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CO/9342/2008

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**THE ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 9th February 2009

**B e f o r e:**

**MR JUSTICE PLENDER**

**Between:**
**THE QUEEN ON THE APPLICATION OF I**
**Claimant**

v

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**
**Defendant**

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(Official Shorthand Writers to the Court)

**Mr G Denholm** (instructed by Wilson & Co) appeared on behalf of the **Claimant**
**Mr S Kovats** (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T
(As Approved by the Court)

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1. MR JUSTICE PLENDER: In this case I am required to determine an application for judicial review of a number of decisions made by the Secretary of State in connection with his proposal to deport from the United Kingdom "Mr I", a national of Nigeria, and certain of his children. The complicating feature of the case, which will be recognised by those who follow Nigerian legal affairs is that Mr I is the husband of an advocate at the Court of Lagos who has an enviable and substantial reputation in the field of human rights.

2. Mr I arrived in the United Kingdom with his wife and the children of the marriage on 17th April 2002 with a visa valid until 6th September 2004. I need not deal in detail with the family's immigration history beyond then, save observing that while Mr I himself left the United Kingdom and returned, Mrs I and the children remained beyond the expiration of their leave. Two of the children were born before their parents arrived in the United Kingdom and the other three were born in the United Kingdom.

3. The time came when the family applied for asylum. Mr I's ground for making that application, I was told, was that he had a well-founded fear of persecution in Nigeria by reason of his wife's conduct of her human rights practice and her advocacy. Alternatively, or additionally, the deteriorating state of the matrimonial relations, and the loyalty of Mrs I's family presented him with difficulties in Nigeria such as to found a claim based on Article 3 of the European Convention on Human Rights. That application was refused and in due course was certified by the Secretary of State under section 96 of the Nationality, Immigration and Asylum Act 2002.

4. It was nevertheless advanced as one of the grounds for application for judicial review. Mr Mott QC granted permission to apply for judicial review, except in the case of the Article 3 claim, by which I understand him to make an exception for that part of the claim which related to the allegation that Mr I would face persecution or treatment contrary to Article 3 in the event of his return to Nigeria.

5. The remaining grounds of the application are, however, persevered in by Mr Denholm in this application. First, it is said that the Secretary of State acted unlawfully in denying the claim under Article 8 of the European Convention on Human Rights for the family to remain. Second, it is said that the Secretary of State acted unlawfully in detaining the family, if indeed they were detained, on 2nd October 2008. Next, it is said that the failure of the Secretary of State to secure the welfare of the children amounted to illegality, this illegality constituting either breach of Article 8 of the European Convention on Human Rights or breach of the Secretary of State's own Code of Practice which states that the interests of the child are a primary consideration.

6. I now address those three issues in turn. In the case of the application under Article 8, it is relevant for me to record that I was, at the outset of today's proceedings, presented with an application to adjourn pending determination by the High Court Family Division of a difference between Mr and Mrs I in respect of parental responsibility for the children. It is evident that two divisions of this court are currently seised of the difficulties in the relationship between Mr and Mrs I which have arisen and which appear to be as acute as such differences have a tendency to become.

7. The background, according to Mrs I (whom I heard as intervenor in this case) is that Mr I has formed a relationship with a Jamaican lady which Mrs I, not surprisingly, finds intolerable. At the same time, Mrs I has maintained strong maternal affection towards the children and a desire which she expresses to remain with them and to remain in contact with them.

8. Against that, I have read a substantial number of documents indicating that Mr I is a good and satisfactory father of the children and putting doubt on the suitability of Mrs I to act as their mother. While the family court is seised of these issues, I have been clear that it is not for me to seek to determine them at all. There is, however, this problem of sequence. It is submitted that the Family Court could not determine the issue of parental responsibility presented to it until it knew what was the outcome of the application for judicial review on the part of Mr I. Conversely, it was contended that the application for judicial review should await the decision of the Family Court, since the argument advanced on Article 8 of the European Convention on Human Rights would then be easier to determine. I reached the conclusion that it was right for me to proceed, since one court or the other must cut the Gordian knot and the outcome of these proceedings may simplify or even avoid the necessity for proceedings in the Family Court.

9. Turning, therefore, to the question of Article 8 in the present case, I have the uncomplicated situation as follows. None of the five children of this marriage has independently of Article 8 a claim to remain. Three, it is true, were born in the United Kingdom but not born at a time when either parent was either a British citizen or a person having an unqualified right to remain. The other two were born in Nigeria. Since they do not have a right to remain independently, their claim based on Article 8 must depend on the relationship with one parent or the other. But no parent has the right to remain in the United Kingdom. Indeed, the very question is whether the order for removal made in respect of Mr I should be maintained.

10. I was referred by Mr Denholm for the claimant to the case of **MS (Ivory Coast) v Secretary of State for the Home Department** [2007] EWCA 133. I derive, however, little assistance from that case in the circumstances of the present one, since in **MS (Ivory Coast)** the position was the very converse of the present. There, the Court of Appeal had to deal with the case where one parent had the right to remain and the other did not. In the present case, however, no parent independently has a right to remain. I cannot find a basis in Article 8 of the European Convention on Human Rights for Mr I to remain. It is possible that if the children had a right to remain, he might derive a right from them. But in the absence of an independent right on the part of the children, he cannot do so.

11. I was fortified in my conclusion on this point when, as I have indicated, I heard from Mrs I, who indicated that she was very keen indeed to remain with her children. She said with some force that nothing would separate her from them and if they were returned to Nigeria, there she would return. There, she said, she had a substantial family and she would not encounter difficulties. I am therefore confronted with two parents, both of whom are keen to have parental responsibility for their children, both of whom are free to return to Nigeria, one of whom seems rather keen to return to

Nigeria. There is no prospect of the separation of the children from their parents and the question of determining competing claims for parental responsibility is perhaps better addressed by the Nigerian than by the English Family Court.

12. The next claim made on behalf of the claimant was that the detention of Mr and Mrs I beyond 2nd October 2008 was unlawful. On 1st October 2008 the Secretary of State certified the claim of Mr I as ill-founded under section 69 of the Nationality, Immigration and Asylum Act. It was on the following day, and with a view to his removal, that Mr I and his children were detained. Mrs I was also detained. On the following day the removal directions were cancelled in anticipation of a judicial review application, but on 3rd October 2008 Mrs I signed the form of consent to which I have referred, stating that she agreed to return to Nigeria with the children. It is to be inferred -- and has been confirmed by Mr Kovats for the Secretary of State -- that in the light of Mrs I's signature of form of consent, the Secretary of State took the view that both parents and children might be removed to Nigeria within a short space of time.

13. Mr Denholm observes -- correctly so far as I can make out -- that nowhere is there a written statement to the effect that the signature of the notice of consent from Mrs I led the Secretary of State to believe that she could remove Mr I within a short space of time. I accept that as so, but do not assert that the Secretary of State had the obligation to commit in writing that which is obvious and may reasonably be inferred in the circumstances of the case.

14. The final complaint made by Mr Denholm on behalf of Mr I is that the Secretary of State failed to secure the welfare of the children on the removal to Nigeria. Here also he referred me to the Code of Practice, stating that the best interests of the child are the primary consideration. This is a point to which I paid close interest in view of the tender age of the children concerned. For the Secretary of State, however, Mr Kovats has drawn to my attention a letter from one Alina Timoianu of the Greenwich Children Services stating, in part:

> "If the family was to be returned to Nigeria, Greenwich Children Services will write a transfer summary to the Nigerian Social Services."

15. Here again the question of sequence has given rise to difficulty. There has been, Mr Denholm says, no communication between the British authorities and the Nigerian authorities about the welfare of the children on their return. It is the question of the lawfulness of the return which has been awaiting my decision today. I am reassured to see that the Greenwich Social Services will write to the Nigerian Social Services, and particularly request and ask the Secretary of State to request that I should be supplied with a copy of the communication from the Greenwich Children Services to the Nigerian ones before the removal. I cannot find, however, any fault in the failure of the Greenwich Children Services to communicate in advance of my decision. For this reason I am not satisfied that there is on this ground, or any of the other grounds, an appropriate case for the grant of judicial review. Accordingly this application has failed.

16. MR KOVATS: My Lord, those behind me will take note of your Lordship's request. Would you like it to be sent in hard copy or electronically?

17. MR JUSTICE PLENDER: Either will do. I am perfectly content to receive it in electronic form and it can be sent to my clerk in the normal way. There is no further application?

18. MR KOVATS: No, my Lord. As I understand it, they are publicly funded.

19. MR DENHOLM: My Lord, we seek a detailed assessment for public funding purposes.

20. MR JUSTICE PLENDER: Yes.

21. MR DENHOLM: If I can raise a couple of other matters. I respectfully seek your Lordship's permission to appeal. In relation to the Article 8 point, I respectfully suggest it would have a realistic prospect of a different outcome in relation to our argument that the welfare of the children was left out of the decision. I seek leave to appeal in relation to the fresh claim argument.

22. In relation to contention, I seek leave to appeal on the basis that the Secretary of State's assertions are wholly unevidenced before the court today and, bearing in mind where the burden lies, I respectfully suggest that there is a realistic prospect of a different outcome on that.

23. MR JUSTICE PLENDER: I am afraid, Mr Denholm, I do not grant your application. As you know, you can renew it to the Court of Appeal.

24. MR DENHOLM: In the circumstances, given the circumstances may move quickly, can I request an expedited transcript of your Lordship's judgment?

25. MR JUSTICE PLENDER: Yes. Thank you.