Neutral Citation [2008] IEHC 235

THE HIGH COURT

JUDICIAL REVIEW

2006 No. 836 J.R.

BETWEEN

P.S. (A MINOR SUING THROUGH HER MOTHER AND NEXT FRIEND B.O.)

APPLICANT

AND

REFUGEE APPLICATIONS COMMISSIONER, THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment delivered by Mr. Justice Bryan McMahon the 11th day of July, 2008.

1. This is an application for leave to seek judicial review of the decision of the first named respondent in relation to an application for refugee status. The applicant in this case is a South African minor, born on the 28th March, 1991. She arrived in the State on the 7th May, 2006 and made an application for refugee status on the 15th May, 2006.

2. When the applicant arrived at Dublin Airport on the 7th May, 2006, she was in a very distressed state. Even though she was only 14 years of age she was pregnant as a result of being raped, on her way home from school, in South Africa. She was not aware that she was pregnant until she was about five or six months into her pregnancy. Upon arrival in Dublin, she was immediately transferred from the Airport to the Rotunda hospital. Shortly after being hospitalised, she gave birth to a stillborn baby boy. Thereafter, she became very unwell, went into respiratory distress and was transferred to the Intensive Care Unit in the Mater Hospital for two days. She was released from hospital on the 15th May, 2006.

3. The applicant was called for interview by the first named respondent (hereafter "the respondent") on the 21st June, 2006 and was accompanied to this interview by her mother. She applied for refugee status on the grounds of a fear of persecution arising by reason of her membership of a particular social group comprising young women and/or girls. She was informed by letter dated the 28th June, 2006, that the respondent was recommending that she not be declared a refugee and enclosed a copy of the s.13(1) report of the Authorised Officer dated 26th June, 2006.

4. In the present application for leave, counsel for the applicant submits that the country of origin information in the s.13(1) report was never put to the applicant or to her mother at the interview in order to allow them to address it and/or to make representations on it.

5. In her questionnaire the applicant stated that she did not report her rape to the police and was afraid to tell anyone. She further stated that she was afraid that the same thing might occur again. She was assisted by her mother in completing the questionnaire as she was very emotional and upset. In her interview she stated that she left South Africa as she was living with her grandmother who was old and would not be able to assist her when her child was born. She stated that she informed her aunt of the rape but she said that her aunt "said I was lying because she drinks".

6. The s.13(1) report concluded that she did not establish a well founded fear of persecution. The Authorised Officer stated that while the applicant may indeed need support and assistance, there was a possibility that she had motives other than flight from persecution for departing South Africa. As the applicant is a national of, or has a right of residence in South Africa, the Authorised Officer stated that he was obliged to find that s.13(6)(e) of the Refugee Act 1996, as amended, applied as South Africa is designated a "safe country".

7. The applicant has appealed this finding to the Refugee Appeals Tribunal but this appeal is stayed pending the outcome of these judicial review proceedings.

Relief Sought

8. The applicant is applying to the Court for leave to seek the following reliefs:

> 1. A declaration that the decision of the respondent as notified by letter of the 28th June, 2006, to deny the applicant refugee status and the recommendation and report of the respondent of the 26th June, 2006, are *ultra vires* and without efficacy.
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> 2. A declaration that the investigation, report and recommendation dated the 26th June, 2006 and the decision of the respondent of the 28th June, 2006, were carried out, conducted and concluded in infringement of the applicant's right to fair procedures and natural and constitutional justice.
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> 3. A declaration that the respondent has acted *ultra vires* in applying and/or relying on the provisions of section 12 and section 11A and section 13(6)(e) of the Refugee Act 1996, as amended, and S.I. No. 714 of 2004 (Refugee Act 1996 (Safe Countries of Origin) Order 2004) in the processing and investigation of the applicant's application for refugee status.
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> 4. Without prejudice to the foregoing and if necessary, a declaration that section 11(3)(a) and section 13(10) of the Refugee Act 1996, (as inserted by section 7 of the Immigration Act 2003) and or/said provisions in combination are repugnant to the Constitution and are an infringement of the applicant's right to constitutional and natural justice and fair procedures.
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> 5. An order of *certiorari* quashing the decision of the respondent of the 28th June, 2006, refusing the applicant refugee status and the report and recommendation of the respondent of the 26th June, 2006 pursuant to section 13(1) of the Refugee act 1996.
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> 6. An order of mandamus remitting the applicant's application for refugee status for an investigation by the respondent in accordance with the directions of this Court.
>
> 7. An order quashing the report/interview record under section 11 of the Refugee act 1996 as amended.
>
> Without prejudice to the foregoing and if necessary:

8. A declaration that section 13(6) and/or without prejudice section 13(6)(e) and/or these provisions in combination with section 11A of the Refugee Act 1996 as amended and/or those provisions in combination with section 13(5) of the Refugee Act 1996, as amended, are repugnant to the Constitution and Article 40.4 thereof.

9. A declaration that S.I. No. 714 of 2004 (Refugee Act 1996 (Safe Countries of Origin) Order 2004) is *ultra vires* and void and/or that said regulation insofar as it relates to South Africa is *ultra vires* and void.

10. Without prejudice to the foregoing, a declaration that the provisions of section 12(4) of the Refugee Act 1996, as amended, and/or S.I. 714 of 2004 are repugnant to the provisions of the Constitution and Article 40.3 thereof and/or without prejudice are inconsistent with the provisions of article 3 of the Convention Relating to the Status of Refugees 1951 (Second Schedule to the Refugee Act 1996).

11. An injunction restraining the second named respondent from taking any steps pursuant to section 17(1)(b) of the Refugee Act 1996 to affirm the recommendation to deny the applicant refugee status and/or to make a proposal to deport and/or to deport the applicant.

12. Further and other relief including, if necessary, an extension of time for the making of this application pursuant to section 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000 or any part thereof.

Submissions

9. Counsel for the applicant submits that information from the country of origin reports mentioned in the s.13(1) report were never put to the applicant or her mother at the interview thereby depriving her and her advisors of an opportunity to make observations, representations or submissions in relation to same. This, it is submitted, amounts to a breach of the applicant's right to fair procedures and natural and constitutional justice. Furthermore, as the information was never put to the applicant and/or her guardians and on the basis of this information, the Authorised Officer made material findings against the applicant and the Authorised Officer therefore erred in law and acted in breach of the applicant's right to fair procedures and natural and constitutional justice. It is submitted that the applicant has a statutory right pursuant to s.11(3) of the Refugee Act 1996 to make representations in writing in relation to any matter relevant to the investigation of her application and the respondent shall take account of any such representations. Failure to know of these country of origin reports in advance effectively prevents her from exercising this right.

10. Counsel for the applicant further submitted that the respondent placed selective reliance on the country of origin information considered and relied upon and failed to consider and keep in mind all relevant country information which was before her in reaching the decision. There is an obligation on the Authorised Officer to have regard to the full contents of country of origin reports which he or she has regard to when considering an application for refugee status and there is an obligation to adopt a balanced approach to the objective assessment. It is also submitted that the Authorised Officer, in considering the application of a minor victim of rape, should have regard to the whole picture instead of selectively relying on country of origin information.

11. It is further submitted that when interviewing and assessing the application of a minor, it is not in the best interests of the child that a negative credibility inference be drawn based on a matter which was never put to that child or to her guardian in order to allow her to address it.

12. In relation to the Authorised Officer's finding that he was obliged to apply s.13(6)(e) of the Act of 1996 to the applicant's case, counsel for the applicant submitted that a constitutional construction of the legislation is that the Authorised Officer is not obliged to apply the section but rather has a discretion as to whether or not to apply those provisions. Furthermore, a mandatory requirement that the provisions of s.13(6)(e) have to be applied, regardless of the circumstances of the applicant's case and without any facility for the respondent to consider the applicant's background and circumstances and the nature of the persecution suffered would amount to a denial of the fair procedures and natural and constitutional justice. This would render the provisions of s.13(5) and (6) of the Act of 1996 repugnant to the Constitution and Article 40.3 thereof.

13. A further consequence of the provisions s.13(5) and (6) of the Act of 1996 is that an applicant can be denied a right to an oral appeal which denies her a right to her constitutionally protected right to a fair trial.

14. Counsel for the respondent submits in reply that any difficulties the applicant has in regard to the findings can be more fairly and properly addressed in the statutory appeal to the Refugee Appeals Tribunal as the complaints before the Court do not go to jurisdiction or procedure but rather to the outcome of the hearing and the manner and content of the decision. It was denied that the Authorised Officer relied on the reports in a selective fashion.

The Commissioner: Well Foundedness

15. At para. 5.6 of the Commissioner's report he states:-

> "While the applicant may indeed require support and assistance considering the above analysis of her asylum claim it seems reasonable to conclude she has not established a well-founded fear of persecution."

16. It is clear from the report itself that the Commissioner accepted the applicant's account as to how she was raped. The Commissioner took no issue and apparently accepted that the applicant was a member of a particular social group for the purposes of s. 2 of the Act of 1996 and the Convention. In relation to the main finding the Commissioner sets out at para. 5.4 why he came to the conclusion that the applicant has not established a well founded fear of persecution:-

> "The Applicant claims she fears 'That it might happen again' (pg. 17, IN) if she returns to South Africa.
>
> From the Applicant's account it appears she was raped last year. When asked if she knew the person who raped her, she said 'No' (pg. 12, IN). She claims she did not go to a hospital after the alleged attack and she did not tell anyone in her school. When asked if she went to the police, the Applicant said 'No', maintaining 'I was scared' (pg. 11, IN). When asked if she went to any organisation/agencies in South Africa who help women who have been raped, for example the Sexual Offences and Community Affairs Unit, the Applicant said 'No' (pg. 14, IN). She claims she tried to tell her aunt '…but she said I was lying because she drinks' (pg. 11, IN). There is no disputing the gravity of the Applicant's account of what happened her in 2005. Indeed country of origin information indicates there continued to be reports of widespread rape, sexual abuse, sexual harassment and assaults of girls by school teachers, students and other persons in the school community. However, the South African government has taken important legislative steps to try to combat violence

against women, including introducing a new Sexual Offences Bill to remove anomalies from the existing law, which was discussed in Parliament during 2004 (Appendix 1, UK Home Office, March 2006; Appendix 2, Human Rights Watch, January 2006). Police continued to receive training in handling rape cases. The government operated 54 sexual offences courts that operated throughout the country, that included designated waiting rooms and counselling for victims. The Sexual Offences and Community Affairs Unit (SOCA) operated five centres known as Thuthuzela centres, which specialised in rape care management and streamlined a network of existing investigative, prosecutorial and medical and psychological services in hospitals where they were located (Appendix 1, UK Home Office, March 2006; Appendix 3, U.S. Department of State Country Report on Human Rights Practices 2005; Appendix 4, Amnesty International, covering events from January to December 2005). Paragraph 100 of the UNHCR Handbook states 'Whenever the protection of the country of nationality is available, and there is no ground based on a well founded fear for refusing it, the person is not in need of international protection and is not a refugee'. Furthermore, paragraph 65 of the Handbook states 'Persecution is normally related to action by the authorities of a country'. When asked why she left South Africa the Applicant stated 'I was pregnant and I did not have a person to live with because my granny is old. She could not look after me and the baby' (pg. 9, IN). The Applicant's mother, Ms. B.O. (File Reference …) arrived in Ireland on the 31 December 2003 (Appendix 5). While this Applicant may indeed require support and assistance, there is a possibility she had motives other than flight from persecution for leaving South Africa and travelling to Ireland. Paragraph 62 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status states 'a migrant is a person who, for reasons other than those contained in the definition, voluntarily leaves his country in order to take up residence elsewhere. He may be moved by the desire for change or adventure, or by family or other reasons of a personal nature. If he is moved exclusively by economic considerations, he is an economic migrant and not a refugee."

17. The applicant alleges that the country of origin information relied on by the Commissioner in the report (quoted above) was not disclosed to the applicant and she had no opportunity to comment on it. This it was submitted was a breach of fair procedures and a breach of her natural and constitutional rights in the circumstances.

18. I set out the written submissions of the applicant on this issue:-

"6. In the Section 13(1) Report the Authorised Officer of ORAC has regard to and places reliance on the following country of origin information which is listed as follows:

> Appendix 1, UK Home Office, March 2006; Appendix 2, Human Rights Watch Report dated January 2006 on South Africa; Appendix 3 US Department of State Country Report on Human Rights Practices 2005; Appendix 4 Amnesty International covering events from January to December 2005. The extract from the US Department of State Report 2005 in fact is 'Appendix 2'. The Authorised Office of ORAC refers to the country of origin information at 5.3 and 5.4 of the Section 13(1) Report. This country of origin information was never put to the Applicant and/or her mother at the interview in order to allow the Applicant and/or her guardian to address it and/or make representations on it. Three of the country of origin information reports were only disclosed to the Applicant after a decision was made to recommend that she not be declared to be a refugee. The fourth country of origin information report referred to and relied on by the Authorised Officer in refusing the Applicant's application (Appendix 4, Amnesty International, covering events from January to December 2005) while referred to in the Section 13(1) report and relied on by the Authorised Officer has never been disclosed to the Applicant and or her guardian and/or her legal representatives. This amounts to a breach of the Applicant's rights to fair procedures and natural and constitutional justice.

7. The Authorised Officer of the First Named Respondent has relied on country of origin information in the Section 13(1) Report in concluding that state protection is available to the Applicant in South Africa. Based on a selective reliance on country of origin information which was never put to the Applicant and/or guardian and where the Applicant (a minor) was never provided with an opportunity to address, either at the interview or thereafter, the Authorised Officer of the First Named Respondent on this country of origin information on foot of which the Authorised Officer has made material findings against her the Authorised Officer has erred in law and acted in breach of the Applicant's right to a fair procedures and natural and constitutional justice.

8. The Applicant and/or her guardian or any other person acting on her behalf has the right and entitlement pursuant to S. 11(3) Refugee Act 1996 to make representations in writing to the First Named Respondent in relation to any matter relevant to the investigation of her application and the First Named Respondent shall take account of any such representations. The failure by the Authorised Officer of the First Named Respondent to disclose to the Applicant matters, materials and information relevant to the investigation at any stage during the investigation has denied the Applicant her statutory right to make representations in connection with same. The Applicant and/or her guardian are not in a position to make representations concerning matters of which they are not aware and have not been made aware."

19. In making complaint on this issue the applicant relies on the dictum of Clarke J. in the *I* case (*I. (V.) v. Minister for Justice, Equality and Law Reform & Anor*. [2005] I.E.H.C. 150) which reads in part as follows:-

"In those circumstances it seems to me that whatever process or procedure may be engaged in by an inquisitorial body, they must be such as to 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 that applicant with 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."

(This passage has since been approved in *Moyosola v. Refugee Applications Commissioner & Ors.* [2005] I.E.H.C. 218 and *Olatunji v. Refugee Appeals Tribunal & Anor.* [2006] I.E.H.C. 113).

20. I have no difficulty in accepting this as an accurate statement of the law. It must be noted, however, as it is by Clarke J., that the obligation on the relevant body is an obligation to give "a reasonable opportunity" to the applicant and that the obligation arises only where the relevant matter is "important to the determination" so that the applicant will have the opportunity to respond. Clearly, not every matter must be put to the applicant or to her advisors. It is not incumbent on the Commissioner after every question is answered to say to the applicant:-

> "I am not sure I believe your answer. It may be when I assess the matter fully and examine the evidence in its totality that I will reject your answer to this question. What have you to say to that?"

21. It is quite clear to all who participate in this exercise especially where the applicant is assisted by legal advisors, that the application will be at risk if the applicant is not believed, and that the principal onus of proof lies on the applicant who is in appropriate cases to be given the benefit of the doubt. The dicta of Clarke J. is of particular relevance where the applicant's version is challenged by reference to a specific fact which the Commissioner learns of from another source and which clearly challenges the applicant's version of events. If, for example, the applicant alleges that Ireland is the first State where she has made an application for refugee status and it comes to the knowledge of the Commissioner that the applicant has in fact previously applied for this status in the United Kingdom under a false name, such a significant matter will of course have to be put to the applicant in an open and clear manner. It does not follow however, that every piece of country of origin information, however banal or however clearly it comes within the phrase general knowledge, must be put to the applicant. It appears to me that it is only if it is special and significant that it must be put. Whether a particular matter assumes such significance in any given case depends on all the circumstances and in determining this issue one must look at the overall picture and review the process in the round.

22. Whether the Authorised Officer's challenge is to the applicant's personal accounts or to the applicant's description of conditions in the country of origin would also be important. In the former it may be appropriate to question the applicant more closely than in the latter where the applicant's full appreciation might not be comprehensive. But even there, it may be that the issue is between general and abstract statements on the one hand, and conditions on the ground and local practices, on the other, where more penetrating dialogue is appropriate. It is relevant to note in the present case that there was no adverse credibility finding against the applicant. What is alleged is that the conditions in the applicant's country were not such as would a warrant a well founded fear that she would be raped again if she returned which was her expressed fear. An examination of the interview discloses that the issue of State protection was raised and addressed and was an issue clearly being referred to at the interview (see pp. 11 and 14 of the interview). There is a specific reference to the Sexual Offences and Communities Affairs Unit at p. 14 of the interview as well as to "organisations or agencies in South Africa who help women who have been raped". The applicant merely stated that she had not sought any help. The applicant's mother did not seek to supplement or explain this answer in any way and it is certainly not clear from the notes of interview that the applicant or her mother had not heard of the unit referred to. When given further opportunity to make submissions at the end of the interview the applicant's mother declined to do so.

23. It is clear from the Commissioner's report that he accepted that sexual violence in schools is reported to be widespread in the country of origin and that school authorities often concealed or delayed disciplinary action. The Commissioner nevertheless accepted as accurate the general thrust of the matters contained in the country of origin information report of the United Kingdom Home Office in that regard. Taken in the round I am satisfied that for the most part there was no breach of fair procedures in failing to put these matters more specifically, to the applicant and her mother.

24. It must be recognised in cases such as this that country of origin information is to be found in many sources and where the applicant is legally represented, as in this case, it must be assumed that her legal advisors will be aware of the fact that various sources will be consulted and used by the Commissioner in his final report. While it is acknowledged that in the process both parties have an obligation to bring forward the evidence, the initial onus remains on the applicant. One must also recognise here that we are not dealing with a person who has been thrown upon our shores in abnormal circumstances and subjected to a process where she does not speak the language and is not legally represented. The process in which the applicant is now involved is a very familiar process in respect of such persons and the central issues are easily identified and the likely sources of the information on the country of origin are well known, available and easily accessed on various websites. In such circumstances, the element of surprise in these matters is rare.

25. Where one is therefore dealing with general matters of country of origin information many of the matters are so well known as to amount to no more than common sense or matters of general knowledge. As already stated the importance of the principle established by Clarke J., referred to earlier, arises especially when a specific matter is being referred to pertaining to the applicant in particular. In such a case the matter should clearly be put to the applicant so that she will have a full opportunity to respond.

26. In my view this is not the case here. General matters appreciated by all involved in these kind of legal processes do not normally have to be flagged specifically.

27. The applicant also argues that the respondent was selective in relying in parts of the country of origin information at para. 5.3 of the report where the Commissioner states:-

> "There continues to be reports of widespread rape, sexual abuse, sexual harassment and assaults of girls by school teachers, students and other persons in the school community. The law requires schools to disclose sexual abuse to the authorities; however, administrators often conceal sexual violence and delay disciplinary action."

28. He continues:-

> "Equal rights for women are guaranteed by the constitution and promoted by constitutionally mandated Commission on Gender Equality. Laws such as the Maintenance Act and the Domestic Violence Act are designed to protect women in financially inequitable and abusive relationships."

29. These last two sentences are direct quotes from appendix one, United Kingdom Home Office, March, 2006, but that they are direct quotations is not indicated in the Commissioner's report. More significantly, the remainder of that paragraph which greatly qualifies the effect of the legislation referred to, reads as follows:-

> "These laws, however, do not provide the infrastructure necessary for implementation. Discriminatory practices and customary law remain prevalent, as does sexual violence against women and minors. 40% of rape survivors and girls are under 18. The Criminal Law (Sexual Offences) Amendment Bill, introduced to Parliament in 2003 seeks to widen protection for sex crime victims, but human rights groups say that it does not go far enough. The Home Office report then goes on to refer to the United States department of State Report on Human Rights Practices in South Africa in 2004 which refers

> to societal attitudes and lack of infrastructure, resources and training for law enforcement officials hampering the implementation of domestic violence legislation and to the number of women filing complaints representing only a fraction of those suffering abuse and stating that doctors, police officers and judges often treat abused women badly."

30. In *S v. Minister for Justice, Equality and Law Reform & Anor*. [2007] I.E.H.C. 305 Edwards J. in a similar case before the RAT stated:-

> "However, the country of origin information before him contained conflicting information. He gives no indication as to how, or on what basis, he resolved the conflicts in the information before him…While this court accepts that it was entirely up to the Refugee Appeals Tribunal to determine the weight (if any) to be attached to any particular piece of country information it was not up to the Tribunal to arbitrarily prefer one piece of country of origin information over another. In the case of conflicting information it was incumbent on the Tribunal to engage in a rational analysis of the conflict and to justify its preferment of one view over another on the basis of that analysis."

31. In the case before this Court also I find that the Commissioner was selective in the part of the paragraph he chose to quote in support of his decision, omitting the remainder which greatly modified the selected passage. Moreover, he engaged in no rational analysis of the conflict and gave no reasons to justify his preferment of one view over another on the basis of that analysis.

32. It is also appropriate to recall the peculiar circumstances of this case in considering whether I should grant leave to allow judicial review in this case. The applicant was only 14 years of age when she arrived in this country. She was heavily pregnant as a result of a rape and on arrival she had to be rushed to the Mater Hospital. She gave birth to a stillborn baby and was placed in Intensive Care for some days. The interview with the Commissioner was conducted some four weeks later. In such circumstances it is my view that great care should be given to the way such a meeting is conducted. It must be appreciated that in such circumstances it may be difficult to get comprehensive responses and answers to the questions posed by the Commissioner. Generous allowance should be made in interpreting the answers furnished. It would be unfair in such circumstances, in my view to interpret monosyllabic answers suspiciously or to deduce from the brevity of the responses negative findings. Great care must be taken and great sensitivity must be shown in conducting such an interview and in some cases a second interview may be required.

33. The UNHCR guidelines "Interviewing Applicants for Refugee Status (RLD4)" of 1995 sets out that in interviewing children the principle to be applied is that of "best interests of the child" as set out in article 3 of the UN Convention on the Rights of the Child. Although there is no obvious discourtesy or lack of sensitivity in reading the interview transcript I am prepared to give the applicant the benefit of the doubt in this matter. For this reason, I accept that this may not have been borne in mind in the interview in this case or in the conclusions deduced by the Commissioner therefrom.

34. The last point which concerns me relates to a statement made by the Commissioner in his Report. The Commissioner at para. 5.4 states:-

> "While this applicant may indeed require support and assistance, there is a possibility she had motives other than flight from persecution for leaving South Africa and travelling to Ireland."

35. Quoting para. 62 of the UNHCR handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 protocol relating to the status of refugees, it is suggested that these motives would mean that the applicant is not a refugee. In my view there is very little basis from the interview to justify a finding on the applicant's motives being other than a fear from persecution. It sounds dangerously close to speculation and it is only slightly modified by the use of the word "possibly". Bearing in mind that the applicant was not only a child but also a victim of sexual violence I do not consider that the interview process in this case fully recognised the vulnerability of the applicant in the circumstances. If the suspicion was that the applicant came to Ireland to be with her mother or to avail of medical services, this should have been clearly put to her.

36. It is also relevant to note that as South Africa has been designated a safe country of origin by the Minister for Justice, Equality and Law Reform the Commissioner's finding, if left stand, will also mean that the applicant will not have a full oral hearing and will be greatly disadvantaged as a result.

37. Taking all the circumstances into account, therefore, I am satisfied that the interests of justice in this case will best be served by granting leave to the applicant.

Constitutional Grounds Advanced by the Applicant

38. Because of my determination in favour of the applicant on other grounds I do not have to determine the constitutional issues raised by the applicant. I will content myself with these comments, which of course are no more than *obiter dicta*, on the substantive matters in dispute.

39. The applicant advanced two grounds challenging the Commissioner's report on constitutional grounds:

> 1. The applicant wished to advance an argument that the proper constitutional interpretation of s. 13(5) and s. 13(6) of the Refugee Act 1996, as amended, means that the respondent has a discretion as to whether or not to apply the provisions of s. 13(6)(e). The respondent, the applicant wished to suggest, was wrong when she felt that she was obliged to apply s. 13(6) when the relevant provisions applied.
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> 2. The second constitutional argument advanced by the applicant was that depriving the applicant of an oral hearing, confining the applicant instead to an appeal on the papers, was itself unconstitutional since it denied the applicant her constitutional right to a fair trial or fair hearing.

40. The respondent objected to the applicant canvassing the first argument because notice of this argument was only advanced on the 9th April, 2008 and was out of time by approximately 21 months. The matter was dealt with at this hearing as a preliminary issue and having considered the arguments, the submissions and the case law (*.Z. v. Refugee Appeals Commissioner & Anor.*, [2008] I.E.H.C. 36 ;see also *Jolly v. Minister for Justice Equality and Law Reform* (Unreported, ex tempore, High Court, Finlay Geoghegan J., 6th November, 2003)), I ruled it out of time.

41. With regard to the second argument this issue was dealt with by the Supreme Court in *V.Z. v. Minister for Justice* [2002] 2 I.R. 135. In that case McGuinness J. for the Supreme Court dismissed the applicant's claim and held that a denial of an oral appeal under procedures then operating in the asylum process did not constitute a breach of his "rights" to natural and constitutional justice and that the State was entitled to apply accelerated procedures. Although the procedures in that case were those which were in

existence before the present procedures were introduced I accept the principles expressed by McGuinness J. at p. 161:-

> "I now turn to the second appeal. Here I would accept the submission on behalf of the respondents that there is no authority to establish that an oral hearing on appeal is necessary in all cases. The applicant is not in the position of an accused person facing prosecution. There are no witnesses against him. He is not in a position to cross-examine the assessors of his claim and it is difficult to see how in these circumstances a right to cross-examine is relevant. He may certainly wish to expand on either his own evidence or independent evidence concerning the conditions prevailing in his country of origin but it is open to him to provide this information in writing."

42. The applicant has not advanced any legal basis to demonstrate that the law as expressed by McGuinness J. does not apply to the present case.

43. For the above reasons I grant the applicant leave to bring judicial review proceedings. Because of the inter-connectedness of the various grounds advanced by the applicant in support of her case I grant leave for the applicant on all grounds, in spite of my own views on some of these arguments, except for the first constitutional argument which I have found to have been advanced too late.