Neutral Citation Number: [2007] IEHC 300

THE HIGH COURT
JUDICIAL REVIEW

[2006 No. 332 J.R.]

BETWEEN

K. M.

APPLICANT

AND
REFUGEE APPEALS TRIBUNAL,
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

AND
THE HUMAN RIGHTS COMMISSION

NOTICE PARTY

Judgment of Mr. Justice John Edwards delivered on the 18th day of July, 2007.

Background Facts
1. The applicant was born in Ibadan, Oyo State, Nigeria, in 1970. He is of Yoruba ethnicity. The applicant's father, who died when the applicant was 15 years old, was the elder of the Osugbo cult. The applicant contends that this cult practises ritual human sacrifice and that his father had sacrificed the older brother of the applicant when initiated into the cult. The applicant was aware since his father's death that he was expected to join the cult, but at that time this was not of great concern to him. However, following his marriage and when his wife was five months pregnant, cult members called to the applicant on three occasions to remind him of his duties in relation to initiation and sacrifice. He believed that they wanted him to sacrifice his child when he or she was born. The applicant fled to the Republic of Benin in February, 2005. He subsequently went to France in July, 2005. He claims that while in France he was informed that his wife and child were in Ireland and he travelled to Ireland on the 4th September, 2005 and upon arrival claimed asylum on the basis that he had a well founded fear of being persecuted for reasons of religion. He applied for a declaration pursuant to s. 17 of the Refugee Act, 1996, that he was a refugee as defined in s. 2 of that Act. He completed the necessary form and the questionnaire in support of his claim. He was subsequently interviewed by an investigating officer authorised in that behalf by the Refugee Applications Commissioner in the context of an investigation of the application by the Commissioner pursuant to s. 11 of the Refugee Act, 1996 for the purpose of ascertaining whether the applicant was a person in respect of whom a declaration should be given. Following the said s. 11 investigation, the Commissioner prepared a report in writing in accordance with s. 13 of the Refugee Act, 1996 (as amended) as to the results of the investigation and the said report recommended to the Minister for Justice, Equality and Law Reform that the applicant should not be declared a refugee as he had failed to establish a well-founded fear of persecution as defined under s. 2 of the said Act.

2. The RAC's report and recommendation found that there were serious credibility issues with the applicant. In arriving at that assessment the RAC engaged in a critical analysis of all of the circumstances and factors pertaining to the case and the assessment took into account the matters to which the RAC was obliged to have regard pursuant to s. 11B of the Refugee Act, 1996. In all the circumstances the RAC was satisfied that the applicant had showed either no basis or a minimal basis for the contention that he was a refugee, and held accordingly that section 13 (6)(a) of the Refugee Act, 1996 (as amended) applied.

3. The court is not concerned with the correctness or legality of the decision and recommendation of the Refugee Applications Commissioner. However, the applicant, as he was entitled to do, appealed the recommendation of the Refugee Applications Commissioner to the Refugee Appeals Tribunal (the first named respondent herein) pursuant to s. 16 of the Refugee Act, 1996. Nevertheless it is important to rehearse in a little detail the basis for the Refugee Applications Commissioners' decision because of the finding that s. 13(6)(a) of the Refugee Act, 1996 applied. By virtue of the application of that provision the applicant's appeal to the first named respondent was required to be determined without an oral hearing pursuant to s. 13(5) of the 1996 Act and also s. 16(3) of the 1996 Act as amended by the Immigration Act, 2003.

The Proceedings before the Refugee Applications Commissioner
4. It is clear from the decision of the RAC that the Commissioner took the view in the first instance that the applicant's claim was capable of being considered as being of a persecutory nature. However, that view was expressed to be a preliminary one without prejudice to an examination of the well-foundedness of the applicant's claim encompassing a critical analysis of all the circumstances and factors pertaining to the case, including, *inter alia*, an assessment of the applicant's credibility and the availability of State protection.

5. As stated the RAC found the applicant to be not credible. The RAC had regard, *inter alia*, to the matters listed section s. 11B of the Refugee Act, 1996 in assessing the credibility of the applicant. While the specifics of this analysis are not fully recited certain aspects of the evidence were clearly relevant in that regard.

6. Section 11B(a) required the RAC to have regard to whether the applicant possessed identity documents, and, if not, whether he had provided a reasonable explanation for the absence of such documents. At the very outset of his report the Commissioner noted that the applicant had submitted the following documentation:

1. A British passport (false) in the name of Aborisade Bolanji.

2. An airline boarding card in the name of Aborisade Bolanji.

3. An invoice for an airline ticket

4. A baggage check slip

7. He further noted that the applicant said he could produce at a later date his birth certificate and his driving licence. However, he did not have them with him and has never in fact produced them. The RAC was bound to have regard to this in applying the first part of s. 11B(a).

8. Moreover, this court has had regard to all the documentation that was before the RAC. It is noted that the applicant speaks English and that he completed the "Application for Refugee Status Questionnaire" himself. At the front of the questionnaire there are guidelines for its completion and among those guidelines at item 6 is the following admonition:-

> "If you wish to lodge documentation in support of your application, it should be obtained and submitted immediately. If you intend to seek documentation from your Country of origin, you should do so immediately."

9. Therefore there was evidence before the RAC which would have entitled it to infer that applicant knew, or at least ought to have known, from the outset that purported reliance upon documents on the basis that he would undertake to produce them later would not be acceptable. He provided no explanation for not producing his birth certificate and driving licence to the RAC. The RAC was bound to have regard to this in applying the second part of s. 11B(a).

10. In having regard to s. 11B(b) the Refugee Applications Commissioner would also have been concerned with whether the applicant had provided a reasonable explanation to substantiate his claim that the State was the first safe country in which he had arrived since departing from his country of origin or habitual residence. The information provided by the applicant was that he went from Benin to France in July, 2005 and then travelled onto Ireland on the 4th September, 2005. Clearly Ireland was not the first safe country in which he arrived since departing from his country of origin and the explanation that he gave for coming to Ireland was that he believed his wife and child were in Ireland. Accordingly, *prima facie*, he travelled to Ireland from France to be united with his wife and child and not because he was fleeing persecution. The Commissioner was obliged to take that into account.

11. The Commissioner, pursuant to s. 11B(c), was also obliged to have regard to whether the applicant had provided a full and true explanation of how he travelled to and arrived in the State. The Refugee Applications Commissioner took the view that the applicant's statement as to where he was in 2003, 2004 and 2005 was very difficult to believe. Moreover, there were inconsistencies between answers given in response to the questionnaire completed by the applicant on the one hand and the statement given by him at interview on the other hand. The Refugee Applications Commissioner was obliged to take those matters into account under the said heading, and it is clear from his decision that he did so.

12. The Refugee Applications Commissioner also took into account certain country of origin information in examining the well-foundedness of the applicant's claim. The Commissioner had regard to the British Home Office report entitled "Nigeria Country Report – October, 2004" wherein with respect to the Osugbo cult it was reported that human sacrifices for ritual purposes very rarely occurred, if at all. The Commissioner also had regard to the joint British Danish "Report on Human Rights Issues in Nigeria" which indicated that it would have been open to the applicant to complain to the Nigerian police force who would have been obliged by law to investigate his complaint. The Commissioner took the view that the applicant's failure to go to the police was relevant and appeared to preclude him from claiming a lack of State protection.

13. In all the circumstances outlined the Refugee Applications Commissioner formed the view that the applicant had showed either no basis or a minimal basis for the contention that the applicant was a refugee. In the circumstances s. 13(6)(a) of the Refugee Act, 1996 applied. In all the circumstances the Commissioner was satisfied that the applicant had failed to establish a well-founded fear of persecution in accordance with s. 2 of the Refugee Act, 1996 (as amended) and recommended the applicant should not be declared a refugee.

The Appeal to the Refugee Appeals Tribunal

14. The applicant filed a detailed notice of appeal on the required form (Form 2) running to 9 pages. The grounds of his appeal are set out at item number 3 on the said form commencing on page 2., and running to page 9.. In his grounds of appeal the applicant makes detailed written submissions to the Refugee Appeals Tribunal and it is clear from a perusal of this document that the applicant has attempted to engage with some of the concerns raised by the Refugee Applications Commissioner, though not all of the them. Moreover, it is clear from a perusal of this document that the applicant had the assistance of a legal advisor in the preparation of these grounds of appeal. They are clearly drafted by a professional legal person and the document is signed both by the applicant and by a named barrister on behalf of the Refugee Legal Service.

15. In a decision dated the 9th February, 2006 the first named respondent rejected the applicant's appeal. Notice of the decision of the first named respondent was sent to the applicant by letter dated the 23rd February, 2006. In the said letter the applicant was advised that the first named respondent's decision was reached having considered the following matters:-

> "Your Notice of Appeal under s. 16(3) of the above Act and the grounds thereof submitted with the notice, including all supporting documentation and records;
>
> The report and recommendation of the Refugee Applications Commissioner under s. 13 of the above Act;
>
> All documents, representations in writing and other information submitted to the Refugee Applications Commissioner in connection with your case which have been previously furnished to you or your legal representative and the documents submitted with your appeal."

16. It is important for the purposes of this judgment to recite the operative part of the decision of the first named respondent:-

> "Decision
>
> Having had regard to all the relevant facts and considered in details of the applicant's answers given in his questionnaire, his replies at interview and taking into consideration the submissions made in his grounds of appeal, I am not satisfied that the applicant has been subjected to persecution for any of the reasons contemplated in s. 2 of the Refugee Act, 1996 (as amended), while he lived in Nigeria for the following reasons.
>
> 1. I find that the applicant has not established his credibility. He provided untruthful responses to questions 31, 42, 44 and 46 of his questionnaire and offered no satisfactory explanation for same when questioned at interview.
>
> 2. I find that the applicant's failure to apply for asylum in France, the first safe country in which he arrived following his departure from Nigeria, where he remained for a period of two months, is inconsistent with the a well-founded fear of persecution and undermines his credibility. I am fortified in this view given the fact that the applicant was granted asylum in Germany in 2003.
>
> 3. The applicant's credibility is further undermined by his assertion that he was in Germany from January, 2004 to October, 2004, nevertheless his son was born on the 20th April, 2005 to his wife who was in Nigeria during this period. I find the provisions of s. 11B of the Refugee Act, 1996 (as amended) apply to the applicant.

4. The applicant has not produced any documentation which might establish his identity, notwithstanding his commitment to do so at interview.

5. Applying a forward looking test I am not satisfied that there is any evidence that there is a likelihood that the applicant would be persecuted for a Convention reason should he return to Nigeria. In particular the Tribunal does not accept that the applicant could be located by means of the spiritual powers of the cult members whom the applicant is allegedly fleeing.

6. I find from a perusal of the documents contained in the applicant's file that he has shown no basis for the contention that he is a refugee.

In the circumstances, I find that the applicant is not a refugee within the meaning of s. 2 of the Refugee Act, 1996 (as amended). Accordingly I affirm the recommendation made by the Refugee Applications Commissioner and dismiss this appeal."

The Present Proceedings

17. The present proceedings come before me by way of a notice of motion, undated, but filed on the 16th March, 2006, wherein the applicant applies to this honourable Court pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 for leave to seek the following reliefs by way of judicial review.

1. An order of *certiorari* by way of application for judicial review quashing the decision of the first named respondent made on the 9th February, 2006 to refuse the applicant refugee status and notified to the applicant not earlier than 26th February, 2006;

2. An order of *certiorari* by way of an application for judicial review quashing the decision of the first named respondent made on the 9th February, 2006 to affirm the recommendation of the Refugee Applications Commissioner and notified to the applicant not earlier than 26th February, 2006;

3. An order of *mandamus* by way of an application for judicial review directing the first named respondent to remit the appeal of the applicant for a determination de novo before a separate member of the Refugee Appeals Tribunal;

4. A declaration by way of application for judicial review that the decision of the first named respondent made on 9th February, 2006 and notified to the applicant not earlier than 26th February, 2006 refusing the applicant refugee status and/or affirming the recommendation of the Refugee Applications Commissioner is *ultra vires*;

5. A declaration pursuant to s. 5(1) of the European Convention on Human Rights Act, 2003 that the rule of law governing the scope of judicial review relating to asylum decisions set out in *O'Keeffe v. An Bord Pleanála* is incompatible with the European Convention on Human Rights in that the test so afforded fails to constitute an effective remedy for the purposes of Article 13 of the said Convention;

6. A declaration by way of an application for judicial review that the first named respondent has acted in breach of the European Convention on Human Rights Act, 2003;

7. A declaration by way of an application for judicial review that the decision of the first named respondent is wrong in law having regard to the provisions of the Refugee Act, 1996 (as amended) and particularly s. 2 thereof;

8. A declaration by way of an application for judicial review that the decision of the first named respondent is founded on an error of law in that it is based on unsustainable findings of facts;

9. A declaration by way of an application for judicial review that the first named respondent erred in law in failing to have regard to the principles of natural and constitutional justice in arriving at her decision.

10. A declaration by way of an application for judicial review that the decision of the first named respondent is irrational and unreasonable having regard to the evidence available to her;

11. An order providing for an extension of time herein and in so far as it is necessary;

12. Such further and other orders this Honourable court shall deem meet;

13. Costs.

18. The application is grounded upon a statement of grounds filed in accordance with the rules and a grounding affidavit of Sean Mulvihill, solicitor, sworn on the 15th March, 2006. The substance of Mr. Mulivhill's affidavit is contained in paragraphs 3, 4, & 9 inclusive. It is not necessary to recite the entirety of it because aspects of it are uncontroversial, namely, the procedural history of the case before both the Refugee Applications Commissioner and the Refugee Appeals Tribunal respectively. These matters are dealt with in paragraphs 5, 6, 7 and 8 respectively and I do not propose to recite them. The background facts are set out at paragraphs 3 and 4 and as these are quite short it may be instructive to recite them:-.

"3. The applicant was born in Nigeria on the 16th August, 1970 and I beg to refer to a copy of his birth certificate upon which marked with the letter 'A' I have endorsed my name prior to the swearing hereof. The applicants states that his father was a member of the Osugbo cult and following the death of his father he was to assume membership of the cult. He was fifteen when his father died, and did not worry about the cult at that time. However, following entering marriage, the applicant was informed that he would have to abide by the cult rituals including human sacrifice.

4. The applicant originally left Nigeria in October, 2003 and went to Germany. Following arrest in Germany the applicant applied for asylum. The applicant appears to have difficulty in appreciating asylum terminology, and confuses his application for refugee status in Germany with a grant of refugee status. I am not aware of any grant of refugee status being made to the applicant in Germany. The applicant states he remained in Germany until July, 2004 when he returned to Nigeria in the belief that his difficulties may have receded. When this transpired to be otherwise, he fled Nigeria in

> January or February, 2005. He went firstly to Benin, where he remained for approximately 3 to 4 months. He was then assisted to France. While in France, he was informed by a relative of his wife that his wife was in Ireland. He subsequently travelled from Nice in France to Cork on a false UK passport. He arrived in Ireland on the 4th September, 2005. He was initially arrested and imprisoned. He subsequently applied for asylum and completed a questionnaire. I beg to refer to copies of the said application form, questionnaire and documents submitted upon which pinned together and marked with the letter 'B' I have endorsed my name prior to the swearing hereof."

19. The other paragraph of the applicant's affidavit that merits recital is paragraph 9 thereof. Paragraph 9 states:-

> "9 The applicant attended at my offices on 7th March, 2006 seeking legal representation. He stated that he had been informed that the Refugee Legal Service were not instituting proceedings challenging the decision of the Tribunal member and instead offered to submit a leave to remain application. The applicant believes that the Tribunal member made an error of significance relating to the time period he spent in France, and that no regard was made to explanations furnished relating to confusion arising from perceived discrepancies between his questionnaire and interview. Further, he was afforded no opportunity to clarify any perceived discrepancies by oral evidence. The applicant signed an authority and I sought and received his file. I beg to refer to the said authority and correspondences and upon which pinned together and marked with the letter 'G' I have endorsed my name prior to the swearing hereof."

20. The grounds upon which the applicant seeks the reliefs in question are recited in paragraph E of his statement of grounds. There is firstly an allegation that the first named respondent failed to properly construe the meaning of "fear of persecution" in the context of s. 2 of the Refugee Act, 1996 (as amended) and that accordingly she exceeded her jurisdiction, her decision was *ultra vires* and unsustainable in law. There is then a complaint of general unfairness in the procedures applied by the first named respondent. Further, there is a complaint that the first named respondent erred in law in relying on erroneous facts and particular reliance is placed on the fact that the Tribunal member stated that the applicant was in Germany from January, 2004 until October, 2004 whereas in fact the applicant was in Germany from October, 2003 until July, 2004. Further, complaint is made that the Tribunal member erroneously held that the applicant had been granted asylum in Germany. It is further complained that the first named respondent failed to take explanations furnished for inconsistencies in the questionnaire and interview into account, that she took into account matters that were irrelevant to the determination of the appeal and/or that she failed to take into account relevant considerations. It is complained that she failed to consider all of the evidence. It is further complained that she failed to have regard to the European Convention on Human Rights and fundamental freedoms. It is further complained that she failed to have any or any sufficient regard to the evidence of the applicant and supportive country of origin information. The applicant complains that the consequences of the first named respondent's decision are so serious for him that he is entitled to a judicial examination of the decision of the first named respondent, of the reasoning behind the said decision and of the evidence upon which the decision is based. The applicant contends that the court ought not to confine itself to a review in accordance with the principles laid down in *O'Keeffe v. An Bord Pleanála*. It is contended that if the court were to approach the matter in that way its judicial review would be inadequate and contrary to the rights guaranteed by the European Convention on Human Rights. It is further alleged that the first named respondent failed to adequately assess the objective elements of the applicant's stated fear of persecution and that she foreclosed on speculation regarding the risk of persecution for a Convention reason facing the applicant on refoulement. It is further contended that there was a failure to consider the country of origin information before the Tribunal in any reasonable manner and that if the first named respondent did consider that information she failed to indicate what part of it she relied upon, and why she relied on that part of it. On a roll up basis it is pleaded that the decision of the first named respondent is irrational, unreasonable and flies in the face of common sense. Finally, it is contended that ss. 13(5) and 13(6) are unconstitutional insofar as they permit a decision of such significance as the decision in this case to be made on the grounds of adverse credibility findings in circumstances where the applicant was denied the opportunity of an oral hearing.

21. It is to be understood and appreciated that the grounds as I have recited them are a précis and a distillation of the grounds as put forward by the applicant which run to twenty closely typed paragraphs over two and a half pages. In arriving at the decision that I have arrived at in this case, I have, of course, had regard to the full pleadings and a failure to mention any matter in my summary is not to be taken as a disregard of that matter. I have had regard to all of the extensive potential grounds for judicial review put forward by the applicant.

Delay

22. With regard to the question of delay the applicant seeks an extension of time on the basis of the matters pleaded at para. 19 of his statement of grounds which is in terms:-

> "Insofar as it is necessary to seek an extension of time in respect of grounds advanced in these proceedings, it is submitted that an extension of time should be granted in the interests of justice having regard to the facts of the case. In particular, two weeks had passed before the applicant was informed that the Refugee Appeals Tribunal would not be issuing proceedings."

23. At the hearing of the motion before me it was pointed out to the applicant's counsel that s. 5(2) of the Illegal Immigrants (Trafficking) Act, 2000 requires an application for leave to apply for a judicial review to be made within fourteen days commencing on the date on which the person was notified of the decision concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application should be made. I expressed the view that while the Court would be disposed to show more flexibility in a case such as this where the time limit is extremely short, and the delay in applying was not a gross delay, nevertheless the onus was on the applicant to put sufficient evidence before the Court to enable the Court to make a finding of good and sufficient reason for extending the time. I expressed grave reservations as to the sufficiency of the averments in that behalf in the affidavit of Sean Mulvihill hereinbefore referred to, but stated that in the interests of justice I would permit the applicant to file a supplemental affidavit, sworn in person, expanding upon and amplifying the skeletal reasons then before the Court. The case was adjourned for a number of days to enable that to be done.

24. A supplemental affidavit of the applicant, sworn on the 29th June, 2007 was duly filed. It greatly amplifies and expands upon what was put before the Court previously. In summary the applicant puts forward the explanation that he had to await a decision of the Refugee Legal Service as to whether or not they were prepared to institute and fund judicial review proceedings on his behalf and that it was some time before a decision that they would not do so was communicated to him. It was only at that stage that he was in a position to instruct his present solicitor and his solicitor in turn needed to brief and seek and advices from counsel, and then to have counsel draft and settle proceedings. I am satisfied that the applicant has put forward good and sufficient reasons as to why he did not apply in time. In the circumstances outlined I am further satisfied, that should I be otherwise disposed to grant the applicant leave to apply for judicial review on the basis that the applicant has advanced substantial grounds in that regard, this would be an appropriate case in which to grant an extension of time.

Preliminary objection raised by the Respondents – hearsay.
25. It should be mentioned at this stage that the respondents have put forward, as a preliminary objection to the applicant's application, a submission that the Court is being asked to rely upon hearsay evidence in as much as the principal grounding affidavit is sworn by Sean Mulvihill, his solicitor. It is submitted on behalf of the respondent that the Court should exclude the hearsay evidence contained in the said affidavit. The reason why the principal grounding affidavit is sworn by the applicant's solicitor, rather than by the applicant himself, is explained by the applicant is the supplemental affidavit that he swore on the 29th June, 2007 and to which I have already alluded. In that regard he explained that when contacted by his solicitor on Wednesday 15th February, 2006, for the purpose of finalising the paperwork in connection with the present proceedings, the applicant was in Cork. He had travelled to Cork to be with his wife and child who were at that stage resident at Kinsale Road Accommodation Centre in Cork. He explained that the train fare back to Dublin would have cost him approximately €60.00 and that he had no money, that his sole income was €19.10 each week and he was unable to save anything from this. He advised his solicitor that hitching back to Dublin was an option but that this means of travel was very difficult and would take a full day. Moreover, in the past when he had attempted to hitch he had not always been successful in getting a lift. He therefore asked his solicitor if he (the Solicitor) could proceed without his attendance and the solicitor agreed to swear the principal grounding affidavit on his instructions and at his request. I accept this explanation. I have a discretion in respect of the matter and I am prepared to exercise my discretion in favour of the applicant insofar as the issue of hearsay evidence is concerned. I am disposed to deal with the matter on the basis of the evidence put forward by Mr. Mulvihill, notwithstanding that it is strictly speaking hearsay.

The applicant's submissions
26. It was argued by the applicant that the Tribunal's reliance on findings in relation to the applicant's failure to produce identification documents and failure to seek asylum in France was in breach of fair procedures. It is submitted that no such findings were made by the Commissioner, and that the applicant could not have known that this failure was central to the Tribunal's decision. Significant reliance is placed upon the judgment of White J. in *Nguedjo v. The Refugee Applications Commissioner* (Unreported, White J., 23rd July, 2003); as well as the decision of Clarke J. in *Idiakheua v. The Minister for Justice, Equality and Law Reform* (Unreported, Clarke J., 10th May, 2005) and the decision of Clarke J. of *Moyosola v. The Refugee Applications Commissioner & Ors.* (Unreported, High Court, Clarke J., 26th June, 2005). The applicant further submitted that the Tribunal had failed to consider or affirm the substantial finding in the Refugee Application Commissioner's Report that s. 13(6)(a) of the Refugee Act, 1996 applied to the claimant the first named applicant. In that regard the case of *Iroegbu v. The Refugee Appeals Tribunal* (Unreported, High Court, Murphy J., 23rd January, 2007) is relied upon. It is further submitted that if the Tribunal was entitled to arrive at the decision it did arrive at, ss. 13(5) and 13(6) of the Refugee Act, 1996 (as amended) are unconstitutional.

27. In relation to the allegations of a failure on the part of the Refugee Appeals Tribunal to consider explanations put forward by the applicant and the Refugee Appeals Tribunal's reliance on alleged errors of fact, the Court's attention has been drawn to *Carciu v. The Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal* (Unreported, High Court, Finlay Geoghegan J., 4th July, 2003) and *Bisong v. The Minister for Justice, Equality and Law Reform and Ors.* (Unreported, High Court, O'Leary J., 25th April, 2005), amongst other cases.

28. In relation to the alleged failure on the part of the Tribunal to consider country of origin information and the Tribunal's alleged misuse of country of origin information the applicant contends that the Tribunal made no reference to country of origin information at all and my attention is drawn to the decision of Finlay Geoghegan J. in *Kramarenko v. The Refugee Appeals Tribunal* (Unreported, High Court, Finlay Geoghegan J., 2nd April, 2004) and the decision of Clarke J. *Muia v. The Refugee Appeals Tribunal & Ors*. (Unreported, High Court, Clarke J., 11th November, 2005).

29. It is further argued that the Tribunal's findings in relation to the applicants travels in the years 2003/2004 were of a peripheral nature and bore no relation to the core claim of persecution maintained by the applicant and in that regard he relies on *Sango v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Peart J., 24th November, 2005).

30. With respect to the ground based upon foreclosure on speculation it is urged upon me that the Tribunal member erred in foreclosing on speculation regarding the possibility of the applicant being exposed to future persecutory risk and in that regard reliance is placed upon the judgment of Peart J. in the case of *da Silveira v. The Refugee Appeals Tribunal* (Unreported, High Court, Peart J., 9th July, 2004) wherein it was stated:-

> "A lack of credibility on the part of the applicant in relation to some, but not all past events, cannot foreclose or obviate the necessity to consider whether, if returned, it is likely that the applicant would suffer Convention persecution."

31. In relation to the standard of the review, namely the so-called "*O'Keeffe test*" the applicant makes the following submissions. He contends that even accepting that the *O'Keeffe* test applies, the decision of the Refugee Appeals Tribunal is unreasonable and irrational in the *O'Keeffe* sense and should be quashed. It is argued in the alternative that if the decision meets the *O'Keeffe* criteria that it ought to be subjected to greater scrutiny than that mandated in *O'Keeffe v. An Bord Pleanála*. My attention has been drawn to dicta in a number of cases wherein the appropriateness of the O'Keeffe test has been questioned, notably, by McGuinness J. in *A.O. and D.L. v. The Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 124 and the judgment of Fennelly J. in the same case. It was pointed out to me that the question has been raised many times on leave applications in asylum cases and in that regard I am referred to the decision of Clarke J. in *Gashi v. Minister for Justice, Equality and Law Reform* (Unreported, 3rd December, 2004) and in *Idiakheua v. The Minister for Justice Equality and Law Reform* (Unreported, 10th May, 2005). I am also referred to the decision of Gilligan J. in *Meadows v. Minister for Justice Equality and Law Reform* (Unreported, High Court, Gilligan J., 4th November, 2003) wherein a certificate of leave to appeal to the Supreme Court on this issue was granted on the basis that it represented a matter of exceptional public importance. Insofar as the Court has been able to ascertain that appeal has not yet come on for hearing. Finally, reliance is place upon various provisions of the European Convention on Human Rights and Fundamental Freedoms 1950 as incorporated into Irish law under the European Convention on Human Rights Act, 2003 and on the decision of the European Court of Human Rights in the case of *Vilvarajah v. United Kingdom* [1991] wherein national courts have been urged to subject administrative decisions in the area of asylum to the most anxious scrutiny where an applicant's life or liberty may be at risk.

The respondents' submissions
32. The respondents draw the courts attention to the decision of Finnegan J. in *Z. v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Finnegan J., 29th March, 2001) wherein he stated:-

> "When the application is deemed manifestly unfounded further examination is terminated: there is no consideration of the case on its merits. The person duly authorised by the Minister makes the decision on the basis of the application, the note of the interview, the report of the interview and any written representations made by or on behalf of the applicant. Of necessity he must have regard to the objective element in the concept 'well founded fear of persecution' and must have regard to the relevant background material on the applicant's country of nationality. On the basis of all the foregoing

> he must determine whether the applicant has disclosed an arguable case that he is entitled to refugee status under the Convention. In doing so he is not obliged to accept mere assertion by the applicant of facts or circumstances which if true would entitle him to refugee status. He is entitled to consider credibility and to take into account that the applicant's story is inconsistent, contradictory and fundamentally improbable: see London Declaration. para. 6(c)."

33. The respondent's submit that the Refugee Appeals Tribunal fully complied with those requirements. With respect to the Tribunal's alleged error of fact, namely that the applicant was granted asylum in Germany in 2003, the respondent contends that the error of fact was not material in the context of the decision made and in that regard reliance is placed on the judgment of Finlay Geoghegan J. in *Traore v. The Refugee Appeals Tribunal* (Unreported, High Court, Finlay Geoghegan J., 14th May, 2004). The respondent points out that the applicant gave inconsistent and conflicting information with respect to whether, and when, he was in Germany. He further gave conflicting information concerning whether or not he had applied for asylum and whether or not he had been granted asylum in Germany. The respondents say that the Refugee Appeals Tribunal was entitled to take the provision of this conflicting and inconsistent information into account.

34. With respect to the applicant's assertion that, in the absence of an oral hearing, he was unable to adequately explain perceived discrepancies, the respondents draw the courts attention to the decision of the Supreme Court in the case of *Z. v. The Minister for Justice, Equality and Law Reform* [2002] 2 I.L.R.M. 215. In her judgment in that case McGuinness J. stated that that there is no authority that establishes that an oral hearing is necessary in all cases. The necessity of an oral hearing will depend upon the circumstances of the individual case and the absence of such a hearing in determining the appellant's appeal against the decision that his application for refugee status was manifestly unfounded did not, in the submission of the respondents, infringe his right to natural or constitutional justice. The court's attention was also drawn to *Akinyemi v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Smyth J., 2nd October, 2002) wherein it was held:-

> "The decision of the respondent, its servants or agents, and/or the decision of the Refugee Appeals Tribunal to assess the veracity and credibility of applicant's application was not in breach of natural justice and fair procedures in the absence of an oral hearing. It was her duty to tell the truth, in respect of which the applicant was fully aware at all times, and the question of truthfulness and credibility were emphasised in the documentation signed by her."

35. The respondent's submissions do not address the "*O'Keeffe test*" arguments advanced by the applicant in his submissions. Neither do they address the applicant's contention that ss. 13(5) and 13(6) are unconstitutional. However, and in fairness, it must also be stated that, though not expressly abandoned, the O'Keeffe test arguments were given "a light rub" by the applicant's counsel, and the unconstitutionality arguments were not pressed by him at all, at the hearing before me.

Decision

36. First of all it should be stated that the ground advanced to the effect that the first named respondent failed to properly construe the meaning of "fear of persecution" in the context of s. 2 of the Refugee Act, 1996 (as amended) was not pursued in argument and I am treating it as having been abandoned.

37. Secondly, I do not accept that the Tribunal's reliance on findings in relation to the applicant's failure to produce identification documents and failure to seek asylum in France was in breach of fair procedures. Both the Refugee Application's Commissioner and the Refugee Appeals Tribunal were obliged to take these matters into account in making their respective decisions. Moreover, I do not believe that it is strictly speaking correct to say that no such findings were made by the Commissioner, and that the applicant could not have known that this failure would be central to the Tribunal's decision. Section 11B of the Refugee Act, 1996 (as amended) is in mandatory terms. The matters set out in s. 11B are matters to which the Commissioner or the Tribunal, as the case may be, shall (my emphasis) have regard in assessing the credibility of the applicant for the purposes of the investigation of his/her application or the determination of an appeal in respect of his/her application. The requirement to have regard to these matters is mandatory. There is no getting around it. In every single case that comes before either the Refugee Applications Commissioner or the Refugee Appeals Tribunal these matters must be considered in the course of assessing the applicant's credibility. It is therefore disingenuous for the applicant to argue that he could not have known that his failure to produce identification documents, and that his failure to seek asylum in France, would be relevant. Moreover, when he appealed from the decision of the Refugee Applications Commissioner to the Refugee Appeals Tribunal he submitted lengthy and detailed grounds of appeal that were clearly drafted by, or at least settled by, legal counsel. The applicant had a further opportunity at that point to provide explanations. Because s. 11B considerations may arise in every assessment of credibility it would have been obvious to Counsel that these matters needed to be addressed, if indeed they could be addressed. If the applicant felt that explanations previously given had not been understood or taken on board by the RAC he had an opportunity to re-iterate them, and indeed to amplify or expand on them. In all the circumstances I am driven to the conclusion that the applicant knew, or ought to have known, that satisfactory explanations in respect of the failure on his part to produce the identification documents that he had undertaken to produce on the one hand, and for not seeking asylum in France on the other hand, would be required. The default is his and he cannot reasonably complain about it now. Moreover, in the guidelines for completion of the Application for Refugee Status Questionnaire it is clearly emphasised that supportive documentation must be submitted immediately. The applicant speaks, reads and writes English and he completed the questionnaire himself. I am completely satisfied that the applicant has not put forward substantial grounds under this heading.

38. Thirdly, and with respect to the general argument that there was a want of fair procedures on account of the absence of an oral hearing, and in particular the argument that the Refugee Appeals Tribunal acted in breach of the principles of natural and constitutional justice by virtue of the fact that conclusions were reached on matters in respect of which the applicant did not have an opportunity to comment, I am also not satisfied that substantial grounds have been put forward. I consider that, at best, an arguable case has been advanced and that does not satisfy the threshold. I had better explain why. As previously mentioned the decision of Mr. Justice White in the case of *Nguedjdo v. The Refugee Applications Commissioner* (Unreported, ex-tempore judgment of White J., 23rd July, 2003) is relied upon. While I do not have a specific note of the ex-tempore judgment in *Nguedjdo* it is extensively referred to by Clarke J. in his judgment in the case of *Idiakheua v. The Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal* (Unreported, High Court, Clarke J., 10th May, 2005). It is appropriate to quote from the judgment of Clarke J:-

> "The next leg of the applicant's claim stems from a contention that the procedures followed by the RAT are in breach of the principles of natural justice by virtue of the fact that conclusions were reached on matters not put to the applicant.
>
> In *Nguedjdo v. Refugee Applications Commissioner* (Unreported, ex- tempore judgment of White J., 23rd July, 2003) this court made an order of *certiorari* quashing the decision of the Refugee Appeals Commissioner on the basis that same was made in breach of constitutional and natural justice by virtue of the failure to give the applicant the opportunity to deal with matters which would appear to have been crucial to the determination made in the case then under consideration. It should be recalled that the process before the RAT is an inquisitorial one in which a joint obligation is placed on the applicant and the decision maker to discover the true facts. It seems to me that an inquisitorial body is under an

> obligation to bring to the attention of any person whose rights may be affected by a decision of such a body any matter of substance or importance which that inquisitorial body may regard as having the potential to affects its judgment. In that regard an inquisitorial body may, in many cases, be in a different position to a body which is simply required to adjudicate upon the contending positions of two competing parties in an adversarial process. In the latter case the adjudicator simply decides the issues on the basis of the case made whether by evidence or argument by the competing parties. However the principles which have been developed by the courts since the decision of the Supreme Court in *Re Haughey* [1971] I.R. 217 are equally applicable, in principle, to inquisitorial bodies. The precise way in which those principles may be applied may, of course, differ. However the substantial obligation to afford a party whose rights may be affected an opportunity to know the case against them remains. In those circumstances it seems to me that whatever process or procedures may be engaged in by an inquisitorial body, they must be such as afford any person who may be affected by the decision of such body a reasonable opportunity to know the matters which may be likely to affect the judgment of that body against their interest. In the course of argument in this case it was suggested on behalf of the RAT that it would be inappropriate for the Tribunal either to direct the line of questioning which should be adopted on behalf of the Commissioner or to engage in questioning itself (on the grounds that such questioning might give rise to an appearance of bias). I am afraid I cannot agree.
>
> If a matter is likely to be important to the determination of the RAT then that matter must be fairly put to the applicant so that the applicant will have an opportunity to answer it.
>
> If that means the matter being put by the Tribunal itself then an obligation so to do rests upon the Tribunal. Even if, subsequent to a hearing, while the Tribunal member is considering his or her determination an issue which was not raised, or raised to any significant extent, or sufficient at the hearing appears to the Tribunal member to be of significant importance to the determination of the Tribunal then there remains an obligation on the part of the Tribunal to bring that matter to the attention of the applicant so as to afford the applicant an opportunity to deal with it. This remains the case whether the issue is one concerning facts given in evidence by the applicant, questions concerning country of origin information which might be addressed either by the applicant or by the applicant's advisors or, indeed, legal issues which might be likely only to be addressed by the applicant's advisors.
>
> In setting out the above, I would wish to make clear, that the obligation to fairly draw the attention of the applicant or the applicant's advisors to issues which may be of concern to the Tribunal arises only in respect of matters which are of substance and significance in relation to the Tribunal's determination. White J. in *Nguedjo* came to the view he did, because, on an analysis of a determination of the Commissioner in that case he was satisfied that the matter not put is "is or has been so crucial to the determination made in this particular case". I am also satisfied it is at least arguable that the must be some reasonable proportionality between the extent to which attention is drawn to an issue and the importance which the Tribunal is likely to attach to it."

39. *Nguedjo* and *Idiakheua* were again applied in the slightly later case of *Moyosola* (Unreported, Clarke J., 23rd June, 2005). It is clear from the decisions in *Ngeudjo, Idiakheua* and *Moyosola* that in certain situations a decision maker within the refugee applications process, which is an inquisitorial process, is obliged to bring matters to the attention of the party whose rights may be affected by their decision. This would arise, for example, where a matter which was tangently referred to during the process looms larger in the mind of the decision maker as he or she contemplates making the decision concerned. Clarke J. has indicated, and in my opinion, correctly, that fair procedures may require that the person whose rights may be affected by the decision should be given an opportunity to deal with the matter concerned. However, I am far from convinced that there has been any failure to observe fair procedures in the case with which I am presently concerned. Even though there was no oral hearing the applicant in this case had an opportunity to make representations to the Refugee Appeals Tribunal by means of written submissions. Indeed, as I have already pointed out he filed lengthy and detailed written submissions in this case. Moreover, in those submissions he has sought to address some of the issues that concerned the Refugee Applications Commissioner though not all of them. Moreover, he has sought to anticipate other issues that were likely to be of concern to the Refugee Appeals Tribunal. The applicant has specifically sought to address alleged errors of fact on the part of the Refugee Applications Commissioner in grounds 9 and 10 of his statement of grounds. In ground No. 9, he asserts that at the time he left Nigeria his son was not born and that his wife left Nigeria some one to days after he left. In ground No. 10, he asserts that he made a successful asylum application in Germany in or about 2003 on the same grounds as he has relied upon in his present application. Moreover, he stated that he had no documents in that regard. He further stated that in 2004 he assumed the cult members had stopped looking for him and that it was safe for him to return to Nigeria. When he returned his troubles started up again and he decided to flee Nigeria again.

40. It is clear from the grounds of appeal filed that the applicant was acutely aware that his credibility was greatly in doubt. However, there is no meaningful effort in his grounds of appeal to explain the damaging contradictions and inconsistencies in his questionnaire and interview beyond what he had previously stated. I am satisfied that the applicant fully appreciated that the Refugee Applications Commissioner found him not to be credible, and the reasons why he was not regarded as being credible, and that he had a further opportunity to address those issues in writing in his grounds of appeal but chose not to do so. Accordingly, there was no breach of fair procedures or of what might be described as the "*Ngeudjo principle*". I would adopt and endorse the view of O'Neill J. in the case of *Lilia Nicolai v. The Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* (Ex-tempore, O'Neill J., 7th October, 2005) wherein he stated:-

> "It was a matter in my view for the Tribunal to draw such inferences as reasonably arose from the evidence as it stood and it would seem to be to be unreal to suggest that the general inference of incredulity which might arise in the judgment of a Tribunal would have to then subsequently be put back to the applicant for comment."

41. It should be appreciated that in the Nicolai case the Tribunal had heard oral evidence and the circumstances were therefore somewhat different to the present case. Nevertheless, having regard to the fact that the applicant had an opportunity to offer whatever explanations he saw fit in the present matter by way of written submissions contained in, or accompanying, his grounds of appeal I believe O'Neill J.'s comments to be apposite and applicable to this case as well.

42. Fourthly, the applicant further complains that the Refugee Appeals Tribunal made no reference to country of origin information. It is true that the decision of the Tribunal does not specifically refer to country of origin information but that does not mean that it was not considered. The Tribunal member states that she had had regard to all the relevant facts and considered in detail, *inter alia*, the submissions made in the applicant's grounds of appeal. The applicant had expressly addressed what he perceived to be deficiencies in the country of origin information relied on by the authorised officer in grounds 2, 3, 4 and 11 of the grounds of appeal. Moreover, in the letter notifying the applicant of the decision of the Refugee Appeals Tribunal it is stated that the decision was reached by the Tribunal having considered:-

> "Your notice of appeal under s. 16(3) of the above Act and the grounds thereof submitted with the notice, including all supporting documentation and records; the report and recommendation of the Refugee Applications Commissioner under s. 13 of the above Act; all documents, representations of writing and other information submitted to the Refugee Applications Commissioner in connection with your case which have been previously furnished to you or your legal representatives; (and) the documents submitted with your appeal."

43. I consider that in circumstances where the Refugee Appeals Tribunal had the relevant documentation, and contends in general terms that it had regard to all the relevant facts, that it can strongly be argued that it is to be inferred that the Tribunal did in fact consider country of origin information. I further consider that it is strongly arguable that it was not necessary for the Tribunal to specifically refer to country of origin information as the Tribunal's decision was based upon a major credibility deficit with respect to the applicant's claims. For these reasons I believe that the applicant has done no more than advance an arguable case under this heading. I do not consider that his case under this heading meets the threshold of substantial grounds.

44. Fifthly, it is further argued by the applicant that the Tribunal member erred in foreclosing on speculation regarding the possibility of the applicant being exposed to future persecutory risk. The applicant relied on *da Silveira* (Unreported, High Court, Peart J., 9th July, 2004) wherein it was stated:-

> "A lack of credibility on the part of the applicant in relation to some, but not all past events, cannot foreclose or obviate the necessity to consider whether, if returned, it is likely that the applicant would suffer Convention persecution."

45. Having reviewed all the documentation before the Refugee Appeals Tribunal, and the decision of the Tribunal itself, I do not believe that this ground is made out, even on an arguable basis. The Tribunal member states expressly at para. 5 of her decision that she applied a forward looking test and upon doing so she was not satisfied that there was any evidence that there was a likelihood that the applicant would be persecuted for a Convention reason should he return to Nigeria.

46. Sixthly, it is further argued that the Tribunal's findings with respect to the applicant's travels in the years 2003 to 2004 were of a peripheral natural and bore no relation to the core claim of persecution being maintained by the applicant. That submission is disingenuous and utterly misses the point. The Tribunal's finding with respect of the applicant's travels in years 2003-2004 went directly to the issue as to whether or not the applicant was credible in claiming to be a *bona fides* refugee within the meaning of the Refugee Act, 1996 (as amended). They were of direct relevance to the issues set out in s. 11B(b) and s. 11B(c), to which the Tribunal was obliged to have regard in assessing the credibility of the applicant.

47. Seventhly, with regard to the standard of review and the "*O'Keeffe test*" I reject the submissions of the applicant that there are substantial grounds for considering that the decision of the Refugee Appeals Tribunal was fundamentally at variance with reason and common sense and that the *O'Keeffe* test of unreasonableness and irrationality is satisfied. The court is aware of, and does not disregard, the doubts that have been expressed from time to time as to whether the O'Keeffe test represents an adequate standard of judicial scrutiny in asylum cases. However, it is my view that even if the higher standard contended for were to apply, namely, the type of scrutiny contemplated by phrases such as "anxious scrutiny", "careful scrutiny" and "heightened scrutiny". I believe that the decision of the Refugee Appeals Tribunal in this case would meet that standard.

48. Eighthly, the applicant complains the Tribunal failed to consider or affirm the substantial finding in the Commissioner's report that s. 13(6)(a) of the Refugee Act, 1996 applied to the claim of the first named applicant. In this regard the applicant relies upon the decision of Murphy J. in *Iroegbu v. The Refugee Appeals Tribunal* (Unreported, Murphy J., 23rd January, 2007) wherein it was stated:-

> "The Tribunal should consider the substantial findings in the Commissioner's report before it affirms or sets aside a recommendation of the Commissioner."

49. In this regard it is instructive to note that s. 13(6)(a) of the Refugee Act, 1996 (as amended) is in the following terms:-

> "That the application showed either no basis or a minimal basis for the contention that the applicant is a refugee."

50. I believe the applicant is mistaken and simply wrong. The decision of the Refugee Appeals Tribunal, at para. 6 under the heading "decision" states expressly:-

> "I find from a perusal of the documents contained in the applicant's file that he has shown no basis for the contention that he is a refugee."

51. There is therefore a clear finding on the part of the Refugee Appeals Tribunal that s. 13(6)(a) applied and it is incorrect to say that the Tribunal failed to consider that aspect of the matter.

52. Ninth, and finally, and in accordance with the well established principle that one should arrive at constitutional arguments last, it falls to me to consider the contention on the part of the applicant that s. 13(5) and s. 13(6), respectively, of the Refugee Act, 1996 (as amended) are unconstitutional. Though these matters were pleaded no arguments were put before me as to why these provisions should be regarded as unconstitutional. This court must approach the issue on the basis that there is a presumption of constitutionality in respect of the provisions in question and that if it is to be suggested that they are unconstitutional the matter requires to be argued in a comprehensive and serious way. That has not been done and in the circumstances I can only proceed on the basis that that aspect of the claim is not being proceeded with.

Conclusion

53. Having carefully considered all aspects of the matter I regret that I must dismiss the applicant's claim for leave to apply for the reliefs that he seeks by way of judicial review. While the applicant has, perhaps, advanced an arguable case with respect to a number of issues, and in particular the fair procedures issue, the country of origin information issue and the standard of review issue I am not satisfied that the higher threshold provided for in s. 5(2)(b) of the Illegal Immigrants (Trafficking) Act, 2000 is met. While an arguable or stateable case could be put forward under the headings that I have mentioned I would not characterise the case under any of those headings as being so strong as to justify me in holding the view that there are substantial grounds for contending that the decision of the Refugee Appeals Tribunal is invalid or ought to be quashed. Accordingly, I must dismiss the application herein.