COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF DARREN OMOREGIE AND OTHERS v. NORWAY

(Application no. 265/07)

JUDGMENT

STRASBOURG

31 July 2008

FINAL

31/10/2008

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Darren Omoregie and Others v. Norway,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Christos Rozakis, *President,*
Nina Vajić,
Anatoly Kovler,
Elisabeth Steiner,
Khanlar Hajiyev,
Sverre Erik Jebens,
Giorgio Malinverni, *judges,*
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 8 July 2008,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an applications (nos. 265/07) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by Mr Louis Osaze Darren Omoregie, a Nigerian national; Mrs Elisabeth Skundberg Darren, a Norwegian national; and their daughter Selma, a Norwegian national (“the applicants”), on 13 December 2006.

2. The applicants, who had been granted legal aid, were represented by Mr A. Humlen, a lawyer practising in Oslo. The Norwegian Government (“the Government”) were represented by their Agent, Mrs F. Platou Amble, Attorney, Attorney-General's Office (Civil Matters).

3. The applicants alleged that the decision to expel the first applicant to Nigeria with a prohibition of re-entry into Norway for a period of five years constituted a violation of Article 8 of the Convention.

4. By a decision of 22 November 2007, the Court declared the application admissible.

5. The applicants and the Government each filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The first applicant, Mr Louis Osaze Darren Omoregie, is a Nigerian national who was born in Sierra Leone in 1979. The second applicant is Mrs Elisabeth Skundberg Darren, a Norwegian national who was born in 1977. The third applicant is their daughter, Selma, who was born on 20 September 2006. The second and third applicants reside in Biri, Norway, as did the first applicant, before he was expelled to Nigeria on 7 March 2007.

7. The first applicant lived in Nigeria as from the age of 6 months until he went to Norway, where he arrived on 25 August 2001, without passport or other identity document. On the same date he applied for asylum.

8. In October 2001 he met the second applicant. The couple started cohabiting in March 2002.

A. Rejection of the first applicant's asylum application and related expulsion order and refusals

9. The first applicant's asylum application was rejected by the Directorate of Immigration on 22 May 2002. He appealed to the Immigration Appeals Board and, pending a decision of his appeal, he was granted a stay of execution of his expulsion and a temporary work permit.

10. The first and second applicants got engaged on 10 September 2002.

On 11 September 2002 the Immigration Appeals Board rejected the applicant's appeal, stating *inter alia*

> "This administrative decision means that the appellant is obliged to leave the country voluntarily. If the appellant does not leave the country voluntarily, the police shall implement the decision; see sections 40 and 41 of the Immigration Act."

11. Shortly thereafter the Implementation Group of the Oslo Police District sent a notification of the decision to the first applicant's lawyer, giving the first applicant until 30 September 2002 to leave Norway. The notification further stated:

> "Your client must contact the Implementation Group for Administrative Decisions as soon as possible to make arrangements for his departure from Norway. If we have not been contacted by the time the deadline expires, the decision will be implemented in accordance with section 41 of the Immigration Act. This could result in his arrest without further notice."

12. On 1 October 2002 the first applicant requested the Board to stay his expulsion, which the Board refused on 7 October 2002.

13. No judicial appeal was lodged against the above decisions, which became final.

14. On 2 February 2003 the first and second applicants got married.

15. On 14 February 2003 the first applicant applied for a work permit on the ground of family reunification. The Directorate of Immigration rejected the application on 26 April 2003 and ordered him to leave Norway while indicating that the decision could be appealed against and that the police could set a time-limit for asking for respite of the expulsion. The decision was notified to him by local police on 7 May 2003 with an order to leave the country by 4 June 2003. The Directorate considered that the first applicant fell within a group of persons who were granted work permit for the purpose of family reunification under section 9 of the Immigration Act (and Article 23(1)(a) of the Immigration Regulation (*Utlendingsforskriften*)) but rejected the application on the ground that it was not documented that he had fulfilled the condition of ensured means of subsistence (Article 25 of the Regulation). In the view of the Directorate, there were no particularly strong human considerations warranting an exception being made from this condition in the instant case (Article 25(3)).

16. On 14 May 2003 the first applicant again appealed and requested stay of execution. The Directorate of Immigration rejected the request and local police notified him thereof on 19 October 2003 with an order to leave Norway by 30 October 2003.

B. Administrative sanction for failure to leave the country and ensuing judicial proceedings

17. Concurrently with the Immigration Appeals Board's examination of the first applicant's appeal of 14 May 2003, the Directorate of Immigration on 4 July 2003 warned him that it was contemplating to expel him pursuant to section 29(1)(a) of the Immigration Act. It referred to his registered gainful employment since 1 September 2002 and to his having worked in breach of section 6 of the Immigration Act since the rejection of his asylum application on 11 September 2002. Moreover, the Directorate referred to his defiance of his obligation to comply with the time-limit for leaving the country after the rejection of his asylum request. The Directorate considered that he had seriously contravened the provisions of the Act and had evaded implementation of the order to leave the country.

18. On 26 August 2003 the Directorate of Immigration decided to expel the applicant pursuant section 29(1)(a) of the Immigration Act. It found that the applicant's alleged ignorance of the unlawfulness of his gainful occupation was no excuse and that it would not be disproportionate to expel him despite his marriage with the second applicant. It decided to prohibit the first applicant from re-entry into Norway for five years, with a possibility of re-entry on application - normally only after two years.

19. On 21 July 2004 the Immigration Appeals Board upheld the Directorate of Immigration's rejection of his request for family reunification

and its decision that the basic conditions for expelling the first applicant under section 29(1) of the Immigration Act were fulfilled; for more than a year he had been in gainful occupation without a work/residence permit. The Board also noted that he had avoided the implementation of the decision refusing him asylum and obliging him to leave the country. The Board found that his expulsion would not be disproportionate or otherwise contrary to Article 8 of the Convention. It also dismissed his appeal against the Directorate's rejection of his application for a work permit.

20. By a judgment of 15 February 2005 the Oslo City Court quashed the Immigration Appeals Board's decision of 21 July 2004 as being invalid.

21. In its judgment the City Court observed that it found it obvious that the basic condition for expelling the first applicant – that he had seriously or repeatedly violated the Immigration Act or had defied implementation of the decision that he should leave the country – had been fulfilled. The question then was whether expulsion would be a disproportionate measure vis-à-vis the first applicant and his close family.

22. In this regard the City Court observed that, although the first applicant had failed to comply with one of the conditions for contracting marriage in Norway, namely lawful residence in the country (sections 5(a) and 7 (k) of the Marriage Act 1991), he had had reason to believe (as from February 2003) that he had a right to stay and to apply for a work permit and a residence permit. While he had failed to respect two time-limits for leaving the country (30 September 2002 and 4 June 2003), he could not be criticised for having exceeded such deadlines after 26 April 2003 as the information furnished to him by the Directorate of Immigration had been unclear as to the time-limits set for his leaving the country compared to those set for asking respite and the replies given to his requests for respite. He had worked unlawfully for nine months and had resided unlawfully for four and a half months. This was, relatively speaking, not a very serious offence, which fact counterbalanced his relatively weak links to Norway. To impose a prohibition on re-entry for five years would constitute a disproportionate measure towards the applicant and his family in the sense of section 29 of the Immigration Act. It could easily lead to the dissolution of the family. The second applicant would presumably have great difficulties of adaptation in the first applicant's home country. Even if the first applicant could apply for re-entry after two years, he would most probably only be granted permission to come for shorter visits. The City Court found it unnecessary to examine whether the disputed decision violated Article 8 of the Convention.

23. On an appeal by the State against the City Court judgment, the High Court reached a different conclusion. By a judgment of 27 February 2006, it found that the first applicant's omission to leave the country voluntarily, although not the same as going under ground, meant that he had avoided compliance with the order to leave the country, meaning that the basic

conditions for his expulsion under section 29 of the Immigration Act were fulfilled.

24. The High Court noted from the outset that the first applicant had acknowledged that he had seriously or repeatedly infringed the provisions of the Immigration Act and that the formal conditions for expulsion were fulfilled. The first applicant disputed that he had evaded a decision to leave the country and had only omitted to voluntarily comply with the decision. However, the High Court considered that also such an omission constituted evasion for the purposes of the act, although it was less serious than going under ground.

25. The High Court found it established that the applicant had stayed lawfully in Norway from 25 August 2001 to 30 September 2002. It was undisputed that his stay was unlawful from 30 September or 1 October 2002 until 14 February 2003 when he applied for family reunification. It was further undisputed that he had worked unlawfully without a work permit for 9 months, from 30 September/1 October 2002 until early July 2003, when the Directorate of Immigration warned him about expulsion. Thus the formal grounds for expulsion according to section 29 of the Immigration Act (as defined in Circular 03-25) were fulfilled.

26. The High Court observed that the central issue was the one of proportionality. In this regard it noted that the first applicant's links to Norway were very limited. He had arrived in Norway aged 22 years, without any links to the country. At the time of the impugned decision he had lived there for less than three years, parts of the time unlawfully. Already after less than two years he had been warned of expulsion. His stay in Norway had been very short and could not have given him any legitimate expectation of being able to live there. This was not significantly altered by his marriage to the second applicant, which had been entered into shortly before the disputed decision and in breach of the provisions on marriage. It was not uncommon for a person whose expulsion had been decided to marry a Norwegian citizen and use this as an argument to have the expulsion order invalidated. In such a situation expulsion would inevitably interfere with an established family situation. In this case there was no indication that expulsion would entail extra burdens of any kind beyond what followed from the separation.

27. The High Court also found that the first applicant's links to Nigeria were particularly strong and far more so than his links to Norway. In Nigeria he had lived from the age of six months until the age of 22, had studied at university for four years, and had three brothers with whom he was still in contact. Nor were there any concrete factors suggesting that, because he sought asylum in Norway, he would encounter particular problems with the Nigerian authorities upon return.

28. As regards the second applicant, the High Court observed that at the time that they married she must already have been aware of the uncertainty

of the first applicant's stay in Norway. Moreover, she was used to living abroad, having lived for several periods in South Africa. English was also the official language of Nigeria. In the view of the High Court, she would not face insurmountable problems by settling in Nigeria for a shorter or longer period, should she so wish.

29. As to the first applicant's violations of the Immigration Act, the High Court found them to be of a certain degree of seriousness but did not find them particularly aggravated. However, having regard to the tenuous character of his links to Norway, the High Court considered that the balance of interest was not in his favour. Were it to be otherwise, expulsion would be possible only in very rare cases, with the consequence that this would have for the implementation of adopted immigration policies. The only countervailing consideration was his marriage to the second applicant. However, this could not be decisive; otherwise it would leave open a practice which would completely undermine the authorities' implementation of the Immigration Act.

30. Relying essentially on the same considerations as mentioned above, the High Court, taking into account the Strasbourg Court's case law, did not find that the disputed decision would be incompatible with Article 8 of the Convention.

31. On 14 June 2006 the Appeals Leave Committee of the Supreme Court refused the applicant leave to appeal, finding it obvious that the appeal had no prospects of success.

32. In the meantime, on 15 February 2005 the first applicant had submitted a new application for a work permit on the ground of family reunification with the second applicant. The Directorate of Immigration rejected his application on 21 July 2006.

C. Birth of the third applicant and renewed requests by the first applicant

33. On 20 September 2006 the couple had a child, Selma, who is the third applicant.

34. On 31 October 2006 the Immigration Appeals Board rejected an appeal by the first applicant against the Directorate of Immigration's refusal of 21 July 2006. The Board found that quashing the refusal of re-entry was not required in the interest of the third applicant, *inter alia* noting that the child had been conceived after a final expulsion order and referring to the circumstances of the entry into marriage. It would be possible for the second and third applicants to live with the first applicant for shorter or longer periods in his home country. Although the fact that the first and second applicants had had a child together substantially altered the assessment of the proportionality of the prohibition of re-entry, the Board still did not find that the measure would be disproportionate. Neither Article 8 of the

Convention nor the United Nations Children Convention could imply a different solution.

35. On 2 November 2006 the Directorate of Immigration refused to stay the applicant's expulsion.

36. On 13 December 2006 the applicants, represented by a lawyer, submitted an application under the Convention, which was received at the Registry on 3 January 2007. They complained that the first applicant's expulsion would entail a splitting of the family in breach of Article 8 of the Convention. It would not be possible for the second and third applicants to accompany him to Nigeria. They submitted that, having regard to the minor character of his breaches of the Immigration Act, the enforcement of the expulsion order would constitute a disproportionate interference with the applicant's family life. Any such enforcement should await a final decision by the Court.

37. On 5 January 2007 the President of the Section decided, in the circumstances, not to indicate to the Government of Norway, under Rule 39 of the Rules of Court, the interim measure requested. The circumstances underlying the application were not of the kind to which, in the Court's practice, Rule 39 was applied. On 19 January 2007 the applicants' lawyer informed the Court that they wished to maintain their application notwithstanding the refusal to apply Rule 39.

38. On 30 March 2007 the Immigration Appeals Board dismissed an appeal by the first applicant against a rejection by the Directorate of Immigration of 30 October 2006 of a renewed request by the first applicant for family reunion with the third applicant. The request had been made on the basis of a provision in the Immigration Regulation which was applicable to cases of unmarried parents and therefore did not cover the applicants' case. Nor did the Board see any other reason for altering its earlier decision in the case.

D. Implementation of the first applicant's expulsion

39. In the meantime, on 7 March 2007 the Implementation Group of the Oslo Police District expelled the first applicant back to Nigeria.

II. RELEVANT DOMESTIC LAW

40. The Immigration Act 1988 (Act of 24 June 1988 Nr 64, *Lov om utlendingers adgang til riket og deres opphold her* (*utlendingsloven*)) contained the following provisions of relevance to the present case:

Section 6 Work permits and residence permits

"Any foreign national who intends to take work with or without remuneration or who wishes to be self-employed in the realm must have a work permit.

Any foreign national who intends to take up residence in the realm for more than 3 months without taking work must have a residence permit."

Section 8 When work and residence permits shall be granted

Any foreign national has on application the right to a work permit or a residence permit in accordance with the following rules:

[...]

3) There must not be circumstances which will give grounds for refusing the foreign national leave to enter the realm, to reside or work in accordance with other provisions of the Act."

Section 9 Work or residence permits for family members

The closest members of the family of a Norwegian or Nordic national who is resident in the realm or of a foreign national who has or is granted lawful residence in the realm with a work permit or a residence permit without restrictions, have on application the right to a work permit or residence permit provided there are no such circumstances as mentioned in section 8 first paragraph, sub-paragraph 3. As a general rule subsistence must be ensured. The King may by regulations issue further rules."

Section 41 Procedure for the implementation of decisions

"Any decision which means that any foreign national must leave the realm is implemented by ordering the foreign national to leave immediately or within a prescribed time limit. If the order is not complied with or it is highly probable that it will not lead to the foreign national's leaving the realm, the police may escort the foreign national out. When particular reasons so indicate, the foreign national may be conducted to another country than the one from which the foreign national came. Any decision which applies to implementation is not considered to be an individual decision, cf. section 2 first paragraph, sub-paragraph b, of the Public Administration Act."

41. Moreover, section 29(1)(a) of the Immigration Act read:

"Any foreign national may be expelled

a)when the foreign national has seriously or repeatedly contravened one or more provisions of the present Act or evades the execution of any decision which means that the person concerned shall leave the realm"

42. According to section 29(4), an expulsion order may be accompanied by a prohibition of re-entry to Norway. However, the person expelled may, on application, be granted leave to enter Norway. Furthermore, according to well-established administrative practice, when considering an application for leave to enter under section 29(4), the Directorate of Immigration was under an obligation to consider the proportionality of its decision on prohibition of re-entry. The provision read:

> "Expulsion is an obstacle to subsequent leave to enter the realm. Prohibition of entry may be made permanent or of limited duration, but as a general rule not for a period of less than two years. On application the person expelled may be granted leave to enter the realm, but as a rule not until two years have elapsed since the date of exit."

THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

43. The applicants complained that the first applicant's expulsion to Nigeria would entail a violation of their right to respect for private and family life in violation of Article 8 of the Convention, which in so far as relevant, provides:

> "1. Everyone has the right to respect for his private and family life ....
>
> 2. 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."

A. Submissions by the parties

1. The applicants' arguments

44. The applicants maintained that the first and second applicants had had a relationship since the spring of 2001 and had been married since 2 February 2003. On 20 September 2006 a child had been born from their union, the third applicant. In the event of the first applicant's being expelled to Nigeria it would not be possible for the second and third applicants to follow him to settle there. The expulsion of the father would lead to the family being split, which would have particularly adverse consequences for the wife and the child and would amount to a disproportionate interference with the applicants' right to respect for private and family life.

45. The applicants pointed out that the reason why the authorities of the respondent State had found it necessary to expel the first applicant had been that he had omitted to leave Norway from 1 October 2002 to 2 February 2003, when he got married, and the fact that he had worked without a work permit from the former date until July 2003, when he had become aware that he no longer had a work permit as a result of the refusal notified to him on 30 September 2002. The first applicant had not gone under ground but

had stayed at a permanent address that was known to the authorities all the time. Having regard to the trivial nature of his transgression of Norwegian law, an interference of such a far reaching character and its damaging effect for his spouse and newly born child would be disproportionate.

46. The applicants disputed the Government's argument that their case fell outside the scope of protection of Article 8 of the right to respect for private and family life. They pointed out that the first and second applicants had been married during the period when a stay of execution had been granted in respect of the first applicant's expulsion and were thus lawfully residing in Norway. A marriage, even if entered into in breach of the criteria for contracting marriage, should be regarded as having been legally contracted and as implying the same rights as other marriages entered into in Norway. Spouses of Norwegian citizens who had applied for family reunion had a right to make such an application from Norway and to live with their spouse in the country pending final decision on their application. Thus the first applicant had established and enjoyed family life with a permission to reside in Norway, which was sufficient to trigger the protection of Article 8 of the Convention. Referring to the Court's case-law in this area (notably *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, ECHR 2006-...; and *Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, ECHR 2006-...), the applicants argued that the Article 8 guarantees applied also where the person concerned did not hold a formal residence permit but nevertheless lived and had family life in the respondent State.

47. The applicants further disagreed with the Government's argument that there had been no justifiable expectation of married life in Norway. After having co-habited for a time, the first and second applicants had married, following which the first applicant had applied for family reunion with his spouse. As mentioned above, although the first applicant did not hold a formal residence permit, as a married couple they were nonetheless on an equal footing with married couples who had wedded in accordance with the Marriage Act. Under section 9 of the Immigration Act they were entitled to family reunion, as was also confirmed by the 26 April 2003 Decision of the Directorate of Immigration. The reason why the application for family reunion had been denied was that the subsistence requirement had not been fulfilled. With a view to comply with this requirement, the second applicant had interrupted her studies in order to take up gainful employment. Therefore, on the basis of the rights accorded to them under the relevant national laws and regulations, the first and second applicants had a legitimate expectation of being able to continue their married life in Norway.

48. The applicants moreover emphasised that at the time when the case had been pending before appellate courts the second applicant had been pregnant with the third applicant and that the first applicant was the father.

It had thus been clearly predictable for those courts that a reestablishment of the marriage would have to take place at the time of the child's birth. This constituted an unacceptable requirement in view of the living conditions in Nigeria, from the point of view of health, culture and employment. At the time the second applicant was pursuing her studies in Norway. Her educational background would not have provided her with any basis for obtaining employment in Nigeria. Moreover, the cultural differences had been such that both she and the child would have encountered adaptation problems in Nigeria. The High Court's argument that she had previously sojourned in South Africa (seven months for study purposes) was simply unreasonable and unfair. Also, in view of the high infant mortality rate, the high crime rate and great risk of kidnapping of non-African children in Nigeria there were special circumstances to the effect that re-establishing family life in Nigeria would be contrary to the best interests of the child.

49. In light of the above, the applicants maintained that the expulsion of the first applicant would give rise to a violation of Article 8 of the Convention.

2. The Government's arguments

50. The Government submitted that Article 8 of the Convention was inapplicable in a case, where, as here, the relevant family link had been established at a time when the applicants could not have had any reasonable or legitimate expectations as to the prospects of establishing and continuing a family life in Norway, and where they had failed to show that there existed insurmountable obstacles for establishing a family life in the first applicant's home country. The period of married life that existed while the Immigration Authorities considered the first applicant's application for family reunification with the second applicant, could not have given the applicants any reasonable or legitimate expectations as to the prospects of establishing and continuing a family life in Norway. It was undisputed that the first applicant, at the time of his application for family reunification with the second applicant, had been residing and working unlawfully in Norway for several months, thus disregarding the order to leave the country notified to him on 11 September 2002. The first and second applicants had both been aware of this.

51. Although it was generally true that a spouse of a Norwegian citizen who applied for family reunification normally had a right to reside in the country until the Directorate of Immigration had processed the application, this had not been the case for the first applicant. He had applied for family reunification with the second applicant at a time when he was already unlawfully residing in the country. Thus, the first applicant's residence in Norway after the application for family reunification had in fact merely been tolerated by the authorities pending the Directorate of Immigration decision. The latter had rejected the application for family reunification as

early as 26 April 2003, which measure had been followed up with a new order that he leave the country. In the view of the Government, this could not have given the applicants any reasonable or legitimate expectations as to the prospects of establishing or continuing a family life in Norway.

52. In the Government's view, the Convention case-law invoked by the applicants did not lend support to their argument.

In any event, should the Court nevertheless find Article 8 applicable, the Government submitted that any interference with the applicants' private and family life resulting from the impugned measures was justified under Article 8 § 2. They referred to their arguments above contesting the applicability of Article 8. In the view of the Government, it transpired from the Court's case law that, where the family link had been established at a time when there could be no reasonable or legitimate expectations as to the possibilities for establishing a family life in the Contracting State, the threshold would be very high for finding an exclusion order or an expulsion disproportionate for the purposes of the necessity test under Article 8 § 2 of the Convention. The threshold had not been surpassed in the present case. The impugned expulsion and prohibition on re-entry had been based on the first applicant's aggravated and repeated violations of Norwegian immigration law. Moreover, his ties with Norway had been very limited at the time of the contested administrative decisions and he still had strong ties to Nigeria. There were no insurmountable obstacles preventing the applicants from enjoying family life in the first applicant's home country. The second applicant had had the experience of living in South Africa and the third applicant was of an adaptable age.

B. The Court's assessment

53. At the outset the Court finds it clear that the relationships between the applicants constituted "family life" for the purposes of Article 8 of the Convention, which provision is therefore applicable to the instant case.

54. Turning to the issue of compliance, the Court reiterates that a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 34, § 67, *Boujlifa v. France*, judgment of 21 October 1997, *Reports of Judgments and Decisions* 1997-VI, p. 2264, § 42). The Convention does not guarantee the right of an alien to enter or to reside in a particular country. The applicant entered Norway on 25 August 2001 and was expelled to Nigeria on 7 March 2007. Pending his appeal to the Immigration Appeals Board against the Directorate of Immigration's rejection of his asylum request on 22 May 2002, he was granted a stay of execution of his expulsion and a temporary work permit but at no time was he granted lawful residence

in Norway (cf. *Rodrigues da Silva and Hoogkamer v. the Netherlands*, no. 50435/99, § 43, ECHR 2006-). As from 11 September 2002, when the Immigration Appeals Board rejected his appeal, he was under an obligation to leave the country and was given until 30 September 2002 to do so. His continued stay there beyond that time-limit was unlawful. As from February 2003 the first applicant applied for a right to stay in the country on a new ground, namely family reunification with the second applicant, but also this request was rejected and he was ordered to leave the country. The Court is not persuaded by the applicants' submission to the effect that, pending the latter decision, the first applicant's continued stay in Norway was not merely tolerated, as argued by the Government, but an entitlement.

55. However, it is to be noted that the first and the second applicants got married in Norway on 2 February 2003. The genuineness of their marriage has not been called into question and a child from the couple, the third applicant, was born on 20 September 2006. The family remained united and lived in Norway until the first applicant's expulsion on 7 March 2007. In these circumstances the Court considers that the impact of the impugned measures constituted an interference with the applicants' right to respect for family life under Article 8 § 1 of the Convention (cf. *Rodrigues da Silva and Hoogkame*, cited above, § 38).

56. As to the further question whether the interference was justified under Article 8 § 2, the Court is satisfied that it had a legal basis in national law, namely section 29(1)(a) and (4) of the Immigration Act, and that it pursued the legitimate aims of preventing "disorder or crime" and protecting the "economic well-being of the country". Indeed this seems undisputed. However, a question arises whether the interference was necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aims pursued (see, as a recent authority, *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-...).

57. In assessing the question of necessity, the Court will have regard to the various factors indicated in paragraphs 57 to 59 of the above-mentioned *Üner* judgment. The State must strike a fair balance between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation. Moreover, Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest (see *Gül v. Switzerland*, judgment of 19 February 1996, *Reports* 1996-I, pp. 174-75, § 38; and *Rodrigues da Silva and Hoogkamer*, cited above, § 39). Factors to be taken into account in this context are the extent to which

family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (see *Rodrigues da Silva and Hoogkamer*, cited above, ibidem; *Ajayi and Others v. the United Kingdom* (dec.), no. 27663/95, 22 June 1999; *Solomon v. the Netherlands* (dec.), no. 44328/98, 5 September 2000). Another important consideration is whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious (see *Jerry Olajide Sarumi v. the United Kingdom* (dec.), no. 43279/98, 26 January 1999; *Andrey Sheabashov c. la Lettonie* (dec.), no. 50065/99, 22 May 1999). Where this is the case the removal of the non-national family member would be incompatible with Article 8 only in exceptional circumstances (see *Abdulaziz, Cabales and Balkandali,* cited above, § 68; *Mitchell v. the United Kingdom* (dec.), no. 40447/98, 24 November 1998; and *Ajayi and Others*, cited above; *Rodrigues da Silva and Hoogkamer*, cited above, ibidem).]

58. In this regard the Court first observes that when the first applicant arrived and applied for asylum in Norway on 25 August 2001, he was an adult and had no links to the country. His family links to the second and third applicants were formed at different stages during his stay in the country.

59. The first and second applicants met in October 2001 and started co-habiting in March 2002. Already from the beginning of their relationship it must have been clear to them both that their prospects of being able to settle as a couple in Norway were precarious. The first applicant's asylum request was rejected, first by the Directorate of Immigration on 22 May 2002, and then by the Immigration Appeals Board on 11 September 2002, giving him until 30 September 2002 to leave the country. No judicial appeal was lodged against these decisions, which became final. Nevertheless, the first applicant opted to evade his duty to leave and stayed in Norway unlawfully.

60. On 2 February 2003, while the first applicant was staying illegally in Norway, he got married to the second applicant. Because of his lack of residence status the marriage had not been contracted in accordance with domestic law, though this shortcoming did not deprive the marriage of its validity.

61. In the Court's view, at no stage prior to their marriage on 2 February 2003 could the first and the second applicants have reasonably held any expectation that he would be granted leave to remain in Norway.

62. This state of affairs was not changed, but was confirmed rather, by the developments in the case in the ensuing period. On 14 February 2003 the first applicant made a new request on the ground of family reunification

with the second applicant, but again his request was rejected and he was ordered to leave the country, in a decision of 26 April 2003, notified to him on 7 May 2003. Therefore the applicant could not reasonably expect a right to reside in Norway based on these proceedings.

63. Moreover, on account of the first applicant's unlawful stay in Norway for four months and a half from September 2002 to February 2003 and for his having worked there unlawfully without a work permit for nine months from September 2002 to July 2003, the Directorate of Immigration decided on 26 August 2003 firstly that he should be expelled pursuant to section 29(1)(a) of the Immigration Act and secondly be prohibited to re-enter Norway for five years (with a possibility of re-entry on application-normally after two years). To the Court's understanding, the first part of the decision represented hardly anything new but was rather a renewed response to the first applicant's failure to comply with previous orders to leave the country. The decision of 26 August 2003 was upheld by the Immigration Appeals Board on 21 July 2004 and by the appellate courts respectively on 27 February and 14 June 2006. At each level (including the City Court which held in his favour on 15 February 2005) it was found established that the basic condition for expelling the first applicant – that he had seriously or repeatedly violated the Immigration Act or had defied implementation of the decision that he should leave the country – had been fulfilled. It is true that the City Court found the measure disproportionate but that finding was not final and was overturned by the High Court and leave to appeal was refused by the Appeals Leave Committee of the Supreme Court.

64. Against this background the Court does not consider that the first and second applicants, by confronting the Norwegian authorities with the first applicant's presence in the country as a *fait accompli*, were entitled to expect that any right of residence would be conferred upon him (see *Roslina Chandra and Others v. the Netherlands* (dec.), no. 53102/99, 13 May 2003; *Yash Priya v. Denmark* (dec.) 13594/03; 6 July 2006; cf. *Rodrigues da Silva and Hoogkamer*, cited above, § 43).

65. In the Court's view, the same considerations apply to the third applicant's birth on 20 September 2006, which fact could not of itself give rise to any such entitlement.

66. It should further be noted that the first applicant had lived in Nigeria since he was six months old until he left the country at the age of 22, had studied at university for four years and had three brothers with whom he was still in contact. Whereas his links to Nigeria were particularly strong, his links to Norway were comparatively weak, apart from the family bounds he had formed there with the second and third applicants pending the proceedings. The third applicant was still of an adaptable age at the time when the disputed measures were decided and implemented (see *Ajayi and Others*, cited above; *Sarumi*, cited above; and *Sezai Demir c. France* (dec.),

no. 33736/03, 30 May 2006). The second applicant would probably experience some difficulties and inconveniences in settling in Nigeria, despite her experience from a period spent in another African country, South Africa, and the fact that English was also the official language of Nigeria. However, the Court does not find that there were insurmountable obstacles in the way of the applicants' developing family life in the first applicant's country of origin. In any event, nothing should prevent the second and third applicants from coming to visit the first applicant for periods in Nigeria.

67. Finally, the Court notes that the decision prohibiting the first applicant re-entry for five years was imposed as an administrative sanction, the purpose of which was to ensure that resilient immigrants do not undermine the effective implementation of rules on immigration control. Moreover, it was open to the first applicant to apply for re-entry already after two years.

68. Against this background, the Court does not find that the national authorities of the respondent State acted arbitrarily or otherwise transgressed their margin of appreciation when deciding to expel the first applicant and to prohibit his re-entry for five years. The Court is not only satisfied that the impugned interference was supported by relevant and sufficient reasons but also that in reaching the disputed decision the domestic authorities struck a fair balance between the personal interests of the applicants on the one hand and the public interest in ensuring an effective implementation of immigration control on the other hand. In view of the first applicant's immigration status, the present case disclosed no exceptional circumstances requiring the respondent State to grant him a right of residence in Norway so as to enable the applicants to maintain and develop family life in that country. In sum, the Court finds that the national authorities could reasonably consider that the interference was "necessary" within the meaning of Article 8 § 2 of the Convention.

Accordingly, there has been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT

Holds by five votes to two that there has been no violation of Article 8 of the Convention;

Done in English, and notified in writing on 31 July 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Christos Rozakis
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Jebens;

(b) dissenting opinion of Judge Malinverni, joined by Judge Kovler.

C.L.R.
S.N.

CONCURRING OPINION OF JUDGE JEBENS

I agree with the majority that there has been no violation of Article 8. However, I do not agree with the majority's interpretation and application of that article. For the reasons set out below, I have concluded that there has been no interference with a protected right in Article 8 in the present case.

The following factual elements concerning the first applicant's stay in Norway are in my opinion important for the evaluation of the case:

He entered Norway on 25 August 2001, and applied for asylum. His application was rejected by the Directorate of Immigration on 22 May 2002. He appealed, and pending a decision of his appeal, he was granted a stay of execution of his expulsion and a temporary work permit. His appeal was rejected by the Immigration Appeals Board on 11 September 2002. Having been given until 30 September 2002 to leave Norway, he requested a stay of his expulsion, which was refused on 7 October 2002.

The first applicant did not comply with the order to leave Norway. Having married the second applicant on 2 February 2003, he applied for a work permit on the ground of family reunification, which was rejected on 26 April 2003. He was ordered to leave Norway, but appealed and requested a stay of execution. After having rejected that request, the Directorate of Immigration ordered the first applicant to leave Norway by 30 October 2003.

This account shows that the first applicant was at no time granted lawful residence in Norway, and that he was repeatedly ordered to leave the country. Furthermore, the decision to expel the first applicant, which was passed on 26 August 2003, was a reaction to his persistent defiance with the successive orders to leave Norway. The execution of the expulsion order was carried out as late as 7 March 2007, due to the fact that the first applicant instituted court proceedings.

The Convention does not guarantee the right of a foreign national to enter or reside in a particular country. This is confirmed by the Court's case law, from which it follows that the State is entitled to control the entry and residence of foreign nationals in its territory. As a consequence, the Court's case law distinguishes between expulsion of a person who has been lawfully residing in a country, and expulsion of a person who has not been granted lawful residence. While in the former situation the Court has exercised a close scrutiny of the justification for the interference with the rights protected by Article 8 § 1, in the latter it has accorded States a wide margin of appreciation in their compliance with their positive obligations under this

provision. This implies a limitation of the notion of right to "respect" for family life, which is necessary in order for the State to control entry and residence of foreign nationals in their territory. Reference is made to *Abdulaziz, Cabales and Balkandali v. the United Kingdom, §§ 67-69; Boujlifa v. France*, *§ 42; Rodrigues da Silva and Hoogkamer v. the Netherlands, § 43,* all referred to in paragraph 54 of the judgment, and also to *Mitchell v. the United Kingdom* ((dec.) no. 4047/98, 24 November 1998) and *Gúl v. Switzerland* (judgment 22 January 1996, Reports 1996-I).

It follows from the above referred case law that the fact that the first and second applicant married and got a child in Norway cannot in itself bring the first applicant's case within the ambit of Article 8. Contrary to what seems to be the opinion of the majority, it is decisive so far that family life within the meaning of Article 8 was established during the first applicant's unlawful residence in Norway, and when neither of the applicants could have any reasonable or legitimate expectations that they could enjoy family life in Norway. Therefore, the decision to expel the first applicant did not, in my opinion, interfere with his right to "respect" for family life.

The question of compliance with Article 8 § 1 must therefore refer to the State's positive obligations with regard to protecting the first applicant's family life. For the same reasons that the majority have discussed with regard to the "necessity test" I find it clear that there has been no breach of the State's positive obligations in this case.

While I have arrived at the same conclusion as the majority, I think that the legal approach is important in such cases. This is so, because one can easily imagine situations where application of a necessity test on an alleged interference will lead to conclusions that are more favourable to an applicant than if one bases the discussion on the State's positive obligations. The legal reasoning is therefore of the utmost importance in such cases, namely in order to clarify the State's rights and duties vis-à-vis immigrants.

DISSENTING OPINION OF JUDGE MALINVERNI JOINED BY JUDGE KOVLER

(Translation)

1. To my great regret I am unable to subscribe to the majority's conclusion that the first applicant's expulsion did not entail a violation of Article 8.

2. The main argument put forward by the majority in reaching that conclusion is that the first applicant was never granted a residence permit entitling him to reside lawfully within Norwegian territory. His presence was at best tolerated, and when he married a Norwegian national, he must have known that his right to remain in Norway was precarious and both he and his wife must have expected that he would be expelled.

3. The fact remains, however, that on 2 February 2003, while he was unlawfully resident in Norway, the first applicant got married.

4. I have difficulty in following the majority's reasoning to the effect that "because of his lack of residence status the marriage had not been contracted in accordance with domestic law" (see paragraph 60 of the judgment).

5. Although the Court adds that "this shortcoming did not deprive the marriage of its validity" (see paragraph 60), there is serious cause to wonder whether the registration authorities should not, in such circumstances, have refused to perform the marriage ceremony. The administrative authorities thus undoubtedly committed an error in agreeing to the marriage between the first and second applicant although the former did not satisfy the conditions for validly contracting marriage.

6. As the City Court observed, the consequence of this error was that "although the first applicant had failed to comply with one of the conditions for contracting marriage in Norway, namely lawful residence in the country (sections 5(a) and 7(k) of the Marriage Act 1991), he had had reason to believe (as from February 2003) that he had a right to stay and to apply for a work permit and a residence permit" (see paragraph 22 of the judgment).

7. The first applicant's marriage accordingly instilled in him the conviction that he could lawfully remain in Norway.

8. I would observe in this connection that in several member States of the Council of Europe, marriage in itself entitles a foreign national to reside in the State of which his or her spouse is a national.

9. The decision to expel the first applicant thus constituted undeniable interference with his right to respect for his private and family life, all the more so as the first two applicants had in the meantime produced a child.

10. I do not dispute that the interference had a basis in law and pursued a legitimate aim. The point on which I differ from the majority is whether the expulsion complied with the proportionality principle.

11. Contrary to most expulsion cases which the Court has had to consider, in this case the first applicant had not committed any criminal offence. The only accusation against him was “that he had seriously violated the Immigration Act or had defied implementation of the decision that he should leave the country” (see paragraph 63).

12. Seeing that the offence in question was purely administrative and in no sense criminal, I consider that the first applicant's Norwegian wife could hardly have been required to follow him to Nigeria so that they could pursue their family life there. It was likewise highly unrealistic to envisage that the first applicant would travel alone to his home country and return occasionally to visit his wife and son in Norway. Their family life would have been seriously impaired.

13. In conclusion, when the various competing interests were weighed up, the balance should have tipped towards granting the first applicant a residence permit entitling him to remain in Norway.