Neutral Citation Number: [2012] IEHC 231

THE HIGH COURT

[2009 No. 423 J.R.]

BETWEEN/

HO (AN INFANT SUING BY HER MOTHER AND NEXT FRIEND, AAO)

APPLICANTS

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND REFUGEE APPLICATIONS COMMISSIONER (WASTED COSTS APPLICATION)

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on the 13th June, 2012

1. This is an application brought by the respondents pursuant to 0. 99, r.7 for what has come to be known as a wasted costs order against the applicant's solicitors, Burns Kelly Corrigan, in respects of the costs incurred by the Chief State Solicitor's Office from the period from the date the case was set down for hearing in June, 2009 to the date of the scheduled hearing on 16th October, 2009, at which point the proceedings were withdrawn.

2. The applicant is now a seven year old Nigeria national who arrived in the State on 23rd December, 2008. She applied for asylum on 9th March, 2009. These judicial review proceedings were commenced on 22nd April, 2009, when the applicant asylum seeker challenged a decision of the Office of the Refugee Applications Commissioner to the effect that she had not established a well grounded fear of persecution. The applicant maintained - though her mother and next friend - that she was entitled to asylum by reason of the threat of female genital mutilation in Nigeria.

3. So far as the judicial review was concerned, her contention, in essence, was that the Commissioner had breached fair procedures by arriving at conclusions regarding the availability of State protection in Nigeria by reference to material which had not been disclosed to the applicant's mother. This application in turn presented the vexed question of whether a litigant in the position of the applicant was obliged to appeal to the Refugee Appeal Tribunal or whether, alternatively, there were circumstances in which the applicant could directly challenge the decision of the Commissioner in judicial review proceedings.

4. On 9th October, 2008, Hedigan J. gave judgment in *BNN v. Refugee Applications Commissioner* [2008] IEHC 308, [2009] 1 I.R. 719. In that judgment Hedigan J. held that, absent exceptional circumstances, such a decision was not amenable to judicial review and the appropriate response was to appeal to the Refugee Appeals Tribunal. In *Kayode v. Refugee Appeal Tribunal* the Supreme Court delivered an *ex tempore* judgment on 28th January, 2009, dealing with this issue. This judgment stressed that intervention by way of judicial review was exceptional, albeit (as we shall presently see) that the challenge in that case was really based on reasonableness and rationality.

5. This principle was followed by a series of subsequent decisions of this Court in cases such as *A. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 215, *A. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 219. In the light of these decisions the respondents indicated to this Court (Hon. Mr. Justice McGovern) on 15th June, 2009, that they would allow applicants who sought to challenge decisions of the Commissioner at first instance to strike out their cases with no orders as to costs. There was a further direction that those litigants who maintained that they were entitled to maintain their judicial review challenges in respect of the Minister's decision (the recent case-law notwithstanding) and who did not wish to take up the State's offer were directed to reply to the Chief State Solicitor's Office. At this point there were some 282 cases involving the Commissioner awaiting hearing in the court lists.

6. The applicant's solicitor's responded by letter dated the 8th July, 2009. In that letter the applicant's solicitors stated:-

> "We point out that it is our view that this case may be distinguished in the various recent cases relating to challenges by way of judicial review to decisions of the Refugee Applications Commissioner. We refer to the decision of the High Court cases of [*BNN*], *Diallo, Akintunde, Ajoke, Nnauma* and the Supreme Court decision in the case of *Kayode.* As we see it, the common factor running through these cases is that there was no finding made that any of the decisions in those cases were in breach of fair procedures and natural justice or in breach of any other requirement of the law."

7. The letter writer went on to say:-

> "Furthermore, we are of the view that any comments of the High Court contained in the above cases which could be interpreted to mean that judicial review should not be granted in cases where there had been a breach of natural justice and fair procedures (and we do not concede that there are any) would be necessarily obiter given the findings that there is no such breaches. Indeed, this was the view taken by the respondent in their written submissions in the applications made for a certificate to appeal in the cases of *Nganzumu* and *Nnamua*."

8. The letter writer continued by referring to the breaches of fair procedures alleged in this case and concluded:-

> "The applicant's claim was not properly considered leading inevitably to a situation where, if appealed at this juncture, the applicant's claim would effectively be heard only for the first time. We feel that there has been a material illegality in failing to apply the [Subsidiary Protection] regulation[s]...which would be incapable or unsuitable to be dealt with on appeal. It is our view that, individually or cumulatively, these complaints (if upheld) or some of them may take this case into the category of cases where the discretion of the court might be exercised in favour of judicial review and we are therefore not in a position to advise our client that it would be in her best interest to accept the offer that the case be withdrawn with no order as to costs and, accordingly on our client's instructions same is rejected."

9. The respondents maintain that this letter did not explain why the present application did not fall within the *Kayode* principle or, perhaps more accurately, any exceptions to it. At all events the case was called on for hearing at the list of fixed dates on the 23rd July, 2009. It was fixed for hearing on the 16th October, 2009. The applicants filed legal submissions in September, 2009 and the

respondents maintain that those submissions did not address the issue as to why this case was "an exception to *Kayode - BNN principles*".

10. The next development was that on the 9th October, 2009, the applicant's solicitors sought an adjournment of the case on the basis of considering an appeal to the Supreme Court by reference to certain (relatively similar) cases which had been heard in the recent past, most recently the decision of Cooke J. in *U 0 v. Minister for Justice, Equality and Law Reform and the Refugee Applications Commissioner* [2009] IEHC 451. The respondents dispute the relevance of the decision in *UO*. and maintain – effectively - it was being used a pretext to abandon the present proceedings. This letter referred to the judgment which had been delivered by Cooke J. in *UO*. that very morning, and the letter writer continued:-

> "No written judgment is yet available and our counsel applied for a stay on the order for costs pending a consideration of the judgment and particularly in order for us to consider same in regard to the possibility for applying for a certificate to enable our client to appeal. The stay was granted for a period of 21 days.
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> At this juncture we are unsure as to whether an application we have made and we wish to consult with Senior Counsel as soon as a copy of the judgment is available.
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> We believe that certain findings in relation to the application of the provisions of S.I. No. 518 of 2006 will have considerable ramifications in respect of the above cases and that it is unrealistic to proceed with hearing same until it has been decided whether to seek to appeal same and, if so, the result of any such appeal. It is in these circumstances that we would wish to adjourn these cases and we would be obliged if you would indicate whether you consent to such an application."

11. At the hearing on the 16th October, 2009, Ms. Justice Clark indicated that she had read the legal submissions and indicated to counsel for the applicant that there did not appear to be any issue in the case which had not really been decided. Counsel for the applicant indicated that this appeared to be the case and sought an adjournment. Counsel for the respondents opposed the application for an adjournment and Clark J. accordingly refused to exceed to the applicants request. At that point counsel for the applicant withdrew the case.

12. In the event, all decisions on the question of costs were ultimately adjourned by Clark J. pending the respondents' application under 0. 99, r.7 and the parties were agreed that it fell to me to make all relevant costs orders. There is no doubt at all but that there are no grounds which would justify the court's declining to make an order for costs in favour of the respondents. There remains the more difficult question of whether this is case which would justify the court exercising its exceptional jurisdiction pursuant to 0. 99, r. 7.

13. This provides in material part:-

> "If in any case it shall appear to the Court that costs have been improperly or without any reasonable cause incurred or that by reason of any undue delay in proceeding under any judgment or order or of any misconduct or default by any solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the Court may call on the solicitor of the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the solicitor and his client and also (if the circumstances of the case shall require) why this solicitor should not repay to his clients any cost which the client may have been ordered to pay to any other person and thereupon make such order as the justice of the case may require."

14. It is to a consideration of this issue to which we may now turn.

The jurisdiction to make wasted costs order

15. The foregoing is, accordingly, the general context by reference to which this wasted costs application procedure falls to be measured. In considering this question, it must be recalled, of course, that it is a pure fallacy to suggest that all (or even a significant majority of) litigants will follow the advice of their lawyers. It is for the lawyer to advise and the client to decide. Once the client has decided to continue with the litigation, it becomes the task of the advocate lawyer - be he or she a solicitor or a barrister - to put the best possible case before the court for that client. It is for this reason that the mere fact that a hopeless case is pursued will not in *itself* justify the making of a wasted costs order: see, *e.g.*, the comments of Sir Thomas Bingham MR in *Ridehalgh v. Horsefield* [1994] Ch. 205,234:-

> "Legal representatives will, of course, whether barristers or solicitors, advise clients of the perceived weakness of their case and of the risk of failure. But clients are free to reject advice and insisted that cases be litigated. It is rarely, if ever, safe for a court to assume that a hopeless case is being litigated on the advice of the lawyers concerned. They are there to present the case; it is....for the judge and not the lawyers to judge it."

16. Naturally, the presentation of the case must be done with integrity and by reference to the highest ethical standards. Counsel may not mislead the court and assert the truth of something he or she knows to be false (*cf* Rule 5.3 of the Bar Council Code of Conduct). In civil proceedings it is also the duty of counsel to draw the court's attention to all relevant statutory provisions and authorities, even though they be against his or her own client's interest (*cf* Rule 5.8 of the Bar Council Code of Conduct). Similar principles apply, *mutatis mutandis*, to the instructing solicitor.

17. Nor would it be in the public interest that the creativeness and inventiveness of the legal profession should be stifled or that much cherished independence thwarted by the threat of a wasted costs order. If that were so, then there would be a real danger that the wasted costs procedure - or even the threat of it - would become an instrument of oppression in the hands of the wealthy or the powerful or the vested interests who, for example, feared legal change being brought about by ground-breaking litigation.

18. This is especially true in the context of asylum law, since, as Cooke J. observed in OJ

v. Refugee Applications Commissioner [2010] IEHC 176, [2010] 3 I.R. 637, 644:-

> "The administration of justice and the standing of the asylum process requires that legal representation is available to those claiming asylum and that experienced and competent practitioners should be willing to undertake that difficult work."

19. It must also here be recalled that our legal system is a living organism which is constantly being refreshed by new thinking and

new ideas. If I may freely adapt the famous words of Denning L.J. in his celebrated dissenting judgment in *Candler v. Crane Christmas & Co.* [1951] 2 K.B. 164, in the past timorous judges from time to time have taken refuge in comfortable orthodoxies and dogmatic certainties. Nevertheless, unless a legal system is to atrophy and, ultimately, die, the orthodoxies and certainties beloved of one generation of judges must - and will - give way to a range of factors, such as societal change, new legal and other thinking and the dynamics of on-going litigation. This, at least, has been our experience since this Court and, more importantly, the Supreme Court, came into existence in June 1924.

20. Of course, as Article 35.2 of the Constitution makes clear, the independence of the judiciary is subject to the law, a concept which in this context includes established legal principle and binding precedent. But the judge must always be open to the possibility that the hitherto accepted conventional wisdom of the bar, bench and legal academy is wrong or, at least, that fundamental and timeless legal principles have been misapplied. Or, as Lord Macmillan put it in *Donoghue v. Stevenson* [1932] A.C. 532, 619:-

> "...the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life."

21. All of this means that the courts must be especially wary of retrospective endeavours to saddle solicitors with wasted costs orders simply because the case has been lost. Obvious cases such as misconduct, lack of *bona fides* and a vexatious desire to harass and oppress one's opponent by litigation aside, the jurisdiction to impose a wasted costs order must otherwise be confined to those cases where it is obvious that the litigation is so obviously pointless. The jurisdiction under 0. 99, r. 7 has, of course, been comprehensively examined by Finnegan P. in *Kennedy v. Killeen Corrugated Products Ltd.* [2006] IEHC 385, [2007] 3 I.R. 561 and by Cooke J. in *OJ v. Refugee Applications Commissioner* [2010] IEHC 176, [2010] 3 I.R. 637 and *Idris v. Legal Aid Board* [2009] IEHC 596. As one would expect, these cases make it plain that the jurisdiction must be exercised sparingly.

22. It is clear from *Kennedy* that the jurisdiction to make the wasted costs order against the solicitor for the losing party is contingent on either the solicitor "being guilty of misconduct in the sense of a breach of his duty to the court" or "at least of gross negligence in relation to his duty to the court": [2007] 3 I.R. 561, 568. As Finnegan P. noted in *Kennedy* the fact that the solicitor in that case was acting on the advices of counsel was a major factor in the court's decision that he could not properly be adjudged to have been guilty of gross negligence.

23. In *OJ* the applicants were two young Nigerian teenagers who arrived in the State in July, 2007 to be re-united with their mother and sibling. As a result of what appears to have been a misunderstanding, an application was made to the Refugee Applications Commissioner for asylum on behalf of the two teenagers. It appears that they never sought asylum at all, but rather wished to be re-unified with their mother. For reasons which remain obscure, they nonetheless persisted in commencing judicial review against the Refugee Applications Commissioner contending that they were entitled to a declaration that they had made a valid application for family unification status before the Commissioner.

24. Cooke J. held that these proceedings were entirely misconceived and should never have been commenced. He continued:-

> "Practitioners have also, however, a duty to the court to ensure that the right of access to the court is not abused by vexatious, wasteful or speculative litigation. There is no especially when it has no purpose other than that of prolonging the process and postponing a final determination of the asylum application.
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> Whenever the Court has good reason to conclude that there has been a failure in the discharge of this latter duty such that proceedings have been unnecessarily commenced or wastefully continued, it should be made clear that recourse will be had to 0. 99, r. 7 in order to protect the integrity and effective operation of the asylum process in the interests of the proper administration of justice and of the interests of those genuinely in need of protection and whose determination is likely to be delayed by abuses of process in other cases."

25. While Cooke J. indicated that some allowances might reasonably have been for the initial stages of the litigation given the "short periods available for taking such proceedings", nevertheless:-

> "....the inappropriateness or futility of those steps should have become obvious to the legal representatives very shortly thereafter had serious consideration been given to the implications of the instructions from the client.
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> Had the proceeding been withdrawn in the spring or early summer of 2008 before the respondents had been put to the expense of contesting the proceeding and preparing for a hearing, it would have been difficult to justify recourse to Order 99, rule 7. The gravamen of the present case, in the Court's judgment, lies in the fact that, in spite of the lapse of time between July, 2008 and October, 2009; of the deliberate examination of the basis of claims called for by the Court's direction to provide certificates in cases against the Commissioner; and the protests from the respondents as to the lack of purpose in the proceeding, no serious attention appears to have been given to the legal basis and practical utility of the proceeding at any stage. A decision was taken to proceed and a certificate to do so was given. A date for hearing was sought. It was only on 24th January, 2010 after that date had been fixed and the hearing was imminent, that the claim against the Tribunal was withdrawn and on the basis of a reason that could and should have been obvious from the outset.
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> In pressing the Court for the order sought under rule 7, and relying upon the approach to that rule expounded by Finnegan P. in *Kennedy v. Killeen Corrugated Products Ltd.*, counsel for the respondents emphasised that it was not suggested that there had been "gross misconduct" on the part of the solicitor in the present case. He insisted, however, that costs had been necessarily incurred by the respondents without any reasonable cause and that the costs of appearing on various dates and then at the hearing were effectively wasted in circumstances where the legal representatives of the applicant had been afforded numerous opportunities to reconsider the proceeding and to withdraw it before such costs were incurred by the respondents.
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> The Court agrees that this ought not to be characterised as a case involving gross misconduct in the sense of professional misconduct as such. There has however been a clear default in the discharge of the duty owed by legal practitioners to the Court in commencing and continuing the proceeding. No minimal consideration appears to have been given to the legal objective sought to be achieved by the proceeding. No thought appears to have been given to whether the application could have any bearing or effect upon an application for family reunification when the applicants' mother was not a refugee. No acceptable explanation has been given as to why the proceeding was commenced and especially as to why it was pursued in the light of the applicants' patent lack of a claim to be asylum seekers and thus the irrelevance of the asylum process to their situation."

26. In *Idris*, the applicant had commenced proceedings against Legal Aid Board whereby she sought the transfer of a case file from her former solicitors. As Cooke J. acknowledged, if a client facing deportation proceedings was not in possession of these documents, "it was reasonable to seek their transfer from their previous legal representative". Yet the Board maintained that it had already supplied the entirety of the file. As Cooke J. then explained:-

> "In the written legal submissions lodged on this application, it is sought to justify this decision by saying that other documents typically found on an RLS client file had not been forthcoming such as attendance notes, notes of the Tribunal hearing, and opinions of counsel. In the face of the Board's sworn testimony that the full file had been handed over, the Court has difficulty accepting this explanation. No detailed reason has been advanced as to the precise basis for the claim proposed to have been made by way of challenge to the validity of the deportation orders which was dependent upon the existence or obtaining of such items and would not have been possible by reference to the documents already furnished. It is not unreasonable to suspect that the decision was at least partly motivated by a desire to keep the proceeding alive so as to act a vehicle for more extended reliefs against the deportation orders, an interpretation that may be thought justified by the subsequent application to amend the grounds.
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> In the Court's judgment, there was no valid reason for incurring further costs in pursuing the application against the Board and no interest to be gained for the applicants; and by doing so, wasted costs were thereby incurred. Nevertheless, the Court is inclined to the benign view that this was a misjudgement rather than serious misconduct or gross negligence and it does not therefore meet the threshold indicated by Finnegan P. in the *Kennedy* case. As the learned President did in that case, the Court takes into account the likelihood that the misjudgement may have been attributable to the advice of counsel upon which the solicitor was acting.
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> Therefore, with some hesitation, the Court will not accede to the application made under 0. 99, r. 7, in this case and the normal order for costs will be made."

27. It is thus clear from *Idris* that the mere fact that there has been error or misjudgement on the part of a legal representative cannot in itself justify recourse to 0. 99, r.7.

The basis of the present application
28. Here it will be recalled that the gist of the respondents' case - as evidenced from the replies to particulars dated 18th March, 2010 - is that the judicial review proceedings were governed by the decisions in *BNN* and *Kayode*. It is then contended that the solicitors for the applicants "instituted and continued those proceedings without regard to the settled case-law and the rulings and directions of the judges supervising the asylum list". It is said that the solicitors' correspondence "failed to deal meaningfully with the [State's offer] contained in the letter of 15th June, 2009". In summary, therefore, the case is that the applicant's solicitors pursued pointless litigation after June 2009 when it was obvious that she could not succeed.

The decision in *BNN*
29. Before examining the merits of this contention it is first necessary to examine what Hedigan J. actually said and decided in *BNN* In that case the applicant claimed that the Commissioner's decision was flawed, in part because of a breach of fair procedures, but principally because of a range of other procedural flaws, such as a failure to recall the applicant (albeit that this was also linked to the question of fair procedures). So far as the issue of whether the applicant should have exhausted his appellate remedies was concerned, Hedigan J. observed ([2009] 1 I.R. 719, 732) that:-

> "It is well established that the existence of an alternative remedy does not per se prevent the High Court from granting *certiorari.* Rather, it is a factor that must be considered by the Court. As stated by Denham J. in *Stefan v The Minister for Justice, Equality and Law Reform* [2001] 41.R. 203, "[i]t is clear that whilst the presence of an alternative remedy, an appeal process, is a factor, the court retains jurisdiction to exercise its discretion to achieve a just solution."

30. Hedigan J. continued thus:-

> "Guidance as to how the Court is to approach the question of alternative remedies may be gleaned from the decided case-law on the subject. While the law in this area has recently been subject to refinement, particularly with respect to its application in the area of asylum and immigration law, the decision of the Supreme Court in *The State (Abenglen Properties Ltd) v Dublin Corporation* [1984] I.R. 381, remains particularly instructive. In that case, O'Higgins J. stated that "while retaining always the power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate". In *Abenglen*, Henchy J. - with whom Griffin and Hederman JJ. concurred - noted that in the Planning Acts, the legislature has envisaged "the operation of a self-contained administrative code, with resort to the Courts only in exceptional circumstances". He further held, in this regard, that:-
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> > "[W]here Parliament has provided a self-contained administrative and quasi judicial scheme, postulating only a limited use of the Courts, *certiorari* should not issue when, as in the instant case, use of the statutory procedure for the correction of error was adequate (and, indeed, more suitable) to meet the complaints on which the application for *certiorari* is grounded."

31. Hedigan J. then continued:-

> "The statutory scheme established by the Oireachtas in the area of asylum and immigration may be compared to that established under the Planning Acts and the observations of Henchy J. may be said to apply thereto by analogy.....
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> The Courts must, of course, engage in the weighing of the relative merits of an appeal as opposed to judicial review, as is required under the test first established in *McGoldrick v An Bord Pleanála* [1997] 1 IR 497. The weighing of the relative merits -both in asylum cases and otherwise- is, in the words of O'Leary J. in *Kayode v Refugee Applications Commissioner* [2005] IEHC 172, "a matter for the Court's discretion and will depend on the facts of the case." Guidance may be gleaned, however, from the significant number of asylum cases in recent years in which the Court has refused to grant *certiorari* (or leave) on the basis that the matters raised were of the type that might be raised in the course of an appeal, relating - by and large - to the quality of the decision rather than the defective application of legal principles..... .

Decision

> It is clear in the light of this series of recent decisions that it is only in very rare and limited circumstances indeed that judicial review is available in respect of an ORAC decision. The investigative procedure with which ORAC is tasked must be properly conducted but the flaw in that procedure that entitles an applicant to judicial review of an ORAC decision must be so fundamental as to deprive ORAC of jurisdiction. The Courts, the applicants themselves, and the general public have a right to expect that no such fundamental flaw should ever occur in such an application. An applicant must demonstrate a clear and compelling case that an injustice has been done that is incapable of being remedied on appeal to the RAT. If such a clear and compelling case is not demonstrated, the applicant must avail of the now well established procedure that has been set up by the Oireachtas, which provides for an appeal to the RAT.
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> By way of example, I would note that a clear and compelling case that an injustice at ORAC is incapable of being remedied on appeal to the RAT might be demonstrated where the ORAC officer's findings include one or more of the findings specified in section 13(6) of the Refugee Act 1996 (as inserted by section 7(h) of the Immigration Act 2003). These findings include, *inter alia*, that the applicant failed to show a minimal basis for the contention that he or she is a refugee; made false, contradictory, misleading or incomplete statements leading to the conclusion that the application is manifestly unfounded; or failed to make an application as soon as reasonably practicable after arrival in the State, without reasonable cause. Any appeal against an ORAC report that includes such findings must be determined without an oral hearing, in accordance with s. 13(5) of the Act of 1996. As noted by Clarke J. in *Moyosola v Refugee Applications Commissioner* [2005] IEHC 218, "[t]he combined effect of sections 13(5) and 13(6) is to impose significant limitations on the extent of the appeal that will be available to an applicant to the RAT." For that reason, an injustice complained of may be incapable of being remedied on appeal and this may constitute one of the rare and limited circumstances where the applicant may be entitled to judicial review of an ORAC decision.
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> The procedure established by the Oireachtas envisages in the first place an application to ORAC. It is the role of that body to conduct an administrative investigation to determine if the State should extend its assistance and protection to a person in flight from danger. It is imperative in the interest primarily of such persons that the State provides a decision in as expeditious a manner as is possible, consistent with a fair and thorough investigation. If ORAC makes a positive recommendation, then the matter is concluded. If ORAC makes a negative recommendation, then the system put in place by the Oireachtas provides for an appeal to the RAT. In situations where s. 13(5) and s.13(6) of the Act of 1996 do not apply, this stage of the process provides a dissatisfied applicant with a more elaborate procedure involving legal representation and the right to an oral hearing.
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> The Court is of the view that the existence of a statutory right of appeal to the RAT - with the exception of cases where ss.13(5) and 13(6) of the Act of 1996 apply - is a fundamental reason not to grant judicial review. This Court should not intervene until the statutory asylum process has been completed. To do otherwise would be to usurp the authority that has been granted to the RAT by the Oireachtas. The Oireachtas has put in place a process that aims to ensure that asylum applications are decided upon with all due expedition. The purpose of this process will necessarily be defeated if each and every applicant can issue judicial review proceedings before the process has been exhausted. Judicial review proceedings can take a year or longer to come on for hearing. This has the effect that applicants are deprived of a definitive and expeditious decision, and are thereby left in a legal limbo, unable to progress their lives. This is an undesirable state of affairs, which does justice to no-one."

32. As I read the judgment, Hedigan J. certainly did not exclude the possibility of judicial review of a Commission decision on an *ex ante* basis. Indeed, in view of the case-law of the Supreme Court in decisions such as *Stefan, Tomlinson v. Criminal Injuries Compensation Tribunal* [2005] IESC 1, [2006] 41.R. 321 and *O'Donnell v. Tipperary (South Riding) County Council* [2005] 2 I.R. 483 it would not have been open to this Court to prescribe such a rule, although, as it happens, the latter two decisions do not appear to feature in the judgment in *BNN*. As Denham J. observed in *Tomlinson*:-

> "The existence of the alternative remedy does not prevent the Court from exercising its discretion as to whether or not to grant judicial review. While a court would lean towards requiring that the remedies available under the scheme be exhausted, the ultimate decision depends on the circumstances of the case. In this case, a question of law going to the jurisdiction of the respondent to make the deduction [from a particular criminal injuries award] is the issue, the fact that it is a question of law is a factor in favour of a decision by a court, and that it is appropriate that it be decided by a court of law. In addition, given the views on this question of law previously expressed by the respondent, there would appear to be an apparent bias (which of course is not to say that a three member Tribunal would actually be biased) in returning the question to the respondent for a decision.
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> In this case, the core issue is the jurisdiction of the respondent to make the decision, thus the right of an alternative remedy is not so weighty a factor as to exclude the applicant from the court. In all the circumstances, in the context of common sense, the more just remedy is that of judicial review. To obtain a determination on the issue, which is a question of law going to the jurisdiction of the respondent, the just result is to proceed by way of judicial review."

33. In *0'Donnell* the Supreme Court held that it was more appropriate in the circumstances of that case that the disciplined fire officer maintain his appeal to the Employment Appeals Tribunal rather than pursue judicial review proceedings. A particular factor here was that Denham J. stressed that the procedures adopted were fair, that the applicant had legal representation and that there was no question of bias: see [2005] 2 I.R. 483 at 494. The implication here perhaps is that the court might have been persuaded to take a different view on the judicial review question had the case regarding fair procedures been stronger on its own facts.

34. Quite, apart, therefore from the special and specific case of where the Commission has invoked the provisions of s. 13(5) and s.13(6) of the Refugee Act 1996 - and which was acknowledged as such by both Clarke J. in *Moyosola* and by Hedigan J. in *BNN* - so that the applicant has no entitlement to an oral hearing, there may be particular cases where the Commission has breached fair procedures or otherwise erred in law which would justify recourse by way of judicial review, even though the remedy of appeal to the Refugee Appeal Tribunal is also available. This, indeed, is illustrated by a decision of Clark J. delivered on 29th July 2009 - and which was thus contemporary to the matters at issue so far as the present application is concerned - in *M v. Refugee Applications Commissioner* [2009] IEHC 352. Here the Commissioner had found that the applicant was not in need of international protection because he was entitled to avail of Mozambiquean citizenship through the paternal line. Clark J. found that there had been a breach of fair procedures in that the matter had scarcely been raised with the applicant during the course of two interviews and even though the decision maker had not properly investigated the citizenship issue. Clark J. further held that an appeal was an inadequate remedy, since the Tribunal would not have had the benefit of an oral hearing whereby any of the discrepancies in the Commissioner's s. 13 report could have been properly explored. In these circumstances, Clark J. granted *certiorari* to quash the Commissioner's decision.

35. It is true that cases such as *M* are exceptional and rare, but as further exemplified by the Supreme Court's decisions in *Stefan* and

Tomlinson, they do exist.

The Supreme Court decision in *Kayode*
36. Nor is this analysis altered by a consideration of *Kayode*. In that case the essence of the complaint was that the appellant's mother had been granted refugee status, whereas she herself had been denied status by the Commissioner in circumstances which were said to be similar or, at least, broadly similar. The challenge to the Commissioner's decision was essentially on rationality and reasonableness grounds going to "the quality of the decision" and this was the basis on which the Supreme Court held that O'Leary J. "was entitled in law to exercise his discretion to refuse the application in a case such as the present." *Kayode* is certainly not an authority on the question of whether an applicant who challenges a first instance decision on fair procedures grounds is thereby debarred from seeking a judicial review of that decision.

General conclusions
37. If we endeavour to sum up at this juncture, it may therefore be said that while the governing principles themselves are straightforward, their *application* to the facts of a given case may well be problematic and, candidly, not all of the case-law on this topic since the Supreme Court's first comprehensive examination of this question in *The State (Abenglen Properties Ltd.) v. Dublin Corporation* [1984] I.R. 381 has been perfectly consistent. Indeed, it may justly be observed that few topics have proved to be more vexed and uncertain that the question of whether the availability of a statutory appeal ought to deprive an applicant of the right - whether as a matter of jurisdiction or discretion - to seek judicial review of a decision which he contends is *ultra vires*. It is clear from the Supreme Court's decision in *Tomlinson* (and, for that matter, *O'Donnell*) that irrespective of what either O'Higgins C.J. or Henchy J. said or intended in *Abenglen Properties* on this topic, there is no such jurisdictional bar. The question is, therefore, one of discretion, to be applied on a case by case basis.

38. The very fact, however, that the issue falls to be determined by discretionary principles rather than by reference to some *ex ante* jurisdictional barrier tells heavily against the successful litigant who also wishes to invoke the exceptional 0. 99, r.7 jurisdiction on the ground that the litigation was pointless and destined to fail. In the present case, the applicant had a tenable argument that the case fell within one of the discretionary grounds justifying intervention by way of judicial review in respect of a first instance administrative decision. Given the high hurdle which such an applicant would in all likelihood face, the prospects of success were admittedly not great, but when viewed by reference to what Denham J. expressly said in *Tomlinson* and impliedly so observed in *0'Donnell*, it cannot be said that the prospects were hopeless to the point where the further continuation of the litigation was plainly wasteful and vexatious.

39. Naturally, the fact that the proceedings were abruptly withdrawn on the morning of the hearing might, perhaps, be thought to suggest otherwise. This decision was, however, almost certainly taken in view of the judicial comments to the effect that the case was not particularly strong and in circumstances where discretion seemed the better part of valour. But it cannot be said that the case was untenable and certainly not in the sense of being wasteful and vexatious.

40. In any event, the decision in *UO* did at least have some relevance to this issue, not least having regard to the argument regarding the Subsidiary Protection Regulations advanced by Messrs. Burns Kelly Corrigan in their letter of July 10th. Here the contention was that the European Communities (Eligibility for Protection) Regulations 2006 imposed a particular obligation on the authorised officer at first instance, such that a breach of that obligation was incapable of being remedied on appeal. Cooke J. addressed this argument by saying that mere error on the part of the officer did not render it so "fundamentally unlawful for want of compliance with the Regulations as to require it to be quashed because it is incapable of being remedied on appeal".

41. Nor can I agree at all with the suggestion made by the respondents in their replies to notices for particulars that the letter from Burns Kelly Corrigan of 10th July, 2009 did not identify how this case had "survived the principles" established in *BNN* and *Kayode* or that the applicants had thereby "failed to deal meaningfully with any issue outstanding." The letter-writer referred to those decisions and stressed (correctly) that there was no finding "that any of the decisions were reached in breach of fair procedures or natural justice or in breach of any other requirement of the law". The letter writer went on to say (again, correctly) that any comments of this Court in those to the effect that had there been a breach of fair procedures (and the letter writer did not concede that there had been any) "would be necessarily *obiter* given the findings that there were no such breaches." The letter writer then went to say that the contentions advanced in the present case did relate, *inter alia*, to breaches of fair procedures such that, if accepted, the applicant's claim "would effectively be heard only for the first time" and the letter concluded with the argument that this case accordingly fell into the category of exceptional cases "where the discretion of the Court might be exercised in favour of judicial review".

42. One does not have to agree with every word of the letter writer's contentions to accept that this was a perfectly tenable response to the respondents' letter of 15th June. The letter writer skilfully analysed the recent case-law and provided a sophisticated response in order to demonstrate why cases such as *BNN* and *Kayode* were not dispositive of the applicant's case. I cannot, with great respect, accept that this letter was not a meaningful response or that it somehow flouted this Court's directions and there is, frankly, no basis for suggesting otherwise.

43. It is true that the applicant's written submissions filed on 14th September, 2009 (of which complaint is also made) do not refer to *BNN* or *Kayode* or the other recent decisions of the High Court dealing with the alternative remedy issue. They do, however, refer to well established Supreme Court case-law such as Stefan and *Buckley v. Kirby* [2000] IESC 18, [2000] 3 I.R. 431. They might also with advantage have referred to other more recent Supreme Court authority such as *Tomlinson, 0'Donnell* and Clark J.'s decision in M. (assuming that the latter decision had been available). But the fact that the submissions did not refer either to adverse - but possibly distinguishable - authority from this Court on the question or other - somewhat more favourable - Supreme Court authority on point is, at best, a reflection on the quality of the submissions. It could not seriously be suggested, however, that the fact the written submissions can be critiqued on this basis could in itself form the basis of an application based on 0. 99, r. 7.

44. It follows, accordingly, that there is simply no appropriate basis on which a wasted costs order could possibly be made against the applicant's solicitors. While I will naturally award the respondents the costs of the proceedings against the applicant, I will refuse to make the wasted costs order sought pursuant to 0. 99, r.7 against the applicant's solicitors for the reasons just stated.