

## THE HIGH COURT

## JUDICIAL REVIEW

2009 200 JR

## BETWEEN

**OMO EDNA ASIBOR (A MINOR, SUING BY HER MOTHER AND NEXT FRIEND TINA ASIBOR), LILIAN ASIBOR (A MINOR SUING BY HER MOTHER AND NEXT FRIEND TINA ASIBOR), TINA ASIBOR AND LOVIS ASIBOR**

APPLICANTS

AND

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM**

RESPONDENT

AND

**ATTORNEY GENERAL AND HUMAN RIGHTS COMMISSION**

NOTICE PARTIES

**JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 2nd day of December, 2009.**

1. By order of Feeney J. on the 11th June, 2009 the applicants were granted leave to apply for an order of certiorari to quash the decision of the Minister for Justice, Equality and Law Reform ("the Minister"), dated the 27th January, 2009, to make a deportation order against Mr Lovis Asibor, the fourth named applicant.

2. A similar leave order was previously made by McMahon J. on the 22nd May, 2009 in the case of *Mr Kabir Ali* [2009 No. 193 J.R.]. Mr Ali and Mr Asibor are not related but as the two cases raised similar issues the judicial review hearings were heard together at the King's Inns, Court No. 1, over four days in July, 2009. Mr John Finlay S.C. with Mr Michael McNamara B.L. appeared for the Asibor family. Ms Sara Moorhead S.C. with Ms Cindy Carroll B.L. and Mr David Conlan Smyth B.L. appeared for the respondent in both cases.

3. Feeney J. granted leave to the applicants in this case to challenge the deportation order on the following grounds:-

1) The Respondent failed to apply the correct test in respect of the constitutional and convention rights of the Applicants in applying a test of insurmountable obstacles in the context of considering whether the First, Second and Third Named Applicants could accompany the Fourth Named Applicant to his country of origin.

2) The analysis contained in the record of the Respondent's decision did not reflect the principles laid down by the Supreme Court in the cases of *Ogwekwe v. The Minister* [2008] I.E.S.C. 25 and *Dimbo v. The Minister* [2008] I.E.S.C. 26 and in particular did not identify a substantial reason which required the deportation of the Fourth Named Applicant with sufficient clarity but rather used a formula of words and did not sufficiently weigh and consider facts relevant to the citizen children and the family unit; and

3) The decision to deport the Fourth Named Applicant was neither proportionate nor reasonable.

4. Leave was granted on similar grounds in the case of Mr Ali and there were few differences between the arguments advanced on behalf of Mr Ali and Mr Asibor at the judicial review hearings. Those arguments are analysed at length in the judgment of this Court in the case of Mr Ali which was also delivered today, and the conclusions reached in that case on the applicable principles apply equally to this case. The Court is delivering judgment in the two cases separately in order to avoid confusion between the facts and circumstances of the two families.

**Background**

5. The applicants in this case are a family in which the third applicant Mrs Tina Asibor is the wife and the fourth named applicant Mr Lovis Asibor is the husband. They are the parents of two daughters, the first and second named applicants, who are minors. Mr and Mrs Asibor were born in Nigeria in 1969 and 1975 respectively and were married in May, 2000 in Nigeria. Their older daughter, Omo Edna, was born on the 16th December, 2003 in Ireland and is a citizen of Ireland. Her sister Lilian was born on the 28th February, 2007 in Ireland but because of a change in citizenship law she is not an Irish citizen.

6. Mrs Asibor arrived in the State on the 24th October, 2003 and made an application for asylum based on a fear of persecution at the hands of the Ijaw tribe in the Delta region of Nigeria. However after she gave birth to Omo Edna, an Irish citizen, two months after arriving in the State she abandoned her asylum claim and instead applied for residency on the basis of that daughter's birth. Her husband was not with her in the State at that time and when she was granted permission to reside in the State under the IBC/05 Scheme for an initial period of two years until the 1st September, 2007, her husband was not included. The initial period was subsequently renewed for a further three years until the 1st September, 2010. One of the conditions of the permission to remain in the State was:

*"- that you accept that the granting of permission to remain does not confer any entitlement or legitimate expectation on any other person, whether related to you or not, to enter the State."*

7. Mr Asibor arrived in the State on the 3rd December, 2006, that is almost three years after the birth of his older daughter. His claim for asylum was based on a fear of persecution at the hands of the Ijaw tribe in the Delta region in the context of intertribal conflict there. The Refugee Applications Commissioner compared the accounts given by Mr and Mrs Asibor and found material inconsistencies in those accounts. He recommended that Mr Asibor should not be declared a refugee. An appeal against that recommendation to the Refugee Appeals Tribunal was unsuccessful as was a subsequent application for subsidiary protection. On the 31st August, 2007 the Minister issued a proposal to deport Mr Asibor who then applied for leave to remain in the State on humanitarian grounds.

8. Of some relevance is the fact that when on the 3rd December, 2006 Mr Asibor arrived at Dublin Airport and claimed asylum, he said that he had not seen his wife for more than three years and had only recently discovered that she was in Ireland. When, earlier this year, an injunction was sought preventing the deportation of her husband, Mrs Asibor claimed that she had been continuously residing in the State since the 24th October, 2003. However it became apparent that if Mrs Asibor had never left the State and Mr Asibor had not seen her for three years before coming to Ireland, he could not be the father of Lilian, who was born in February, 2007. It was then admitted in an affidavit that Mrs Asibor had been in England in January, 2006 and that she had been in Nigeria with her daughter Omo between May and June, 2006 during which period her second child Lilian was conceived. Mr Asibor admitted that he had *"made various claims which were not true."* This applied to all the processes of his application for refugee status. He then, in a supplemental affidavit, extended this admission to making untrue statements to his application for subsidiary protection. He admitted that he was in the State to reunite with his family and stated that he had no money, no education and no prospects for work in Nigeria and was financially dependent on his wife. These matters were not before the Minister when his application for leave to remain was being considered.

9. The Refugee Legal Service (RLS) made representations to the Minister on behalf of Mr Asibor, seeking leave to him to remain in the State. Those representations were made over a period of almost a year and were furnished by letters dated the 20th September, 2007, the 23rd October, 2007 and the 7th August, 2008. Those representations are summarised below.

**The RLS Representations**

10. The Court notes that the representations made by the RLS in the Asibor case follow in format and general content those which were furnished in the Ali case. Each of the relevant matters set out in s. 3(6) of the Immigration Act 1999 was addressed. The particular family circumstances were that Mr Asibor was then 37 years of age and was in the State for a period of 9 months. He married in 2000 and had two daughters born in Ireland in 2003 and 2007. His wife had leave to remain based on her parenthood of Omo from September, 2005. She had been living in the State since then and the family lived in Limerick between then and 2008. Mr Asibor and his family attend the Pentecostal Church of the Redeem Church of God Mission in Limerick. It was submitted that Mrs Asibor and her daughters (then aged almost four and seven months) had integrated well into Irish society. In 2007, the Minister was informed that Omo was attending playschool in Limerick and was progressing well. Lilian was looked after by Mr Asibor and he collected Omo from playschool while his wife attended classes in "Care for the Elderly" in Limerick. It was stated that Mr Asibor would not have the means to care for his daughters if he were returned to Nigeria.

11. It was stated that Mr Asibor had not attended school at all but worked for several years as a trader of CDs and DVDs in Nigeria. He would be willing to accept any form of employment offered to him should he be allowed to remain in Ireland, and he would be able to contribute to society as a whole. He was eager to attend adult education classes to enable him to compete for job opportunities, and he spoke English and Oroub fluently. He was of good character and had never come to the adverse attention of the Gardaí.

12. The following submission was made as to Mr Asibor's ties to Ireland :-

*"Our client instructs that since arriving here he has been warmly received by those with whom he has come into contact. He has integrated extremely well into*

*the community and is held in the highest regard."*

13. An identical submission was made in the case of Mr Kabir Alli. Also as in that case, the RLS outlined Ireland's obligations under Article 8 of the European Convention on Human Rights (ECHR) and under Articles 3.1 and 3.2 of the UN Convention on the Rights of the Child and made submissions as to risk of treatment contrary to Article 3 ECHR and refoulement in Nigeria. It was submitted that:-

*"Our client believes that his presence in the state is absolutely necessary to ensure his wife can continue her course and that he can continue to help her in raising their two young daughters."*

14. It was further submitted that:-

*"Our client instructs that his wife has indicated that she is not prepared to return to Nigeria with her children in the event that our client is subject to a deportation order. Our client instructs that his wife's primary consideration is to the well-being of her children who are settled with their local community in Limerick. The children have no connection with Nigeria and Omo is an Irish citizen."*

15. In addition the following submission was made:-

*"It is respectfully submitted that the necessary protection and care for the well-being of our client, and his family life with his wife and daughters can be guaranteed only by the Minister taking the administrative measure of granting him humanitarian leave to remain in the State. Should our client be refused such leave to remain, it would be breach of Ireland's international obligations, as well as contrary to natural justice, as there would exist a serious risk that our client would be subjected to harm, ill-treatment and neglect. Should our client be returned to Nigeria, the family would be separated and Mr Asibor has instructed that he fears for the well-being of his wife and children."*

16. The RLS referred to the following COI reports:

- ? U.S. Department of State report on Nigeria (2005);
- ? Human Rights Watch report on Nigeria (2007)
- ? BBC Online article *EU Monitors to avoid Niger Delta* (22nd March 2007)
- ? IRIN News article *Nigeria: Militants free foreign oil workers but vow more attacks* (30th January, 2006)
- ? Amnesty International Human Rights Report (2007); and
- ? UK Home Office COI report for Nigeria (2006)

17. Many documents were appended to the submissions, including a marriage "announcement" from Warri, Delta State; letters from the family's current and former landlady in Limerick; a letter from the rector of the Augustinian Church in Limerick, stating that Omo was christened there; a further letter from the pastor in charge of the Redeemed Christian Church of God of his Glory parish in Limerick confirming that one of the Asibor children was baptised there; letters from their GP and a family friend and a letter confirming that Mr Asibor had attended basic computer classes.

18. Mrs Asibor furnished two written statements outlining her need for Mr Asibor in the proper upbringing of the children. She said:-

*"I think it is very important to have a father figure in the children's lives. At present he takes our daughter to school every day and picks her up in the afternoon. He supports me in every way in the running of the house and in the care of the children. Our children love their dad and it would be devastating if he could not stay in Ireland and be a part of their lives. I hope you will consider my request and allow him to stay in Ireland on humanitarian grounds. If he returns to Nigeria his life will be in danger and my children and I can not see a future without him."*

19. On the 7th August, 2008 the RLS forwarded further documents to the Minister including a further written statement by Mrs Asibor, stating that she needed Mr Asibor for the proper upbringing of the children. If her husband was returned to Nigeria she and the children would miss his invaluable role in the family and his contribution to domestic chores and childcare. His life would be in danger in Nigeria and she and the kids would not be able to live without him. His removal from the State would have a negative impact on the children because they would be deprived of a gratuitous education and good life. She furnished a letter from her employer, Sodexo Ireland in Cork stating that she had been with them for three months and they hoped she would stay with them for the long term future. The terms and conditions of her employment (dated the 10th March, 2008) indicating that she worked 22.5 hours per week together with three of her payslips were enclosed.<sup>1</sup>

#### **THE EXAMINATION OF FILE**

20. An officer of the Repatriation Unit examined Mr Asibor's file on the 14th January, 2009. This was not the same officer who had examined Mr Alli's file the previous day. The examination of file took the same format as in Mr Alli's case and, as in that case, the examining officer had before her Mr Asibor's asylum application file, the s. 13 report prepared by the Refugee Applications Commissioner and the decision of the Refugee Appeals Tribunal. The examination of file extended over 15 pages. The analysis was carried out using the following headings:-

- ? Section 3(6), Immigration Act 1999;
- ? Section 5, Refugee Act 1996;
- ? Section 4(2), Criminal Justice (UN Convention Against Torture) Act 2000;
- ? Article 8, European Convention on Human Rights; and
- ? Constitutional rights of the Irish born (citizen) child.

21. The examining officer recommended that the Minister make a deportation order in respect of Mr Alli. Her recommendation was affirmed by an Executive Officer, a Higher Executive Officer, the Assistant Principal of the Repatriation Unit and finally the Minister. The examination of the file pursuant to s. 5 of the Act of 1996 and s. 4(2) of the Act of 2000 is not relevant to this application, apart from an observation made that credibility issues arose in Mr Asibor's claim for asylum. What is relevant is the consideration given to s. 3(6) of the Act of 1999, Article 8 of the ECHR and the constitutional rights of the citizen child, which are summarised below.

#### **Section 3(6), Immigration Act 1999**

22. As in the case of Mr Alli, the Minister had regard to each of the factors set out at s. 3(6) of the Act of 1999 as they were on the date of the examination. Mr Asibor was 39 years of age and by January, 2009 he had been in the State for approximately two years and one month. It was noted that although he had given his date of birth as the 19th December, 1969, his passport recorded that he was born on the 16th December, 1969. No further comment was made on that discrepancy.

23. Mr Asibor's family and domestic circumstances were fully and accurately noted. It was stated that his connection with the State lay in his application for asylum and his parentage of two children born in Ireland. It was noted that there were no educational details on the file and that according to the applicant, he had been self employed in Nigeria as a trader, selling CDs and DVDs. He was not entitled to work in Ireland and "If he was permitted to work, his prospects of obtaining employment would be poor in the current economic climate." No adverse comments were made on Mr Asibor's character or conduct and it was noted that there were references on file from friends and acquaintances who attested positively to his character.

24. With respect to the "humanitarian considerations" on the file his family circumstances were again summarised and it was noted that his wife had submitted in her personal statement that he played an important role in the lives of the children. It was noted that he had submitted his passport, boarding cards and travel tickets and that his wife had submitted payslips and her contract of employment. It was concluded that there was nothing in the humanitarian considerations on the file to suggest that he should not be returned to Nigeria.

25. The examining officer summarised the submissions made by the RLS on behalf of Mr Asibor accurately and at length but without comment. Under the heading "*The Common Good*" it was stated, as in the case of Mr Alli, that "*It is in the interest of the common good to uphold the integrity of the asylum and immigration procedures of the State.*" It was also noted that considerations of national security and public policy had no bearing on the case.

#### **Article 8, ECHR**

26. The officer accepted that if the Minister made a deportation order, this would engage Mr Asibor's right to respect for his private and family life under Article 8(1) ECHR but she found that the interference with his right to respect for his private life would not have consequences of such gravity as to engage Article 8. That conclusion is not challenged. The applicants' arguments centre instead on the examination of the proportionality of the interference with his right to respect for his family life.

27. The officer noted Mr Asibor's family circumstances: his marriage, his two children, his wife's leave to remain under the IBC/05 scheme until 01/09/2010, the fact that Omo who was born in 2003 is a citizen and that Lilian who was born in 2007 is not an Irish citizen but is entitled to citizenship of Nigeria. It was accepted that the deportation of Mr Asibor would constitute an interference with his right to respect for his family life within the meaning of Article 8(1) but, as in the case of Mr Alli, it was submitted that the

deportation would:-

(1) *Be in accordance with law* (pursuant to s. 3 of the Act of 1999);

(2) *Pursue a pressing need and a legitimate aim* ("i.e. the legitimate aim of the State to maintain control of its own borders and operate a regulated system for control, processing and monitoring of non-national persons in the State. It is consistent with the Minister's obligations to impose these controls and is in conformity with all domestic and international legal obligations"); and

(3) Be necessary in a democratic society, in pursuit of a pressing social need and proportionate to the legitimate aim being pursued within the meaning of Article 8(2).

28. The officer then considered the proportionality of the deportation, commencing her analysis in the same way as the officer proceeded in the *Alli* case, with the following statement:-

"In *R (Mahmood) v. Home Secretary* [2001] 1 W.L.R. 840, the U.K. Court of Appeal found, inter alia, that the 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."

29. The officer then noted that the citizen child, Omo, was born in the State in 2003 and was now five years old and attending play-school in Limerick. It was not known if she had commenced primary school. Being 5 years of age she was "of an adaptable age" and it could reasonably be expected that she could reside in Nigeria with her parents and sibling and could integrate into society there. She was entitled to Nigerian citizenship. As in the *Alli* case, it was concluded that:-

"having taken into consideration the personal circumstances of the Irish citizen child and her father, in particular the young age of Omo Edna Asibor, there is nothing to suggest that there are any insurmountable obstacles to the family being able to establish family life in Nigeria."

30. Still under the heading "proportionality" the officer went on to note Mr Asibor's submission that he has parental responsibilities to his children which he wishes to perform to the best of his abilities, and that those obligations necessitate his presence in the State in order to be fully discharged. It was noted, however, that the Minister is not obliged to respect Mr Asibor's choice of residence.

31. The examining officer next noted that Mr Asibor's child has a constitutional right to the society of her father but that the jurisprudence of the European Court of Human Rights (ECtHR) has established that a State has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations. In addition, the officer noted the following matters (which were also noted in the *Alli* case):-

? Although Mr Asibor stated that he was anxious to undertake full time employment in Ireland, his prospects of obtaining employment would be poor in the current economic climate;

? The grant of permission to remain to Mr Asibor would have an impact on the health and welfare systems of the State, and may lead to similar decisions in other cases;

? Mr Asibor did not take up his parental responsibilities in the State until December, 2006 at which time his daughter was almost three years old. His family existed without his presence in the State during this time; therefore if Mrs Asibor was to decide to stay in Ireland with her children, "the disruption to their family life would not have the same impact as it would have had they been living as a family unit for a much longer period."

32. Having noted each of those matters she reached the following conclusion:-

"Lovis Asibor has been given an individual assessment and due process in all respects. Having weighed and considered all of the above factors outlined above relating to the position of the family, and in particular Omo Edna Asibor who is an Irish citizen child, as well as the factors relating to the rights of the State, it is submitted that if the Minister makes a deportation order in respect of Lovis Asibor, there is no less restrictive process available which would achieve the legitimate aim of the State to maintain control of its own borders and operate a regulated system for control, processing and monitoring of non-national persons in the State. This therefore exists as a substantial reason associated with the common good which requires the deportation of Lovis Asibor."

#### **Constitutional Rights of the Irish Born Children**

33. The officer noted the following matters:

? Omo Edna is a citizen and has personal rights under Article 40 of the Constitution and further rights under Articles 41 and 42, including the right to reside in the State, to be reared and educated with due regard to her welfare, to the society, care and company of her parents, as well as protect of the family pursuant to Article 41;

? She is attending play-school;

? The constitutional rights of the citizen child are not absolute and must be weighed against the rights of the State;

? The rights of the State include the right to control the entry, presence and exit of foreign nationals subject to the Constitution and international agreements. To be considered as issues of national security, public policy, the integrity of the Immigration Scheme, its consistency and fairness to persons and to the State, as well as issues relating to the common good.

34. The officer then set about balancing the competing interests she had identified against one another. She once again acknowledged that Omo Edna has constitutional rights but noted that according to the Supreme Court in *Lobe and Osayunde* [2003] IESC 3 (also known as *A.O. and D.L.* [2003] 1 I.R. 1), it does not flow from those rights that the family or parents and siblings of the children have the right to reside in the State. As was done in the *Alli* case, she set out the position as follows:-

"The Minister may determine to deport the immigrant family, notwithstanding the effective removal of the Irish citizen child, without violating that child's rights. While there is an obligation on the Minister to consider each case on its individual merits, he is entitled to take into account the consequences of allowing a particular applicant to reside in the State where that would inevitably lead to similar decisions on other cases. If the Minister is satisfied for good and sufficient reason that the common good requires that the non-national parent should be removed from the State, even if that means that in order to preserve the family unit the Irish citizen child must also leave the State, then that is an order he is entitled to make."

35. The officer reiterated her previous conclusion, as follows:-

"All factors relating to the position and rights of Omo Edna who is an Irish citizen, have been considered above and these have been considered against the rights of the State. In weighing these rights, it is submitted that if the Minister makes a deportation order in respect of Lovis Asibor, there is no less restrictive process available which would achieve the legitimate aim of the State to maintain control of its own borders and operate a regulated system for control, processing and monitoring of non-national persons in the State. This therefore exists as a substantial reason associated with the common good which requires the deportation of Lovis Asibor."

36. The officer concluded that having considered all of the facts relating to the position of the family and the citizen child, "there is nothing to suggest that there are any insurmountable obstacles to the family being able to establish a family life in Nigeria". As was the case in *Alli* she repeated the conclusions set out above verbatim and she recommended that the Minister make a deportation order against Mr Asibor.

#### **THE ISSUES IN THE CASE**

37. Mr Finlay S.C., counsel for the applicants, formulated the grounds on which the applicants seek relief in a manner which differed slightly from those argued in *Alli* although the difference was more in emphasis rather than substance. As in *Alli*, the first ground related to the use of the "insurmountable obstacles" test. While the evolution in the approach of the U.K. courts to the principles set out in *R (Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840 was examined Mr Finlay's primary focus was on the Supreme Court judgment in *Oguekwe v. The Minister for Justice, Equality and Law Reform* [2008] 2 I.L.R.M. 481 which, he argued, clearly stated that the question for the Minister when considering the deportation of the foreign national father of a citizen child is whether it would be reasonable to expect the family members to accompany him to the country of origin and not whether insurmountable obstacles prevent their joining him. He argued that there is a clear and significant distinction between the "reasonableness" and "insurmountable obstacles" tests as the latter sets a much higher hurdle or threshold for the family than the former.

38. The second ground was that the Minister failed to comply with the directions given by the Supreme Court in *Oguekwe* insofar he omitted to give any real consideration to the consequences of the deportation for the citizen child and the other members of the family. The Minister should have engaged in a serious way with those consequences by considering both the impact for the mother and children if they were to move to Nigeria with Mr Asibor and if they remained in Ireland without him. A feature of this case that distinguishes it from the *Alli* case is that in this case, the Minister neglected to note the mother's intention to remain in Ireland with the children whereas that was a matter that was expressly noted in the *Alli* case. He should have expressly considered whether she would be able to continue working without her husband's support and the impact that would have for the citizen child who has established very clear roots in the community.

39. The third ground was that the Minister failed to identify a significantly strong or weighty "substantial reason" which counterbalanced the constitutional and Convention rights of the family and thereby required the deportation of Mr Asibor. Immigration control was too general to be a "substantial reason" in the particular circumstances of the case.

While the “substantial reason” does not have to be applicant-specific and general policy considerations may suffice, Mr Finlay argued that the mere recital of the “mantra” that the State has an interest in immigration control is not sufficient unless the Minister properly weighs that interest against the interests of the children and the family.

40. The final ground, which is very much linked to the second and third grounds, was that the Minister failed to reach a reasonable and proportionate decision. He failed to weigh the competing rights and interests of the child, the family and the State. The Minister’s recitation of those rights was in standard form which disclosed no serious consideration or engagement. A more sophisticated analysis was required.

41. Ms Moorhead S.C. on behalf of the Minister addressed the arguments of the *Alli* and *Asibor* arguments in a joint submission. Her submissions are summarised in the *Alli* judgment.

#### THE COURT’S ASSESSMENT

42. The applicants’ legal arguments in the *Alli* case on the subject of “insurmountable obstacles” did not differ in any substantial way from the arguments advanced on that issue in the *Asibor* case. There is therefore little benefit in repeating the analysis carried out in the *Alli* case on that argument in circumstances where the applicants’ arguments on that ground failed. The same applies to the applicants’ arguments as to the requirement to identify a “substantial reason associated with the common good” which requires the deportation of the father. The Court found in the *Alli* case that it was firmly decided by the Supreme Court in *A.O. and D.L.* that it is not the case that a reason specific to the applicant’s circumstances must be identified, and that general policy considerations will suffice as a “substantial reason” provided that the Minister has carried out a fact-specific analysis in the applicants’ case and has engaged in a proper balancing exercise.

43. As is clear from the above synopsis, the same “substantial” reason was identified in this case as in the *Alli* case i.e. that there is no less restrictive process than deportation which would achieve the legitimate aim of the State to maintain control of its own borders and operate a regulated system for control, processing and monitoring of non-national persons in the State. In the *Alli* case this Court rejected the applicants’ arguments in relation to the sufficiency of this reason and it follows that the applicants’ arguments in this case must also fail.

44. The only remaining argument that requires consideration in the light of the facts and circumstances of the *Asibor* case is that the Minister failed to comply with the judgment of the Supreme Court in *Oguekwe*. The applicants’ arguments on this issue in this case differed in emphasis but not in substance from the arguments advanced on behalf of Mr *Alli* which were analysed at length in the judgment of this Court in that case. A comparison of the RLS submissions and the examination of file in the two cases disclose only insignificant differences. The Court has addressed the Minister’s decision in the case of the *Asibor* family separately to the decision in the case of the *Alli* family in order to avoid confusion between the circumstances of the two families which overlap to a great extent. In each case the Minister declined to accede to the application for leave to remain, and made a deportation order against the father of citizen children. Although the legal principles remain the same in both cases, the proportionality and reasonableness of a decision will of necessity depend on the particular facts and circumstances of the case. The proportionality of the Minister’s decision to make a deportation order against Mr *Asibor* therefore requires separate consideration to the Minister’s decision in the *Alli* case.

45. The information before the Minister in this case was that the citizen child, Omo Edna *Asibor*, lives with her mother and younger sister who are foreign nationals and are lawfully resident in the State. The Minister was aware that the consequence of the deportation of her father, Mr *Asibor*, would be that the family would be ruptured because Mrs *Asibor*, in common with Mrs *Alli*, stated that it was her intention to remain in the State with her children until at least 2010. The Court does not accept that it follows that because that intention was not recited expressly during the examination of Mr *Asibor*’s file pursuant to s. 3(6) of the Act of 1999 that the Minister was unaware of that intention. In the second paragraph of page 12 of the examination of file, the examining officer noted that “if *Lovis Asibor*’s spouse were to decide to stay in Ireland with the children, the disruption to their family life would not have the same impact as it would if they had been living together as a family unit for a much longer time.” The inference must be that the mother’s stated intention to remain in Ireland with the children was considered as part of the analysis and that the Minister was aware of that intention and, therefore, of the consequences of his decision to deport Mr *Asibor*.

46. As with the *Alli* family, serious consideration must be given to the fact that a mother such as Tina *Asibor* had the emotional and physical resources to travel alone to Ireland from Nigeria while pregnant and then to give birth without the assistance and presence of her husband not once but twice and then to raise them in an alien country for three years without that husband. When such a woman who is finally joined by her husband, who undoubtedly provides assistance in the care, nurture and upbringing of those children, states that she intends to remain in the State without her husband if he is deported, it must be assumed that she has considered her options and concluded that it is in the children’s best interests not to follow him. That is, of course, a decision that she is entitled to make. However it is she who has chosen to follow that path, not the Minister who has to consider whether to deport such a father is, in all the circumstances, both reasonable and proportionate.

47. While the Minister has to carry out an assessment of the individual merits of each case that comes before him, the Court has had the opportunity to see and review both the representations made under s. 3(6) for leave to remain and the examination of the file carried out by and on behalf of the Minister in the *Alli* case and in this case. The Court is therefore well placed to comment that the circumstances and facts made known to the Minister in relation to the *Asibor* family, where all members of the family are Nigerian save the citizen child who has of course been raised as part of a Nigerian family. The Court finds that those facts and circumstances disclose somewhat weaker grounds for resisting the deportation of the father than in the *Alli* case in that there are even fewer obstacles to the family returning to Nigeria and continuing family life there than there were in the *Alli* case where the mother and stepchildren claimed to be from a different country to the father who was from Nigeria, and they claimed that they had never been to Nigeria.

48. As the Minister is not obliged to respect the choice of residence of a foreign national couple who come to this country without complying with Irish visa requirements, even if that family includes a citizen child, it is open to him to approach the question of the deportation of the parent who has unlawfully present in the State by asking whether in this family’s particular circumstances, it would be reasonable to expect those family members living in the State to return with the father to his country of origin, in this case Nigeria. As the Court noted in the *Alli* case, it is clear from the jurisprudence of the European Court of Human Rights that among the primary matters for consideration when examining that question are the ages and adaptability of the children, the length of time spent in the Contracting State, the extent to which the family has integrated into society in the Contracting State, the duration and strength of the family bonds, and the extent to which the family has connections with the country to which the deportee is being returned.

49. The *Asibor* family unit cannot be said to have established firm roots in the Irish community such that it would be unreasonable to expect them to return to Nigeria if they wish to remain together as a family unit. They lived for a time in Limerick and then moved to Cork. The citizen child attended playschool in Limerick before moving to Cork and the Minister assumed (although he was not informed) that she then commenced school in Cork. The younger child *Lilian*, who was born in February, 2007 is even now still too young to attend school. In the 2007 representations, the Minister was informed that Mrs *Asibor* attended night classes in Limerick but in the 2008 submissions he was notified that she had taken up employment in a factory in County Cork. Thus they have not been present in Ireland for very long much less have they been resident in any one community for an appreciable length of time.

50. Both Mr and Mrs *Asibor* and *Lilian* are nationals of Nigeria. Omo Edna, the Irish citizen child, is also entitled to Nigerian citizenship. The applicants did not put any material before the Minister suggesting that they would not be able to move to Nigeria and establish family life there. For example no information was submitted about the language(s) spoken by the children. Thus it was reasonable for the Minister to conclude that there were no insurmountable obstacles to their returning together to continue family life in Nigeria and that it was not unreasonable to expect them to return to Nigeria to enjoy family life there. As is clear from the analysis in the *Alli* case, the judgment in *Oguekwe* and the jurisprudence of the European Court of Human Rights on the Article 8 rights of persons who seek to resist deportation or expulsion demonstrate that the Minister acted in accordance with law when he assessed the proportionality of the decision to deport Mr *Asibor* by reference to those questions.

51. Although this was not a matter that was before the Minister when he was examining Mr *Asibor*’s file, the Court cannot close its eyes to the fact that it has been revealed in the course of the proceedings that Mrs *Asibor* and the citizen child, Omo, returned to Nigeria on at least one occasion since 2003 on a holiday that was paid for by Mrs *Asibor*’s mother. It must be assumed that Omo met her grandmother and probably other relatives on that visit. Thus it is simply not the case that the citizen child has no links to Nigeria, as was submitted on behalf of the applicants in the course of the s. 3 representations. Although this was not before the Minister, it reinforces the Court’s view as to the reasonableness and rationality of his decision that there is nothing to prevent the family from returning to Nigeria if they wish to maintain family life with Mr *Asibor*.

52. In circumstances where the Court has found that the applicants in the *Asibor* case would encounter fewer difficulties in moving to Nigeria with Mr *Asibor* if he were deported than the applicants in the *Alli* case, little would be gained from reiterating the analysis in the *Alli* case. The Court has found that the Minister carried out a sufficiently fact-specific analysis, weighed each of the relevant considerations appropriately and balanced them against each other in accordance with the requirements of *Oguekwe*. It cannot be said that his decision in either case was unreasonable or disproportionate.

53. In the light of the foregoing and on the basis of the analysis carried out in the *Alli* case, the Court is satisfied that the applicants are **not** entitled to the reliefs sought. The application fails.

---

<sup>1</sup> The Court was informed during the injunction proceedings that Mrs *Asibor* is now employed on a full time basis. That information was not before the Minister at the time of the impugned decision.