

THE HIGH COURT

JUDICIAL REVIEW

2008 262 JR

BETWEEN

J. G. M.

APPLICANT

AND

THE REFUGEE APPLICATIONS COMMISSIONER AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 29th day of July, 2009.

1. The applicant seeks an order of certiorari by way of judicial review of the recommendation of the Office of the Refugee Applications Commissioner (ORAC), dated the 5th February, 2008, that the applicant should not be granted a declaration of refugee status. Leave was granted on the 27th January, 2009 by Cooke J. (see *J.M. v. The Refugee Applications Commissioner & Another* [2009] I.E.H.C. 64). The substantive hearing took place at the King's Inns, Court No. 1, on the 23rd June, 2009. Mr. Mark Connaughton S.C. and Mr. David Leonard B.L. appeared for the applicant. Mr. Gerard Hogan S.C. and Ms. Ann Harnett O'Connor B.L. appeared for the respondents. The essence of the applicant's complaint is that the ORAC decision is fundamentally flawed and ought to be quashed by reason of the authorised officer's failure to explore with the applicant the potential for him to acquire nationality of Mozambique. The applicant argues that this flaw in the investigative process would be an appropriate case for judicial review rather than an appeal to the Refugee Appeals Tribunal.

Background

2. On the 1st December, 2006 the applicant applied for asylum in the State, claiming to be a national of Zimbabwe. There are some unusual features regarding his application.

3. From the outset he disclosed that he had been refused asylum in the U.K. and had been asked to leave that country. He said he entered the U.K. in June, 2004 and made an application for asylum there in November, 2004. The date of his application in the U.K. was confirmed by a Eurodac search. His explanation for the negative outcome of that application was that the UK authorities found "*that I am not Zimbabwean but that I had dual citizenship*". He also said that "*The UK refused saying that I am Mozambican*".

4. He furnished ORAC with voluminous documentation relating to his U.K. application although surprisingly the decisions by the U.K. authorities were not included. The furnished documents indicate that he arrived in the U.K. using a Mozambican passport and claiming to be a national of Mozambique. However both in the U.K. and in this State his claim for asylum centred on the ill-treatment he suffered in Zimbabwe as a result of his membership of the opposition Movement for Democratic Change (MDC) and his trade union activities.

5. At the appeal stage in the U.K. asylum process, he claimed that the Mozambican passport was not genuine and that he was in fact a national of Zimbabwe. However included in the bundle of U.K. asylum application papers furnished to ORAC there was a report from the *Medical Foundation for the Care of Victims of Torture* dated April, 2005, which lists his nationality as "*Zimbabwean / Mozambique*" and records that he was born in 1976 in "*Esubeira, Mozambique, near Manica, eastern Zimbabwe*" and that "*his family moved to Zimbabwe in 1978 as a consequence of the civil war in Mozambique*". The Medical Foundation report also records that he had "*extended family in Mozambique*."

6. At a later stage in the applicant's asylum process in the U.K. he claimed that he was in fact from Zimbabwe and he furnished documentation in proof of that assertion. These were copies of his Zimbabwean birth certificate, his passport, ID card and MDC membership card. His U.K. solicitors submitted a report from a forensic document examiner which found that the applicant's Zimbabwean passport was genuine and concluded that there is "*no evidence of forgery or counterfeiting*". The report noted that the passport showed that he had travelled extensively over the previous two years. It seems that in addition to establishing the authenticity of the Zimbabwe passport the solicitors sought confirmation from the Mozambique High Commission that the applicant was not a national of that country. They stated in a letter that no confirmation could be produced as this would have required an exhaustive check of all Mozambique nationality records to prove a negative. I understand this to mean that an exhaustive search was necessary to exclude the applicant's name from the birth registers.

7. It was not disputed in the U.K. that the applicant was tortured in Zimbabwe. The Medical Foundation report concluded that he had "*a number of scars consistent with his account of torture*" and that the examining physician "*did not doubt that this man has been tortured as he describes*". While accepting the torture claim the Secretary of State and the special adjudicator found that the applicant was from Mozambique and not Zimbabwe. His appeal to the Immigration Appeal Tribunal (IAT) was refused in June, 2006 and it seems the finding of the IAT was that he had dual nationality. The IAT rejected the authenticity of his Zimbabwean birth certificate although his Zimbabwean passport and ID document were accepted as being genuine. His application for reconsideration of the IAT decision was, it seems, refused in August, 2006. The applicant says he appealed "*to the High Court and the Supreme Court*" in the U.K. but he has not provided any documentation in support of that assertion and as none of the decisions were furnished, the reasons for the refusal are

not available to this Court.

8. The applicant travelled to Ireland on the 18th November, 2006 but did not apply for asylum then. After a number of days here he left for the Netherlands. He explained he had planned travelling from Ireland to Canada where he intended to apply for refugee status. When he discovered that there were no direct flights between Ireland and Canada he went to the Netherlands to take a connecting flight but was refused entry because he was travelling on a false Botswana passport which he says his father had organised for him. He declined to apply for asylum in the Netherlands and was returned by the Dutch authorities to Ireland in December, 2006 and detained in Cloverhill Prison. Upon his release he sought assistance from SPIRASI (the Centre for the Care of Survivors of Torture) in Dublin in preparing a medico-legal report and proceeded with an application for asylum here.

The Asylum Application in Ireland

9. Although it was determined that the applicant should be transferred to the U.K. pursuant to the Dublin II Regulation, he was not transferred on time and it fell to Ireland to examine and determine his asylum application. In his ORAC questionnaire the applicant claimed that his application was dealt with inappropriately in the U.K. He said he was forced to say he was from Mozambique even though he repeatedly told the authorities that he was from Zimbabwe. He furnished ORAC with the grounds of appeal lodged with the IAT and letters addressed to the U.K. authorities by himself, his legal representatives and his MP; each representation stresses that he is from Zimbabwe and not Mozambique.

10. In his questionnaire the applicant addressed the issue of dual nationality attributed to him by the U.K. immigration authorities saying that this is not permitted in Mozambique or Zimbabwe. He cited Chapter 2 of the Constitution of Mozambique of 1990 (dealing with citizenship) and an article entitled *Zimbabwe Tightens Ban on Dual Citizenship* (February 18, 2001). He furnished an extract from a U.K. Home Office COI report on Zimbabwe of April, 2006, para. 5.10 of which states that the Citizenship Act "*requires all citizens with a claim to dual citizenship to renounce their claim to foreign citizenship under the laws of the foreign country by January 2002 to retain their citizenship and the right to vote.*" He also submitted excerpts of an unofficial UNHCR translation of the Constitution of Mozambique of November, 1990. This document deals with how Mozambican nationality is acquired and of relevance are:

"Article 15

Mozambicans are persons who, although satisfying the prerequisites for original nationality, did not acquire such nationality due to a choice made by their parents or guardian, provided they personally declare, within a year of reaching the age of 18, that they wish to be Mozambican. [...]

Article 19

Mozambicans are the children of a Mozambican mother or father even if born outside the country, provided that they expressly renounce, on their own behalf if they are older than 18, or through their parents or guardians if younger, any other nationality to which they may be entitled. [...]

SECTION III. LOSS OF NATIONALITY

Article 24

Mozambican nationality shall be lost by any person who:

- a) voluntarily acquires a foreign nationality;
- b) without authorization from the Government, agrees to provide services to a foreign State which may prejudice the higher interests of the nation or the sovereignty of the State;
- c) being also a citizen of another State, duly declares, that he or she does not wish to be Mozambican, or having attained the age of majority, behaves in fact as a foreign national;
- d) having as a minor obtained Mozambican nationality by virtue of a parent's or guardian's declaration, renounces, in accordance with the requisite procedures and within one year of reaching the age of majority, his or her Mozambican nationality, provided he or she can demonstrate possession of another nationality; or
- e) expressly renounces Mozambican nationality.

SECTION IV. REACQUISITION OF NATIONALITY

Article 25

1. Mozambican nationality may be granted to persons who have first lost and now wish to reclaim such nationality, provided that they meet all the following conditions:

- a) that they renounce their previous nationality;
- b) that they establish domicile in Mozambique; and
- c) that they meet the other requirements set by law.

2. Such reacquisition of nationality shall restore the legal status held prior to the loss of nationality."

11. In October, 2007 the Refugee Legal Service (RLS) furnished ORAC with 24 documents in support of his asylum application. These included a copy of his birth certificate from Salisbury, Rhodesia dated 1977, a certified copy of a further birth certificate from Harare, Zimbabwe stamped in 2005, and copies of the birth certificates of his siblings, each registered in the District of Harare, Zimbabwe. The siblings' birth certificates are not identical to one another or to the

applicant's – three are stamped on the 12th February, 1988 and the other two are stamped on 9th December, 2003 and 12th April, 1988. The three certificates stamped in February, 1988 record the place of birth as Salisbury while the other two are stated as being born in Harare, this notwithstanding that each of the five certificates is headed "*certified copy of an entry of birth registered in the District of Harare in Zimbabwe*". The place of birth of the siblings' father is listed as Mozambique on the certificates of the applicant and his sister but their three brothers' certificates list his place of birth as Rhodesia, Zimbabwe and "Portuguese East" (i.e. Mozambique) respectively.

12. Various other documents were also furnished including a copy of the applicant's Zimbabwean ID card and MDC membership card; letters from his former employer in Harare and the President of the MDC; certificates from his primary and secondary schools and the polytechnic in Harare where he studied; and various medical affidavits and medico-legal reports including the new SPIRASI report. This report indicates that he was seen by an examining physician and appeared to be very distressed by the experiences he had in Zimbabwe; that he was referred for counselling and had attended with psychotherapeutic services on a weekly basis but remained "*significantly depressed and extremely vulnerable*".

The Questionnaire

13. The applicant's questionnaire sets out his experiences in Zimbabwe and the U.K. He said he was born in 1976 in what was then Salisbury, Rhodesia but is now Harare, Zimbabwe. He qualified as a maintenance engineer in a polytechnic in Harare and gained employment in the tobacco industry. He became secretary of the *Tobacco Processors of Zimbabwe* (TPZ) workers' union from 1998 and was a member of MDC opposition party from 2000. He said he was tortured by the police, Zanu-PF supporters and Mugabe's war veterans because of his involvement in peaceful protests with the TPZ and because of his MDC activities. He witnessed the death of one of his colleagues and his brother was also killed. He records that he had attempted to start a new life in Mozambique and Botswana but on each occasion he was returned to Zimbabwe. He travelled to and from Mozambique frequently using his Zimbabwean passport but that document was taken from him by army officials in October, 2003 when he was forcibly returned to Zimbabwe. After that he travelled using falsified documents. He fled from Harare using a fake Mozambican passport.

The s. 11 interviews

14. The applicant attended for two s. 11 interviews. A representative of the Irish Refugee Council was present at each interview and made written submissions to ORAC after each interview. Nothing turns on those submissions in these proceedings. The applicant submitted additional COI for his first interview on the 10th October, 2007. He repeated his claim that he had lived in Harare since he was born. He was questioned at length about his travel arrangements and his experiences in Zimbabwe and he was asked in detail about the periods of the trips in and out of Mozambique and his journey out of Harare in June, 2004 using a Mozambican passport. He said he had been in hiding in Mozambique but was found and returned to Zimbabwe. He then tried to leave Zimbabwe by travelling through Mozambique using a Mozambique passport but this document indicated a Zimbabwe residence and as this created difficulties he abandoned that plan. He decided to instead leave from Harare where in the end he did not have any problems leaving on his Mozambique passport. Of particular importance to the applicant's claim he was asked:-

"According to your birth cert your father is from Mozambique. COI states that anyone whose father is a Mozambique national can claim nationality of that country. Why did you not do so?"

15. He replied "*His place of birth is Mozambique but his nationality is Zimbabwean.*" No further probing on the issue of his father's nationality was conducted. No questions were asked as to whether he had ever considered claiming Mozambique nationality through his father or whether his father would or could pass on nationality to his son. No reference was made to the COI furnished by the applicant from the UNHCR source on the nationality provisions in the Constitution of Mozambique.

16. The applicant said he originally claimed to be Mozambican in the U.K. because he did not have any documents to show he was from Zimbabwe. He repeated the complaint that although he had subsequently explained to the UK authorities that he was from Zimbabwe this was ignored.

17. Thereafter, further documentation and COI was submitted dealing with the escalating human rights situation in Zimbabwe but these documents do not address the issue of Mozambican or Zimbabwean citizenship or nationality.

18. On the 9th January, 2008 a second s. 11 interview was conducted. The applicant was asked a series of questions designed to test his knowledge of Zimbabwe and about the documents he had furnished. Various discrepancies in the birth certificates which he had furnished were noted. He was again asked about his frequent travel to and from Mozambique and Botswana. He submitted three pages of the false Mozambique passport he said he had used to enter the U.K. and Botswana; the pages show a one-month visa to enter Botswana, a U.K. entry visa and a U.K. entry stamp dated June, 2004. When asked why he could not go and live in Mozambique if he had a (false) Mozambique passport, he replied "*Because my residency was in Zimbabwe on the Mozambique passport. If I was staying there for a long time, they will want to see your birth cert and see how you got those documents.*"

19. The applicant was asked why the medico-legal report of April, 2005 from the Medical Foundation stated that he was born in Mozambique. He first said the doctors had taken his biological details from the forms he initially completed in the U.K. and that some of those details were fabrications. He clarified that he had told the doctors on his first visit to them that he was from Mozambique but afterwards he said he was Zimbabwean. He said he was afraid to be rude when first making his asylum application in the U.K. so when he was asked to stick to one nationality he said he was Mozambican. He also said he waited five months before applying for asylum in the U.K. because he wanted to have evidence of his nationality and MDC membership before applying. He said his brother who had formerly been a police officer was able to recover his Zimbabwean passport from the army officers who had taken it from him in October, 2003 when he was returned from Mozambique to Zimbabwe. His father he said brought it to him when he visited him in the U.K.

The s. 13 report

20. On the 12th February, 2008 a negative recommendation was made by the ORAC officer in the s. 13 report. It is that decision that is challenged in these proceedings. The report is in effect divided between a consideration of the applicant's nationality and of his account of his ill-treatment in Zimbabwe. In summary the report draws two alternative conclusions from the applicant's evidence – first that he was a national of Mozambique and was not coerced by the U.K. authorities into claiming that he was a national of Mozambique and second that even if he is not a national of Mozambique, his father was born there and if he is not already a citizen he would be able to acquire citizenship of Mozambique and the applicant

would then be entitled to apply for citizenship through his parentage.

21. The officer noted a number of errors in the applicant's testimony at interview in relation to his Zimbabwe nationality and concluded that although "*his level of knowledge does appear to be that of someone who has resided in Zimbabwe for a number of years*" this does not confirm that he was born in Zimbabwe. The officer accorded weight to the fact that the applicant himself had signed official papers in the U.K. stating that he was a national of Mozambique. It was not accepted that he was coerced into signing those papers, especially as he claimed he had waited five months before applying for asylum in order to receive evidence of his Zimbabwe nationality. Weight was also accorded to the content of the Medical Foundation report which records that he was born in Mozambique. It was also noted that the applicant gave contradictory answers at interview as to why that report was not amended if he subsequently told them he was Zimbabwean.

22. The ORAC officer went on to find that "*even if*" it was accepted that the applicant was born in Zimbabwe, most of the birth certificates indicate that his father was born in Mozambique and the applicant had submitted no documentation to show his father was a citizen of Zimbabwe. The s. 13 report refers to an extract appended at Appendix 4 dealing with the citizenship law for Mozambique ("the Appendix 4 document"). The ORAC officer concluded:-

"[i]t appears that the applicant's father, if he is not presently a citizen of Mozambique, would be entitled to reacquire his Mozambique citizenship which in turn would allow the applicant to gain citizenship of that country. It appears that the applicant himself would be able to claim citizenship in Mozambique as he was born there or through his parentage. Either way, the applicant appears to have dual nationality and could seek the protection of the second country of available citizenship, Mozambique."

23. Having made this determination the ORAC officer went on to address the applicant's account of his experiences in Zimbabwe. He accepted that the medico-legal report submitted by the applicant was "above reproach" and he accepted that the applicant was a victim of torture in Zimbabwe. He was satisfied the applicant had worked in the role of maintenance fitter, that his knowledge of the tobacco industry was of a high level and that he was able to give a reasonable amount of information on the MDC but that he was not satisfied that the applicant had the level of knowledge of trade unions in Zimbabwe that would be expected of a highly involved trade unionist.

24. The s. 13 report notes a variety of discrepancies and inconsistencies in the applicant's account and in his answers to questions posed at interview, particularly in relation to the dates on which various events occurred. The authorised officer found that as the details of the events surrounding the torture were purely based on the applicant's testimony, it was not possible to prove the details. He concluded that:-

"[T]he alleged acts of persecution occurred in Zimbabwe and the applicant has not presented a case that negates the protection of the country of his second available citizenship, Mozambique. Therefore the applicant would avail of the protection of Mozambique and is not in need of international protection."

25. The ORAC officer found that as the applicant had lodged a previous application for asylum in the U.K., s. 13(6) of the Refugee Act 1996 applied which means that his appeal will be document based.

THE ALLEGED BREACH OF FAIR PROCEDURES

26. Leave was granted by Cooke J. in this case to argue that the s. 13 report infringed the applicant's entitlement to fair procedures by reason of the failure of the authorised ORAC officer:-

"1) to disclose and to afford the applicant an opportunity of rebutting or answering the Appendix 4 document extract on the laws of Mozambique citizenship; and

2) to adequately alert and permit the applicant to consider and answer the proposition that he could, either in his own right or through his father, obtain or reacquire Mozambique nationality and thereby have the protection of that country and not need international protection."

27. At the substantive hearing Mr. Connaughton S.C., counsel for the applicant, urged the court to bear in mind that it was accepted in the s. 13 report that the applicant was tortured in Zimbabwe and that the reason for the negative recommendation was that the applicant could obtain citizenship of Mozambique and could seek protection there. He argued that there was an almost total absence of any reference in the s. 11 interview notes to the question of the applicant's potential to acquire citizenship and therefore the protection of Mozambique. He submitted that while the mobility of the applicant between Zimbabwe and Mozambique was discussed, there was nothing further than a fleeting reference to his ability to acquire citizenship of Mozambique. This, he submitted, was a stark omission when as it turned out that his citizenship of Mozambique became the core reason for the negative recommendation.

28. Mr. Connaughton also complained that the ORAC officer failed to disclose to the applicant the document relied on in the s. 13 report and contained at Appendix 4 of that report. The applicant was therefore denied an opportunity of rebutting or answering the Appendix 4 document, which is an extract from a report entitled *Citizenship Laws of the World* produced by the Office of Personnel Management of the U.S. government in 2000 / 2001 as a resource for dealing with multiple citizenship issues. It was argued that if the extract had been disclosed to the applicant, the applicant could have made submissions as to the accuracy of its contents and as to why it should not be relied on in a manner adverse to him. For example, he could have pointed out that the report is prefaced by the caveat that the information "*should not be considered formal legal advice*" and that:-

"Readers should understand that citizenship laws are often amended to keep in step with political changes. A considerable time lapse between the enactment of new laws and their actual implementation is not uncommon. Moreover, it is not unusual to encounter differences between a nation's laws and its actual practices."

29. In addition the applicant could have provided further evidence that dual citizenship is not allowed either in Mozambique or in Zimbabwe by drawing attention to the documentation furnished to ORAC and referred to in the applicant's questionnaire, or by submitting further up-to-date documentation.

30. Counsel argued that there is an obligation on the authorised ORAC officer as a matter of fair procedures to put to an applicant all matters that are considered to be relevant. He relied in particular on *Idiakheua v. The Minister for Justice, Equality and Law Reform & Anor* (Unreported, High Court, Clarke J., 5th May, 2005) and *Moyosola v. The Refugee Applications Commissioner* [2005] I.E.H.C. 218.

31. Counsel submitted that the failure to put these matters to the applicant and / or to explore with him the potential for him to obtain Mozambique nationality constitutes a flaw so fundamental as to deprive ORAC of jurisdiction and which would entitle him to an order of *certiorari* in circumstances where he would not be entitled to an oral hearing on appeal to the RAT. He argued that even if the applicant was aware that his nationality was a live issue, the ORAC officer was still obliged to explore the issue with him.

The Respondents' Submissions

32. Mr. Hogan S.C., counsel for the respondents, argued that although the ORAC stage of the asylum process is inquisitorial or quasi-inquisitorial, the applicant is not merely a passive recipient of a decision. Pursuant to s. 11C of the Refugee Act 1996, as amended, he has a duty to co-operate in the investigation of his application and has a duty to furnish to the Commissioner as soon as reasonably practicable all relevant information in his or her possession, control or procurement.

33. Mr. Hogan argued that the issue of the applicant's nationality was a potentially significant matter at all stages of his application. The documentation furnished by the applicant to ORAC makes it clear that he was fully aware that his nationality was a live issue during his previous application in the U.K. and he must be taken to have known that it would be a live issue before ORAC. Knowing that this was a key issue, when the applicant was asked why he had not applied for Mozambican citizenship given that his father was born there, should have spurred him to fulfil his duty under s. 11C of the Act of 1996 and to provide a full answer. Instead he answered in a manner that was at best elliptical and at worst evasive.

34. Mr. Hogan argued that the requirements of fair procedures do not exist in a vacuum and while the ORAC officer might have further teased out the issue of nationality with the applicant this cannot be said to be a fundamental breach of fair procedures in circumstances where the applicant was aware that dual nationality was a live issue.

35. Mr. Hogan submitted that the Appendix 4 document is in substance very similar to the UNHCR document furnished by the applicant to ORAC with his questionnaire. He accepted that there are nuanced differences but argued that the applicant cannot be said to have been prejudiced by the failure of the ORAC officer to disclose the Appendix 4 document to him, given that he was already in possession of a document that contained precisely the same information.

Adequacy of a paper-based appeal to the RAT

36. Counsel for the applicant argued that judicial review should lie in this case because the applicant should not have to seek a remedy by way of a paper-based appeal. He argued that the applicant should be entitled to fair procedures and natural and constitutional justice at the first instance before the ORAC and this was denied to him. He was at pains to enforce the submission that he was not expressing a grievance with the quality of the s. 13 report (as was the case for example in *A.D. (Diallo) v. The Refugee Applications Commissioner* [2009] I.E.H.C. 77 where Cooke J. found that judicial review did not lie). He was complaining of "a fundamental and irremediable infringement of the entitlement to a fair procedure" which was recognised by Cooke J. in *Diallo* as the exceptional type case where judicial review rather than appeal might lie.

37. Counsel for the respondents argued that even if it is accepted that there had been a breach of fair procedures (which he did not accept), the court must consider whether that breach is of such significance that the ORAC recommendation ought to be quashed and the matter remitted for reconsideration or whether, in the alternative, the breach could be remedied on appeal. This is a case that is capable of being directly cured by way of a paper-based appeal, he argued, and the question of whether the applicant is entitled to apply for Mozambican nationality by descent is a question of pure law which could be determined without an oral hearing. It is a question of interpretation, counsel argued, which is in fact more properly suited to a paper-based appeal than to an appeal in which oral evidence is required and he submitted this is not a case that requires judicial intervention to do justice to the applicant.

THE COURT'S ASSESSMENT

38. This is a case where the applicant seeks an order quashing the decision of the ORAC rather than availing of his statutory right to an appeal before the Refugee Appeals Commissioner and in circumstances where he has no entitlement to an oral appeal before the RAT. In view of the recent line of clear authority on the inappropriateness of judicial review rather than appeal, I have approached the ORAC process and the s. 13 report in the light of that authority to ascertain whether this is one of the exceptional cases where "a fundamental and irremediable infringement of the entitlement to a fair procedure" has occurred and where *certiorari* appropriately lies.

39. This is a case where it was accepted from documents furnished to the U.K. immigration authorities and to ORAC that the applicant held a valid Zimbabwe passport and also that he had injuries consistent with his description of torture. However, while significant doubts were expressed about the applicant's credibility on a number of other substantial issues, the ORAC officer did not determine the case on that basis. Instead he found that "even if" the applicant's credibility were to be accepted, there was no need for Ireland to offer surrogate protection because the applicant could avail of the protection of the State of Mozambique. This was because either the applicant was himself a national of Mozambique because he was born there or the applicant's father was a national of Mozambique or could reacquire Mozambican nationality and the applicant could therefore apply for Mozambican nationality through his parentage. It is in that context that this Court must assess the submissions made.

40. The court has been referred to the case law, both in oral argument and in the written submissions, on when it is appropriate to seek judicial review of a decision of the ORAC rather than utilising the statutory appeal remedy before the Refugee Appeals Tribunal provided under the Refugee Act 1996. In particular, reference was made to the decisions of the Supreme Court in *Stefan v. The Minister for Justice, Equality and Law Reform* [2001] 4 I.R. 203 and *A.K. (Kayode) v. The*

Refugee Applications Commissioner (ex tempore judgment of Murray C.J., 28th January, 2009); and the decisions of Hedigan J. in *B.N.N. (Nganzunuj) v. The Minister for Justice, Equality and Law Reform & Anor* [2008] I.E.H.C. 308 and Cooke J. in *A.D. (Diallo) v. The Refugee Applications Commissioner* [2009] I.E.H.C. 77 (27th January, 2009), the leave stage in the present case (see *J.M. v. The Refugee Applications Commissioner & Another* [2009] I.E.H.C. 64); *T.T.A. (Akintunde) v. The Refugee Applications Commissioner* [2009] I.E.H.C. 215 (29th April, 2009) and *R.L.A. v. The Minister for Justice, Equality and Law Reform* [2009] I.E.H.C. 216 (30th April, 2009).

41. It seems to this Court that the application of the principles set out in those cases to the facts and arguments in this case involves a basic two-step assessment. First, the court must determine whether there has been a fundamental flaw or illegality such that a rehearing upon appeal before the Tribunal will be an inadequate remedy and that *certiorari* may lie. If it is found that *certiorari* may be granted, the court must then consider whether to exercise its discretion to grant the order. In this regard the question for the court in accordance with the principles outlined in *Stefan* at p. 217 is whether *certiorari* is the appropriate remedy to attain a just result. I now apply that two step approach.

(a) Has there been a fundamental flaw in the procedures?

42. The applicant's main complaint relates to the reliance by the Tribunal Member on a document appended to the s. 13 report at Appendix 4, *Citizenship Laws of the World*, which was not put to the applicant at his s. 11 interviews. Having examined the contents of that document and compared it with the content of the Constitution of Mozambique document furnished to ORAC, I am not satisfied that this constitutes a breach of fair procedures. I accept the respondents' argument that the applicant's own document appended to his ORAC questionnaire, containing Articles 11 to 25 of the Constitution of the Republic of Mozambique of 30th November, 1990, is very similar in content to the document relied on by the ORAC officer in relation to nationality provisions. In other words the law on nationality is, with some nuances, the same whether one looks at the *Law of Nationality of 1975*, upon which the information in the Appendix 4 document is based, or Articles 11 to 25 of the Constitution of 1990. Given the almost identical principles in both documents the applicant cannot be said to have been prejudiced by the failure of the ORAC officer to disclose to him the Appendix 4 document. I find no illegality or flaw in fair procedures here.

43. The issue which is the cause of some concern to this Court is not the content of the Citizenship Laws of the World document or the failure to disclose it to the applicant in advance of the s. 13 report but rather the failure of the ORAC officer to engage with the applicant on the question of his ability to "acquire" nationality of Mozambique. When questioned about his own nationality, the applicant repeatedly insisted that he was born in Harare and was a national of Zimbabwe and was not a national of Mozambique. In his questionnaire, he stressed his Zimbabwean nationality saying that "*Mozambique and Zimbabwe do not allow dual nationalities.*" While undoubtedly, some of his assertions relating to his place of birth were viewed with scepticism because of previous documents furnished during his U.K. application for asylum, especially the detailed history contained in the medico-legal report from the *Medical Foundation for the Care of Victims of Torture*, the fact remains that during his application in this jurisdiction he at all times asserted he was born in Salisbury / Harare and produced a birth certificate to that effect.

44. An oddity on that birth certificate is a statement in a box at the top right hand side of the document that "*In terms of the citizenship laws in force in Rhodesia the child named in this certificate is not a citizen of Rhodesia by birth.*" I can only speculate that if the document is what it purports to be, the fact that the applicant's father was recorded with an identity number meant that he was not a native of the then Rhodesia when his son the applicant was born.

45. Several but not all the birth certificates of the applicant's siblings state that their father was born in Mozambique. When asked "*According to your birth certificate your father is from Mozambique. COI states that anyone whose father is a Mozambique national can claim nationality of that country. Why did you not do so?*", the applicant answered that his father was born in Mozambique but was a national of Zimbabwe. No further questions were asked of him in that regard. He was not asked for instance how or why his father had become a national of Zimbabwe or whether there would be any impediment or consequence to his father acquiring Mozambique nationality. The applicant may well have assumed that his answer had been accepted as he has previously furnished a U.K. Home Office COI Report on Zimbabwe of April, 2006 which indicates that any claims to foreign citizenship, if held, had to be renounced by January, 2002 in order for the person to retain their Zimbabwean citizenship.

46. This Court is of the view that if the ORAC officer had taken the view that the acquisition of Mozambique nationality derived from his father's origins would or could debar the applicant from protection, then it was incumbent on the ORAC officer to tease out the issue a little further if only to establish the correctness of this view. If the officer had done so and been more forthcoming with his reasoning then of course the applicant had an obligation to establish that his father was not a citizen of Mozambique or that he would not be able to re-acquire citizenship of Mozambique or even that it would be unwise or unsafe for him to do so. As no further elucidation was sought, it seems harsh to describe his answer to an apparently arid line of questioning as 'evasive'.

47. Properly alerted, the applicant might have proffered an explanation as to why he or his father was not entitled to obtain or re-acquire citizenship of Mozambique. Even though two interviews were held at the stage when these issues were being investigated, there was an almost total absence of exploration of the issue of the obtaining of Mozambique nationality and scant regard was paid to documents furnished by the applicant on the constitutional provisions of re-acquisition of Mozambique nationality. Complete reliance was instead placed instead on a document compiled in 2000 / 2001, containing its own caveats. This it seems to me is a serious deficiency in the investigative process.

48. As this issue formed the basis of the negative recommendation it seems to me that there has been a fundamental flaw in the investigation process which amounts to a breach of fair procedures.

(b) Is *certiorari* the appropriate remedy to obtain a just result?

49. Denham J. in *Stefan* at p. 217 held that the court's assessment as to whether *certiorari* is the appropriate remedy to obtain a just result involves an assessment of all of the circumstances of the case including "*the existence of an alternative remedy, the conduct of the applicant, the merits of the application, the consequences to the applicant if an order of certiorari is not granted and the degree of fairness of procedures.*"

50. As the court has found that there has been a fundamental flaw in the applicant's entitlement to a fair procedure the next issue for consideration is whether the flaw is remediable at appeal. I believe not.

51. I am influenced by the fact that although much of the s. 13 report was taken up with aspects of the applicant's

evidence which were found not to be credible, the core reason given for the negative recommendation was the availability of protection in Mozambique by reason of the perceived ability of the applicant to obtain nationality of that country through his own or his father's birth right.

52. The court does not either ignore or minimise the many negative comments made regarding inconsistencies in some of the evidence given and in the documents furnished and outlined in the s. 13 report. However, as the negative credibility comments were not the reason for the failure of the application they provide additional reasons for disadvantage in his paper based appeal. It is also possible that the worsening humanitarian and political situation in Zimbabwe since the s. 11 interviews with the increasing outward flow of refugees to neighbouring countries may have affected a tightening of nationality laws in those countries. The applicant could find himself in the situation of making key arguments for the first time in a paper based appeal where he will have no opportunity to explain changes to the Tribunal Member. It may even be that he could satisfy the Tribunal Member on the legal issue of the non-availability of protection in Mozambique only to be rejected on other credibility issues. In those circumstances, it is certainly possible that where complex issues of nationality and general credibility will have to be addressed on paper, such an appeal would be an inadequate remedy for the error made in the first stage of the investigation. There will be no opportunity for the Tribunal Member to observe the applicant answering questions and no opportunity for the applicant to orally explain any of the discrepancies highlighted in the s. 13 report.

53. Denham J. in *Stefan*, Hedigan J. in *Nganzunuj* and Cooke J. in *Diallo* considered that the absence of the right to an oral hearing may be a factor to be taken into account when it is considered whether the defect identified at the ORAC stage is remediable on appeal. As was noted by Cooke J. at the leave stage in this case:-

"[...] to come within the category of exceptional cases in which certiorari should issue, it is not sufficient to point to an error or an unfairness on the part of the Commissioner in assessing credibility or evaluating information. A substantial ground must be advanced for the existence of some fundamental flaw or illegality in the report such that a rehearing, whether oral or on paper only, will be inadequate to remedy it or which is such that, even if capable of being cured by an appeal, would result in a material issue not being reheard but being heard for the first time upon the appeal."

54. Cooke J. held that the absence of an oral hearing in these circumstances is "*clearly a material factor bearing upon the ability of the appeal adequately to cure the potential unfairness at the first stage hearing*". I agree with this view. There is in my view a real danger that the defective aspect of the investigation at the ORAC stage in this case may not be capable of remedy by a paper based appeal.

Conclusion

55. It is clear that the High Court must respect the statutory appeal process and refrain from intervening where the appeal is an adequate remedy. I adopt the reasoning expressed by Cooke J. in *Akintunde* that the court:

"should confine itself to the necessary correction of significant illegalities in the first stage investigation by the Commissioner when it is indispensable to do so in order to preserve the effectiveness, fairness and integrity of the appeal that is otherwise available to the Tribunal."

56. I am satisfied that this is a case where the court should grant relief. It seems to me that the breach of fair procedures in the process by which the Commissioner reached his decision is capable of having continuing adverse effects on the applicant in the course of the appeal and I am satisfied that the defects in the first instance investigation cannot be cured on appeal. In the light of the foregoing, I am satisfied that an order of *certiorari* is the appropriate remedy to obtain a just result. I therefore make an order quashing the decision of the ORAC dated the 5th February, 2008 and direct that the case be remitted to ORAC for a fresh evaluation before a new authorised officer.