the inadequate laws designed to protect the rights of children."

17. The respondents argue that the consideration of COI is a matter for the decision-maker, that the conclusions drawn in relation to state protection are rational and in accordance with law, and that the consideration of COI in this case is one of the most detailed examples of same that counsel has ever seen.

(b) Breach of s.3, ECHR Act 2003

18. The applicants submit that the Minister acted in breach of his obligations under s. 3 of the *European Convention on Human Rights Act 2003* by failing to engage in a balancing exercise to ensure that the proposed deportation would not be in breach of the applicants' right to respect for their private and family life under Article 8(1) of the European Convention on Human Rights. It is submitted that it was incumbent upon the analysing officer to assess whether the deportation is necessary in a democratic society and proportionate to the aim to be achieved.

19. The respondents submit that the decisions were properly made within the parameters of the relevant legislation. It is argued that the decisions are valid and should be upheld.

(c) Consideration of the best interests of the child

20. It is submitted that the Minister erred by failing to give active consideration of the best interests of the child, in breach of Article 3 of the UN Convention on the Rights of the Child and with the judgment of the European Court of Human Rights at § 58 in *Üner v The Netherlands* (App no. 46410/99, judgment of 18th October, 2006 [GC]). Reliance is placed on *Nwole v The Minister for Justice, Equality and Law Reform* [2003] IEHC 72, and on the judgment of the European Court of Human Rights in *Keegan v Ireland* (1994) 18 EHRR 342, where it was held that Contracting States must act in a manner calculated to enable established family ties to be developed.

21. The respondents submit that the child was legally represented at all times and her case was put forward by the RLS. Representations made on her behalf by the RLS were accompanied by references from community members. It is argued that there was good consideration of the child's interests in the decision, that the child's circumstances were uppermost in the decision-maker's mind, and that the representations made on her behalf by the RLS were fully considered.

THE COURT'S ASSESSMENT: THE SUBSIDIARY PROTECTION DECISIONS

22. Section 5(2) of the *Illegal Immigrants (Trafficking) Act 2000* applies to the deportation orders. The applicants must therefore show substantial grounds for the contention that the decision ought to be quashed. As is now well established, this means that grounds must be shown that are reasonable, arguable and weighty, as opposed to trivial or tenuous. As section 5(2) does not apply to the subsidiary protection decisions, the applicants must meet the somewhat lower threshold set out in *G v DPP* [1994] 1 IR 374: they must therefore make out a *prima facie* case, and satisfy the Court that the facts averred to support a stateable ground for the relief sought and that on those facts an arguable case can be made that the applicant is entitled to the relief sought.

(a) Treatment of COI

23. I have carefully read, in its entirety, the *UK Home Office COI Report* of November, 2007 upon which the analysing officer relied both at the subsidiary protection stage and at the deportation order stage. In the contexts of the

applicants' complaints, it is worthwhile citing the contents of that report. The relevant parts thereof state that personal freedom is guaranteed under the Nigerian Constitution, "whatever its weaknesses"; that individuals who fear persecution from non-State actors can seek police protection, albeit imperfect, and that there are several avenues of complaint; that there is free movement for all citizens within the country and that Nigerians can relocate to another part of Nigeria to avoid persecution by non-state actors, even though they may face difficulties with regard to lack of acceptance and accommodation in their new environment; and that a number of domestic and international human rights groups generally operate without restriction and that numerous domestic and international NGOs are active in the country, including 10 to 15 dedicated exclusively to the support of women. With respect specifically to FGM, the report states that the tradition is widely practised depending on the tribe and geography; that "the incidence has declined steadily in recent years"; that there is no federal law banning the practice but that six States have already banned the practice; that women's groups and anti-FGM groups operate at the state and local levels; that there is "high support for the abandonment of the practice"; that the government has stated its intention to intensify its campaign to eradicate practices such as FGM. In a particularly relevant section, the report states:-

> "However, most women throughout Nigeria have the option to relocate to another location if they do not wish to undergo FGM. Government institutions and NGOs afford protection to these women. BAOBAB [which coordinates a number of women's NGOs] was of the opinion that FGM in itself is not a genuine reason for applying for asylum abroad."

24. The report notes that the federal police do not become involved in FGM matters as they consider it to be a family matter, but that protection may be sought from women lawyers or NGOs and a complaint may be made to the NPF or the NHRC; alternatively, traditional leaders may be able to step in. It also states that it is possible to seek protection in shelters run by NGOs, and that women can avoid FGM by taking up residence elsewhere in Nigeria, and that "the women do so".

25. It is well established, as a matter of international refugee law and as a facet of national sovereignty, that (absent a situation of complete breakdown of state apparatus) there is a general presumption that states are capable of protecting their citizens; it is therefore incumbent upon an applicant for refugee status to provide clear and convincing evidence to rebut that presumption. In the absence of evidence that protection might not reasonably have been forthcoming, there cannot be said to be a failure of state protection where a government has not been given an opportunity to respond to a form of harm (see, among others, *Canada (A.G.) v Ward* [1993] 2 RSC 689; *D.K. v The Minister for Justice, Equality and Law Reform* [2006] 3 IR 368). It is my view that it was open to the officer to draw from the COI that was before him the conclusion that state protection might reasonably have been forthcoming to the first named applicant had she sought it out and the applicants would not be exposed to a risk of being persecuted upon relocation. Thus, the conclusions drawn by the officer were, in my view, consistent with the COI that was before the analysing officer, and do not run contrary to well known facts.

26. In addition, it is noteworthy that section 24.01 of the Report, to which the Court's attention was drawn, relates to the education of children, and the enforcement of laws related to the provisions of free, compulsory and universal primary education. In my view, this underlines the fact that this is not a case in

which the analysing officer has engaged in selective use of COI; rather, it is a case in which the applicant is seeking to do so.

(b) Breach of s.3, ECHR Act 2003

27. It is noteworthy that in the representations seeking leave to remain that were submitted on behalf of the first named applicant, no mention whatsoever was made of her Article 8 rights. In the representations made on behalf of the second named applicant, the Minister's attention was drawn to the provisions of Article 8 of the Convention, but no substantive submissions were made in that regard. In that regard, the Court recalls that there is no obligation on the Minister to seek out any information further to that which was provided to him, and it is incumbent upon the applicants to put to the Minister all or any information to which they wish him to have regard.

28. In any event, the analysing officer was clearly aware of the applicants' family and domestic circumstances - express reference was made thereto when section 3(6)(c) of the Act of 1999 was considered with respect to each of the applicants – and express consideration was given to their Article 8 rights. In the context of the applicants' complaints, it is worth detailing that consideration more fully. A specific section dedicated to the *Consideration under Article 8 of the ECHR* was contained in each document. In each document, the analysing officer notes that each of the applicant's Article 8 rights would be engaged if a deportation order was signed. In each document, he accepted that the proposed deportation may constitute an interference with her "private life", relating to each of the applicant's work, educational and other social ties as well as her personal development. In each document, he found that such an interference would not have consequences of such gravity as potentially to engage the operation of Article 8. With respect to "family life", the analysing officer noted, with respect to the first named applicant, that she had no known family connections in the State apart from her daughter, who – he noted – was also the subject of a consideration under section 3(6) of the Act of 1999; with respect to the second named applicant, the officer noted that she had no known family connections in the State apart from her mother, and that she was entitled to Nigerian citizenship. In each case, the officer concluded that a decision to deport the applicant would not constitute an interference with her right to respect for her family life.

29. As this Court found in *O.S.T. v The Minister for Justice, Equality and Law Reform & Ors* (unreported, Hedigan J., High Court, 12th December, 2007), in circumstances similar to the present, it is not incumbent upon analysing officers in each and every case to assess the proportionality of a deportation, or to engage in a balancing exercise as to the competing rights involved. In the House of Lords' judgment in *R (Razgar) v The Secretary of State for the Home Department* [2004] 2 AC 368, at p.389, Lord Bingham identified the following five questions which an adjudicator would be likely to have to address where removal was being resisted in reliance on Article 8:-

(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society […]?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

30. Those questions which were cited by Feeney J. in *Agbonlahor (a minor) v The Minister for Justice, Equality and Law Reform* [2007] IEHC 166 as being of assistance when considering whether the removal of an applicant from the State would constitute a breach of their rights or any of their rights under Article 8.

31. In the present case, questions (1) and (2) were expressly addressed by the analysing officer, and question (2) was answered in the negative, that is to say the officer found that the proposed deportation would not have consequences of such gravity as to potentially engage Article 8. In *Razgar*, Lord Bingham noted that question (2) reflects the consistent case law of the Strasbourg Court, holding that conduct must attain a minimum level of severity to engage the operation of the Convention. In the present case, given that the minimum level of severity had not been attained, it was not necessary for the officer to go on to assess questions (3), (4) and (5). I am, therefore, satisfied that the Minister did not act in breach of his obligations under s. 3 of the Act of 2003.

(c) Consideration of the Best Interests of the Child

32. The Court reiterates, as it did in *F.U. & Others v The Minister for Justice, Equality and Law Reform* (unreported, Hedigan J., High Court, 11th December, 2008) that it doubts that the requirement to expressly take into account the best interests of a child when assessing the proportionality of a proposed deportation under Article 8(2), set out by the European Court of Human Rights in *Üner v The Netherlands* (App no. 46410/99, judgment of 18th October, 2006 [GC]), applies at all times in all circumstances. The Strasbourg Court was referring, in *Üner*, to the proposed expulsion of the parent of a citizen child who would be deprived of his company and care in circumstances where the parent was a settled migrant who was well established in the Netherlands but had committed criminal offences. The mother and daughter in the present case, as in *F.U*., have entered the State as asylum seekers and have an entitlement to remain here only until their status is determined. The facts of the two cases are not comparable.

33. That notwithstanding, as this Court noted at paragraph 18 in *F.U*., even if it is accepted that the Strasbourg Court was aiming to set out a guideline to be followed by national authorities in all cases when assessing the proportionality of an expulsion under Article 8 where there is the potential that a child (citizen or foreign national) will be affected, I am of the view that it is not incumbent upon the analysing officer to expressly state "I will now turn to the consideration of the best interests of the minor applicants" or a similar phrase in order to comply with the purported obligation to consider the best interests of the child. I am guided in this regard by *Sanni v The Minister for Justice, Equality and Law Reform* [2007] IEHC 398, wherein Dunne J. held as follows:-

> "The [Minister] 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."

34. In *F.U.* the Court found it sufficient for the analysing officer to have acknowledged that the proposed deportation might engage the applicants' Article

8 rights and constitute an interference therewith. The same applies in the present case.

35. Finally, the Court notes, in the context of the applicants' submissions in relation to that case, that the judgment of the Strasbourg Court in *Keegan v Ireland* (1994) 18 EHRR 342 relates to the separation of a biological father from his daughter through the adoption of the latter without the consent of the former. Those circumstances are markedly removed from the circumstances of the present case, in which it was never suggested that mother and daughter would be separated from one another or that the continuing development of their family ties would be ruptured. The Minister was entitled to presume, in the absence of any indication to the contrary, that the first named applicant would fulfil what this Court has previously termed her parental duties and take her daughter with her if deported. In the circumstances, the consideration given to the interests of the second named applicant was wholly sufficient. I, therefore, find no merit in the argument that the Minister failed to comply with any principle that may have been outlined in *Üner* or with the State's obligations under the UN Convention on the Rights of the Child.

Conclusion

36. In light of the foregoing, I am not satisfied that a *prima facie* case has been established with respect to the subsidiary protection decisions, nor am I satisfied that substantial grounds have been established with respect to the deportation order and accordingly, I will refuse leave.