Neutral Citation: [2015] IEHC 111

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 424 J.R.]

BETWEEN

P. D.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 20th day of February, 2015

1. Should the applicant be permitted to seek judicial review of the decision of the second named respondent prior to an appeal to the Refugee Appeals Tribunal? The consistent jurisprudence of the Superior Courts is that intervention by way of judicial review in respect of decisions of the Refugee Applications Commissioner is rarely permitted and only in cases which at least involve errors as to jurisdiction but even then, the court retains discretion to refuse. I must therefore decide whether there are errors as to jurisdiction in the first instance decision and if so whether the applicant may seek judicial review as opposed to pursuing an appeal to the Refugee Appeals Tribunal.

Procedural Background:
2. The proceedings commenced by notice of motion of 11th November, 2010. An intended statement of opposition, in respect of the telescoped hearing, was served on 19th November, 2014; the applicants written submissions were filed on 25th November 2014 and the case was listed for hearing on 28th November, 2014. The applicant's written submissions (prepared by junior counsel only) had not alluded to the jurisprudence of the Superior Courts in relation to the limited circumstances in which judicial review of a decision of the Refugee Applications Commissioner may be permitted. The respondent's submissions raised a preliminary objection (as did its pleading) to the effect that this judicial review is premature. A substantive legal argument was sought to be made orally by junior counsel for the applicant to refute this point. The court directed that supplemental submissions be delivered and the case was adjourned. A wasted costs order was made in respect of the lost hearing date.

Factual Background:
3. In accordance with s.8 of the Refugee Act, 1996 (as amended) an immigration officer interviewed the applicant who sought asylum in the state on the 31st August, 2010. An interview of an asylum seeker conducted in accordance with s.8 seeks to establish "the general grounds upon which the application is based" (see s.8(2)(a)), "the reason why the person came to the State" (see s.8(2)(e)) and the "legal basis for the entry into or presence in the State of the person" (see s.8(2)(f)).

4. The result of the s.8 interview was recorded in writing by the authorised officer and signed by the applicant. The applicant indicated that he was born in Malawi and that he had a passport from that country. He said that he had lived in Zimbabwe, that he was gay and that this was discovered by his family in 2009. He states that he was attacked by his relatives and suffered injury to his head requiring hospitalisation. He states that he left Zimbabwe in February 2010 and went to Malawi as his father was born there and he had relatives there. He says that circumstances were not good there either, that he returned to Zimbabwe but was in hiding as he feared for his safety. He states that he contacted an uncle living here who told him to come to Ireland for a visit. He came to Ireland on 22nd August, 2010. The signed record of the interview acknowledges receipt by the applicant of a questionnaire which must be completed by a person applying for refugee status. This questionnaire is the prescribed form referred to in s.8(4) of the 1996 Act which provides "An application [for refugee status] shall be made in writing in the prescribed form or in a form to the like effect and shall be addressed to the Commissioner."

Questionnaire:
5. The questionnaire was given to the applicant and it was required to be returned by 9th September, 2010. Guidelines for the completion of the questionnaire are provided to applicants for refugee status. Guideline 2 says "this Questionnaire seeks relevant information from you as an applicant for a declaration as a refugee in Ireland. This information will form the basis of the investigation at your interview." This questionnaire must be completed fully and returned within 10 working days. The guidelines also informed the applicant that:

> *"You should seriously consider obtaining the assistance of a professional legal advisor. You may contact a member of the staff of the Refugee Legal Services…or a solicitor in private practice…"*

6. The applicant did not obtain legal advice prior to completing the questionnaire or at any stage during his dealings with the Refugee Applications Commissioner.

7. Part Three of the questionnaire is entitled 'Basis of Your Application for Refugee Status' and sets out the following recommendations:

> • *"When answering the questions below you should tell us everything about why you think you should be considered for refugee status.*
>
> • *You should tell us if you think any of the events you referred to occurred because of your race, religion, nationality, membership of a particular social group, political opinion or any other reason.*

> • *You should also tell us if you have ever been imprisoned, interrogated, tortured or mistreated in your country of origin and give full details."*

8. Immediately following this text, question 21 on the questionnaire asks "Why did you leave your country of origin?" The applicant's (handwritten) answer was as follows:-

> "I left my country of origin because of the profound fear of being tortured and mistreated because I am gay. I left at the time when my fellow activists were on a police [list?] in Blantyre and also a couple had been sentenced to 14 years in jail. I strongly feared to be arrested for homosexuality, thrown in jail and put in physical danger by angry mobs who always say we are guilty of gross indecency and unnatural act. Continued efforts to meet Mr. E.T [redacted] at the human rights group centre for protection had also proved fruitless and my life was hanging on a thread as each day passed and the net was closing in on us gay people."

In part response to question 29, similarly he states:

> "I strongly fear I will be arrested for homosexuality and thrown into jail. I am in physical danger by angry mobs for my sex orientation; I will…a severe discrimination and interference. I will also attract…rude, insulting and downright threatening including verbal and physical aggression from the people of Malawi." The form also indicates that "after years of discrimination and interference in my sexual orientation I decided to leave Zimbabwe for Malawi".

9. At question 25a the applicant was asked whether he had reported his fears to the authorities and he replied: "I reported several incidences to the police during my stay in Zimbabwe and nothing was done since the President Mugabe is an outspoken critic of homosexuality as he openly described us." When asked what action was taken by the authorities he says: "No action was taken since the authorities (police) are loyal to President and homosexuality is seen as an aberration and gay sex is straight forward sin and crime in Zimbabwe". In response to the question "if you did not report it, state clearly why you did not" the applicant, with respect to his time in Malawi said: "I could not report to the relevant authorities (police) because already the police were on a manhunt for gay activist P.S. [name redacted] was arrested for putting up posters that read "gay rights are human rights". My fellow activists were protesting the imprisonment of S.M. and T.C". When asked why he returned to Zimbabwe and what the purpose of that journey was, he answered: "Forced out of Malawi due to fear of jail sentence and continued interference because of being gay."

Section 11 Investigation:
10. Once the prescribed questionnaire is completed, the claim for asylum is investigated in accordance with s.11 of the 1996 Act. That section is entitled "Investigation of Applications by Commissioner". Section 11(1) provides that where an application is received by the Commissioner under s.8, "it shall be the function of the Commissioner to investigate the application for the purposes of ascertaining whether the applicant is a person in respect of whom a declaration [of refugee status] should be given." Section 11(2) says that the Commissioner shall direct an authorised officer to interview the applicant. Reading s. 11(1) and 11(2) together, it is apparent that the statutory purpose of the interview is to investigate the asylum application which has been made in writing in the prescribed form, that being the questionnaire which has been completed. Thus before the investigation under s.11 commences the applicant for refugee status has set out the basis of the claim for refugee status in a form prescribed for that purpose as required by statute.

Section 13 Report:
11. Once the s.11 investigation is complete, a report is prepared pursuant to Section 13 which provides that:-

> "Where the Commissioner carries out an investigation under s.11 he or she shall…prepare a report in writing of the results of the investigation and such report shall refer to the matters raised by the applicant in the interview under s.11 and to such other matters as the Commissioner considers appropriate and shall set out the findings of the Commissioner together with his or her recommendation whether the applicant considered should, or as the case may be, should not be declared a refugee."

12. Section 13 confirms that the investigation of the application for refugee status is not necessarily confined to an interview. The interview may comprise the totality of the investigation but the investigation may comprise more than the interview. The significance of this somewhat obvious comment will become apparent presently.

The Applicant's s. 11 Interview:
13. The s.11 interview comprised 126 questions. In answer to questions as to his circumstances, the applicant indicated that his cousin's sister had discovered that he was gay, that he was attacked and that his relatives didn't want to see him again so he ran away and lived in hiding because he was afraid of his family. He went to Malawi and was asked if he had problems there and he answered: "Yes. I was trying to escape. I found the situation worse there. I went looking for my father's brother but he couldn't accept me because I was gay and the situation in Malawi was very bad". When asked if anything happened to him in Malawi he answered: "Yes. They were looking for gays in Malawi when I arrived there. My uncle went to the police and they were searching for gays. I was one of the people that they were looking for." He was asked, why didn't you stay with certain friends in Malawi and he answered: "P.S [name redacted] was one of the friends but he was arrested." He was asked 'why didn't you stay with your other friends?' and he answered: "It wasn't safe there and they were looking for us. If they found me maybe I would be put in jail."

14. The applicant was asked about the circumstances of his return to Zimbabwe in May 2010 and whether he then had any problems in Zimbabwe and he answered: "I was living in hiding from my family and I had no freedom. If they found me they would attack me. We were being called names by the community". When asked, why the police were looking for him he said: "Because I was gay. I was going to be beaten if they found me". Asked how he knew that he answered: "Things weren't good in Zimbabwe, rumours went around that if they found us gays that we were going to be in big trouble." He was asked why he had returned to Zimbabwe if things were so bad there and he answered: "because the situation was even worse in Malawi and I thought I would be better in Zimbabwe." He was then asked why he said things were worse in Malawi when all he had told the interviewer was that people called him names, he answered: "If I hadn't run away I would have been imprisoned." He was then asked a series of questions about his knowledge of gay rights organisations in Zimbabwe and Malawi. When asked as to the prospect of his return to Zimbabwe he answered: "If I go back there the situation would not be good. They don't even consider us human beings because we are gay. I wouldn't be safe there." When asked what he feared if he returned to Zimbabwe he answered: "I fear I would be jailed and tortured" and he answered "the same" with respect to a return to Malawi.

15. The interview was conducted on the 1st October, 2010 by an authorised officer who, on 27th October, 2010 produced a report pursuant to s.13 of the 1996 Act. Before proceeding to describe the s.13 report I observe that the s.11 interview did not invite the applicant to state the basis of his claim for asylum. In accordance with the provisions of s.11, the interview constituted part of the

investigation of the asylum claim which had been set out in writing on the prescribed form – that being the questionnaire to which I have alluded. The questionnaire, unlike the s.11 interview, expressly asked the applicant why he was seeking asylum.

The Applicant's s. 13 Report:
16. The s.13 report states that "Details of the applicant's asylum application are set out in the ASY1 form, Questionnaire and section 11 interview record." Though this phrase appears in most if not all s.13 Reports it not strictly accurate. The questionnaire may be described as the asylum application. The section 11 interview is not, strictly speaking, part of the asylum application. It forms part of the investigation of the application. The authorised officer directs the investigation and the interview under section 11. The reason I refer to this otherwise irrelevant inaccuracy is that the respondent places some emphasis on the difference between what the applicant said on the questionnaire and what was said at interview. The respondent seeks to argue that the applicant's true asylum claim was based on a fear of his family and the interview, it is said, reflects this fact. The applicant argues that the asylum claim was based on a fear of being prosecuted and jailed by state authorities as well as fear of his family as indicated in writing on the questionnaire. My view is that the claim for asylum is that which is expressed in the questionnaire. Elements of the claim may also come to light from the s'8 interview and from the s.11 interview and from any other investigation carried out. The fact that part of a claim expressed in the questionnaire (which, it is recalled, is the prescribed form for the purposes of s.8(4) of the Act) finds no expression in the s.11 interview does not mean that it is not pursued by the applicant.

17. Section 3.2 of the s.13 report is in the following terms:

> *"3.2 Persecution*
>
> *3.2.1 The applicant states he was born in Zimbabwe. He lived there with his parents until he was 12 years old when he went to live with his aunt and uncle (also in Zimbabwe)…In 2009 his cousin's sister caught him in bed with his partner and told his uncle, who then attacked the applicant (section 8 interview). He states he reported this incident to the police but they didn't do anything…After this incident he ran away and went into hiding in Zimbabwe…He had no problems while he was in hiding in Zimbabwe.*
>
> *3.2.2 The applicant then went to Malawi in February 2010 to look for his father's brother who didn't accept him because he was gay and he states the situation in Malawi was bad…. He states his uncle told the police about the applicant's sexuality and as a result they were looking for him….*
>
> *3.2.3 The applicant states he returned to Zimbabwe in May 2010 where he went into hiding from his family and states he was called names by the community… He left Zimbabwe and travelled to Ireland on 21 August 2010.*
>
> *3.2.4 The applicant's claim may be considered to constitute a severe violation of basic human rights and therefore may be considered as being of a persecutory nature and as such could satisfy the persecution element of the refugee definition. This, however, is without prejudice to an examination of the well-foundedness of the fear of being persecuted in accordance with section 2 of the Refugee Act 1996."*

At section 3.3.1 the section 13 report goes on to say:

> *"At the outset, it should be noted that the applicant's asylum claim is based on uncorroborated assertion since he has not provided this Office with any documentation or evidence which would prove any aspect of his claim of persecution. In accordance with the general legal principles, the burden of proof lies on the person who submits a claim for asylum. Thus, the applicant for refugee status has the burden of establishing the veracity of his allegations and the accuracy of the facts on which the claim is based.*

18. In my consideration of this s.13 report I note that at no other part does the author of the report attempt to describe the persecution claimed. It would appear that the authorised officer perceived the applicant's claim to be based on being persecuted by his family driven by their negative reaction to discovering his sexuality and an attack by his uncle combined with the failure of the police to protect him when he reported the incident and his fears. His fear of prosecution is not mentioned.

19. In assessing whether the applicant had a well founded fear, the authorised officer made numerous credibility findings against the applicant which ultimately lead her to conclude that he did not have a well founded fear of persecution. In addition to the inconsistencies which caused her to doubt the credibility of the applicant, she also decided that he did not have a well founded fear of persecution because when asked what problems he had experienced in Malawi he had replied that the situation in Malawi was very bad and that "they were looking for gays in Malawi when I arrived there. My uncle went to the police and that the police were searching for gays." The authorised officer says: "In view of the fact that nothing actually happened to the applicant while he was living in Malawi, apart from his friends unsubstantiated claims that the police were looking for him, it is difficult to accept that the applicant has a well founded fear of persecution in Malawi." Similarly, the authorised officer finds that as the applicant was able to live in Zimbabwe from June 2009 until February 2010 and from May 2010 until August 2010 without any problems "it is considered that the wellfoundedness of his stated fear in Zimbabwe is seriously undermined".

20. The authorised officer proceeds to examine the possibility of state protection and internal relocation. As to the absence of state protection the authorised officer concludes: "As the applicant claims the police in both Malawi and Zimbabwe are looking for him it is considered the state protection may not be a viable option in this case. However the applicant in this instance is not considered to be credible and no further examination under the state protection alternative is required."

21. This would appear to express the view of the authorised office that because the applicant's credibility was seriously undermined by inconsistencies in certain matters in his narrative, his allegations as to the absence of state protection were also rejected as being incredible. No actual investigation of whether the police protect gay people was ever conducted.

22. I should note in passing at this stage that the court has been informed in pleadings and on affidavit that the authorised officer considered country of origin information. That information has not been exhibited and the content thereof has never been described to me. One detects from the s.13 report that an investigation was conducted as to the existence of gay rights organisations in both countries and certain questions were asked of the applicant in respect of these organisations. The inability of the applicant to answer certain questions in this regard went to his credibility. (The court is entitled to assume that no investigation of the legal regime with respect to homosexuality in either Zimbabwe or Malawi was ever conducted by the authorised officer. In particular the court relies on the statement that "no further examination under the state protection alternative is required" because of the credibility difficulties established in respect of the applicant, to so infer.)

23. The authorised officer also considered the possibility of internal relocation as a solution to the applicant's stated fears. In respect of Zimbabwe the officer concludes: "In view of the fact that applicant was able to live in Zimbabwe from June 2009 until February 2010 and again from May 2010 until August 2010 without any problems, it is considered that he had already successfully relocated in Zimbabwe prior to moving to Malawi and then again when he returned from Malawi." With respect to the possibility of relocating to Malawi, the officer concludes: "The applicant is a relatively well educated man of 22 years of age, therefore, it is considered that he could successfully relocate to Malawi." The officer generally concludes, in respect of internal relocation: "Therefore, in spite of the fact that this claim is not considered to be well founded, I find that the *prima facie* case would fail on the basis of the availability of the internal relocation option in both Zimbabwe and Malawi, as sanctioned in Regulation 7 of the European Communities (Eligibility for Protection) Regulations 2006."

24. Central to the dispute in these proceedings is the content of the final paragraph of the section 13 report which is in the following terms:

> *"3.5 Nexus to section 2 grounds*
>
> *The applicant's claim may have a Section 2 nexus on the grounds of his membership of a particular social group as per section 10(1)(d) of the European Communities (Eligibility for Protection) Regulations 2006.*
>
> *However, since the claim of a fear of persecution is deemed to be unfounded, the question as to whether there may be a Convention/Section 2 nexus becomes irrelevant.*
>
> *4. Conclusion*
>
> *I am satisfied that the applicant has not established a well founded fear of persecution as required by section 2 of the Refugee Act, 1996 (as amended)."*

Pleadings:

25. The statement required to ground application for judicial review advances general allegations of illegality in reasonably short form but specifically pleads at paragraph (f) thereof as follows:

> *"No proper objective or subjective analysis of the Applicant's claim has been undertaken. In particular and without prejudice to the generality of the foregoing the core of the Applicant's claim was not considered properly or at all. The Applicant's claim was based on his being homosexual but it is entirely unclear whether this core assertion was accepted or otherwise by the second named respondent. No analysis of the treatment/persecution of homosexuals in either Zimbabwe or Malawi was undertaken. The applicant is entitled to a decision which is of sufficient clarity to enable the applicant and his advisors to know how best to address any appeal."*

26. A statement of opposition was filed by the respondent which pleads that the applicant has a full right of appeal to the Refugee Appeals Tribunal which has been invoked and that this application is premature and should not be entertained. The pleading positively asserts that:-

> *"It is apparent from the face of a decision that the second named respondent duly and properly analysed all of the submissions made by and on behalf of the applicant herein and that there is no evidence that any significant matter which ought to have been considered was omitted from consideration or ignored."*

It is also positively pleaded that the Refugee Applications Commissioner,

> *"…sourced and consulted country of origin [information] which was appropriate and up to date and properly utilised in arriving at its conclusions."*

Matters in Dispute:

27. The principle dispute in these proceedings is whether the applicant is entitled to seek judicial review rather than appeal the negative decision of ORAC to the RAT. It is common case there are rare circumstances where judicial review of the first instance decision in asylum matters may be appropriate. That depends on the nature of the error in the decision.

28. The leading authority on the question is the decision of the Supreme Court entitled *Stefan v. The Minister for Justice, Equality & Law Reform* [2001] 4 I.R. 203. The case addressed the former non-statutory regime for asylum applications which, like that established under current legislation, involved a first instance decision maker and an administrative appeal. Mr. Stefan was refused asylum in a process which omitted a translated version of part of his asylum questionnaire. Kelly J., in the High Court said as follows:

> *"It is argued that the procedure before the Refugee Appeals Authority is a cure for the complaints made in the present case. I do not agree. It does not seem to me that this form of review is such that certiorari should not lie. No criticism is made of the Hope Hanlan procedure. This provides for a hearing at first instance. The review is premised on a full and proper hearing having taken place before the deciding officer. This was not present in this case.*
>
> *Even if I am wrong in this, even if a full re-hearing was available I take the view that it would be unsatisfactory. An insufficiency of fair procedures at first instance is not cured by a sufficiency on appeal."*

29. That decision was appealed to the Supreme Court where Denham J. reviewed the numerous authorities addressing the circumstances in which judicial review may lie against a first instance decision notwithstanding the possibility an administrative appeal. Denham J.'s conclusions are in the following terms:-

> *"It is clear that whilst the presence of an alternative remedy, an appeal process, is a factor, the court retains jurisdiction to exercise its discretion to achieve a just solution.*
>
> *The stage of the alternative remedy may be relevant, though it may not be determinative of the issue. This is a case where an appeal had been lodged but had not been opened. It is therefore a situation to be distinguished from that in (State)(Roche) v. Delap [1980] I.R. 170.*

In this case the appeal is pending. It is for the court to determine in the circumstances whether judicial review is an appropriate remedy. The presence of the pending appeal is not a bar to the court exercising its discretion. It is a factor to be considered. It is a matter of considering the requirements of justice."

30. The learned judge then quoted from the decision of Barron J. in *McGoldrick v. An Bord Pleanala* [1997] 1 I.R. 497 and referred to the decision of Geoghegan J. in *Buckley v. Kirby* [2003] 3 I.R. 431 and continued by saying:-

"Certiorari may be granted where the decision maker acted in breach of fair procedures. Once it is determined that an order of certiorari may be granted, the court retains its discretion in all the circumstances of the case as to whether an order of certiorari should issue. In considering all of the circumstances, matters including the existence of an alternative remedy, the conduct of the applicant, the merits of the application, the consequences to the applicant if an order of certiorari is not granted and the degree of fairness of the procedures, should be weighed by the court in determining whether certiorari is the appropriate remedy to obtain a just result."

31. It is also worth noting that Denham J. expressly respected the discretion exercised by the High Court in deciding that *certiorari* was the appropriate remedy for the breach of fair procedures which had been identified. She concluded by saying:

"The applicant is entitled to a primary decision in accordance with fair procedures and an appeal from that decision. A fair appeal does not cure an unfair hearing. Consequently, I am satisfied that the appeal should be dismissed."

32. That decision was applied by Murray C.J. in *A.K. v. The Refugee Applications Commissioner* (Unreported, Supreme Court, Murray C.J.) in an *ex tempore* decision of 28th January, 2009. The High Court had refused to entertain judicial review of a decision of the Refugee Applications Commissioner because of the existence of an appeal mechanism. The Chief Justice said the decision of Denham J. in *Stefan* expressed the general principles which apply in cases of this nature. He referred to the decision in the *State (Abenglen Properties) v. Dublin Corporation* [1984] I.R. 381 where O'Higgins C.J., describing the circumstances in which *certiorari* may be refused on a discretionary basis, said:

"…there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint, or were administrative legislation provides adequate appeal machinery which is particularly suitable for dealing with errors in the application of the code in question. In such cases, while retaining or with the power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate."

33. Murray C.J. in *A.K.* found as follows:

"I am satisfied the applicant's case constitutes an attack on the merits of the decision of the respondent and not on the due process adopted by him in coming to his conclusion. The respondent did not fail to take into account anything which he ought to have taken into account and did not take into account anything which he ought not to have taken into account. Even then whether certiorari, notwithstanding the availability of an appeal, would be grounded would depend on all the circumstances of the case including the degree to which fairness of the hearing was compromised."

34. In *B.N.N. v. Minister for Justice, Equality & Law Reform* [2009]1 I.R. 719 Hedigan J. addressed the question of *certiorari* versus administrative appeal. The learned judge reviewed much of the case law identified by the Supreme Court in *Stefan* and subsequent jurisprudence. At paragraph 44 of his judgment Hedigan J. says:-

"Guidance may be gleaned, however, from the significant number of asylum cases in recent years in which the Court has refused to grant certiorari (or leave) on the basis that the matters raised were of the type that might be raised in the course of an appeal, relating - by and large - to the quality of the decision rather than the defective application of legal principles."

35. At paragraph 45 the learned judge expressed his decision on the question as follows:

"It is clear in the light of this series of recent decisions that it is only in very rare and limited circumstances indeed that judicial review is available in respect of an Office of the Refugee Applications Commissioner decision. The investigative procedure with which the Office of the Refugee Applications Commissioner is tasked must be properly conducted but the flaw in that procedure that entitles an applicant to judicial review of an Office of the Refugee Applications Commissioner decision must be so fundamental as to deprive the Office of the Refugee Applications Commissioner of jurisdiction. The Courts, the applicants themselves, and the general public have a right to expect that no such fundamental flaw should ever occur in such an application. An applicant must demonstrate a clear and compelling case that an injustice has been done that is incapable of being remedied on appeal to the Refugee Appeals Tribunal. If such a clear and compelling case is not demonstrated, the applicant must avail of the now well established procedure that has been set up by the Oireachtas, which provides for an appeal to the Refugee Appeals Tribunal."

36. I read the decision of Hedigan J. in *B.N.N.* as being completely consistent with the decisions of the Supreme Court in *Stefan* and in *A.K.* It is not the case that following the decision in *B.N.N.* that judicial review of ORAC is precluded where the error is remediable by the Refugee Appeals Tribunal. This is to overstate the effect of the decision of the High Court and to ignore the decision of the Supreme Court in *Stefan*.

37. The respondent referred to the recent decision of the Supreme Court in *M.A.R.A (Nigeria) (Infant) v. Minister for Justice, RAC and Ireland* [2014] IESC 71 which noted the dictum of Cooke J. in the High Court as follows:

"It is now well settled in law that where the statutory appeal is available and has been invoked in good time, it is only in exceptional cases that the High Court will entertain an application for judicial review of the s. 13 Report and only then when the report is shown to have some potentially independent consequences for an applicant which is incapable or inapt to be dealt with by the statutory appeal."

38. The Supreme Court disposed of the *M.A.R.A.* case by deciding that the challenge to the decision of the Refugee Applications Commissioner was rendered moot by the prosecution and determination of an appeal to the Refugee Appeals Tribunal. It did not comment on dicta of Cooke J. cited in the foregoing paragraph.

39. The principles I gather from the authorities relevant to these proceedings are as follows:

1. The High Court is entitled to grant *certiorari* or other public law remedy in respect of a decision of the Refugee Applications Commissioner where an error as to jurisdiction is identified.

2. The significance of the error will determine whether the court may exercise its discretion to grant judicial review.

3. Not all errors as to jurisdiction attract judicial review.

4. The court must carefully consider the nature of the error in deciding whether the interests of justice require the first instance decision to be quashed and taken again rather than the error being the subject of an appeal to the Refugee Appeals Tribunal.

5. The court should bear in mind the extent of the Refugee Appeals Tribunal's capacity to provide a remedy and reverse the error. (The nature of appeals to the RAT has recently been fully described by Charleton J. in the Supreme Court in *M.A.R.A (supra)*).

Alleged errors in the decision of ORAC:

40. The primary argument advanced by the applicant, as reflected in pleadings, written submissions and oral submissions, is that the authorised officer failed to decide whether the applicant was or was not a gay man. It was submitted that the applicant's core claim was that he was a gay man who feared persecution in Zimbabwe and Malawi

41. The respondent concedes that the s.13 report does not decide whether or not the applicant is gay, though the respondent emphasises that the s.13 report does not contain a negative decision on the question of the applicant's sexuality.

42. It is suggested by the respondent that the absence of a negative finding may be relied upon at the Refugee Appeals Tribunal to the effect that there is an acceptance that the applicant is gay. The respondent refers to the decision of Cooke J. in *H.P.O. v. The Minister for Justice, Equality & Law Reform* [2011] IEHC 97, (Unreported High Court, 11th March, 2011) where an applicant claimed to be a Buddhist and the illegality alleged was that no finding on this fact was made. Cooke J. commented:

> *"What is significant in construing the effect of the [section 13] report is that the officers make no finding to the effect that he is not a Buddhist. In the absence of such finding the report must be read as accepting that the applicant is indeed a practitioner in that religion.*

43. I am not of the view that the absence of a negative finding in a section 13 report in respect of any central fact advanced by an applicant equates to acceptance of the asserted fact by the decision maker which somehow binds the Refugee Appeals Tribunal. I do not believe that Cooke J. was seeking to identify any such rule. In any event, I don't believe that it is possible to read the s.13 report in this case as a finding that the applicant's asserted sexual orientation is accepted by the Commissioner merely because of the absence of a negative decision on the matter. The position of the authorised officer is that whether the applicant is gay is irrelevant because the application for asylum is refused on the basis of the absence of a well founded fear of persecution.

44. A number of decisions of this court have addressed complaints relating to inadequate consideration of an applicant's core claim. In *E.P.A. v. Refugee Appeals Tribunal* [2013] IEHC 85 the court said:

> *"9. The Tribunal Member refers to the fact that he believes the applicant is a happily married man - not language indicative of an acceptance that the applicant is gay. It seems to me that the Tribunal Member does not accept that the applicant is gay. A clear and reasoned finding on this central issue was required of the Tribunal and a failure by the Tribunal Member to decide this critical part of the applicant's claim in express terms establishes a substantial ground that the decision in unlawful and leave to pursue this complaint is granted. [emphasis added]*
>
> *11. The applicant claims that the Tribunal is not entitled to say, as it appears to be suggesting in the passage quoted, that a gay man can avoid problems by living discreetly. The applicant refers to the decision of the Supreme Court of England and Wales in H.J. & H.T. v. Secretary of State for the Home Department [2010] UKSC 31. That case raised the question as to the test which is to be applied when a decision maker is considering whether a gay person who is claiming asylum is entitled to protection. Following a lengthy review of the law, Lord Rodger came to the following conclusions:-*
>
> > *"The Approach to be followed by Tribunals*
> >
> > *82. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.*
> >
> > *i. If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.*
> >
> > *ii. If so, the Tribunal must go on to consider what the individual applicant would do if he were returned to that country.*
> >
> > *iii. If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well founded fear of persecution - even if he could avoid the risk by living "discreetly".*
> >
> > *iv. If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so.*
> >
> > *v. If the tribunal concludes that the applicant would chose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e.g. not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.*

vi. If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect - his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state give effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."

12. I endorse the conclusions of the Supreme Court of England and Wales and find that a substantial ground has been advanced that the Tribunal should have followed a similar approach when faced with an asylum seeker who claimed persecution because of sexual orientation. It is immediately apparent on reading the decision of the Tribunal Member in this case that nothing approximating that approach was attempted by the Tribunal Member. I grant leave to the applicant to claim that the Tribunal failed to determine the asylum application in accordance with law, the relevant lawful approach being that set out by Lord Rodger above. In this regard, I note the decision of Cooke J. of 17th December 2009, in a decision entitled Adams v. The Minister for Justice, Equality and Law Reform (Unreported). Leave was granted on that occasion on a broadly similar ground."

45. It seems only fair to point out that the decision of this court in *E.P.A.* is a decision on a leave application. The court expressed the desirability for clear decision making on core claims. I have no hesitation in repeating that here. The decision in *H.J. & H.T.* needs to read in the light of the decision of the CJEU in *X,Y,Z, v. Minister Voor Immigratie en Asiel* which is addressed later in this judgment. Though this court generally endorsed the passage in the judgment of Rodger L.J. quoted above and said a similar approach should be adopted by decision makers when dealing with claims of this nature, it must be recalled that in *H.J. & H.T*, it was always accepted that the asylum seekers were gay. The issue in that case was whether it might be said that they did not have a well founded fear of persecution in their home countries because they might live discreetly There was no debate in the case as to whether asserted sexual orientation must be ruled upon definitively in every asylum application based on such a claim. Therefore I do no regard it as part of the *ratio decidendi* in *H.J. & H.T*. that the competent authorities must always decide whether they accept that a person is gay when such a claim is presented. Having said that, it is difficult to fault the approach suggested by Rodger L.J. Thus whilst it may not be legally necessary to take a decision on whether the asserted sexuality is accepted in every case, doing so brings great clarity to the manner in which such asylum applications are assessed.

46. In *B.O.B. v. Refugee Appeals Tribunal* [2013] IEHC 187 further dicta on core claim decision making is to be found as follows:

"7. Having set out how the Tribunal Member approached the claim, I now examine the first complaint in respect thereof. Was the applicant's core claim actually decided by the Tribunal Member? A number of authorities are cited by the applicant in support of the proposition that a core claim should be decided (see E.P.A. v. The Refugee Appeals Tribunal, (Unreported, Mac Eochaidh J., 27th February 2013) [2013] IEHC 85), where the court said, as to the core claim:

"A clear and reasoned finding on this central issue was required of the Tribunal and a failure by the Tribunal Member to decide this critical part of the applicant's claim in express terms establishes a substantial ground that the decision is unlawful ... (see paragraph 9 of the decision)."

8. Reference is also made to Voga v. The Refugee Appeals Tribunal (Unreported, High Court, Ryan J. 3rd October, 2010), and S.R. [Pakistan] v. The Refugee Appeals Tribunal (Unreported, High Court, Clark J. 29th January, 2013, at paragraphs 18 to 23). In Meadows v. The Minister for Justice, Equality and Law Reform, Murray J. said as follows:

"An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context. Unless that is so then the constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective. In my view the decision of the Minister in the terms couched is so vague and indeed opaque that its underlying rationale cannot be properly or reasonably deduced."

9. In view of that statement, it seems to me that a Tribunal Member should express conclusions on an applicant's claim clearly. In this case, for instance, it was open to the Tribunal Member to accept that the applicant had converted to Christianity but to reject the assertion that his father was persecuting him. No finding is made as to whether the applicant had converted to Christianity. This of itself is not fatal to the Tribunal's decision. The Tribunal might make multiple credibility findings in relation to a part of an applicant's account, which, read cumulatively, might adequately express rejection of that part of the claim. The fact that no express finding is made on a separate part of the same claim might not vitiate the decision.

10. In this case, it seems to me that the Tribunal Member may well have accepted that the applicant converted to Christianity. But if the reason for the rejection of the applicant's claim was difficulty believing the tale of persecution by the father, this should have been stated in terms.

...

12. As to the treatment of the applicant's core claim, I accept that the Tribunal Member failed to decide whether the applicant was persecuted by his father. It is not sufficient to say that the alleged persecution "is vague". The alleged persecution was far from vague. Concrete examples of persecution associated with the activities of the applicant's father were given. The real question was whether the account of the persecution was credible. If it was not credible, a proper explanation as to why the applicant's account was not believed should have been expressed, based, for example on unsubstantiated connection between the acts of persecution and the father, implausibility, contradictions, inconsistencies, impossibility or the lack of objective evidence to support the account.

13. The failures which I have identified in the credibility findings support the applicant's first complaint that his core claim has not been adequately assessed. Lawful credibility findings, had they been made, might well have answered this complaint." [emphasis added]

47. My view is that the analysis in this case is in line with was said in *E.P.A.* The emphasis in the quoted passage above is on the need for clearly expressed decisions. This approach is also apparent in *A.A.S. v. Refugee Appeals Tribunal* [2013] IEHC 144 where the court said:

> *"As indicated earlier, it was of central importance to the applicant that he establish his Bajuni ethnicity and Somalian nationality. It is the first matter in respect of which the applicant makes complaint in these proceedings i.e. that the Tribunal failed to make a finding on this issue of ethnicity. Mr. Devally's interpretation would, if accepted, be a full answer to the applicant's first and, probably, main complaint in these proceedings. But in my opinion, this contention must be rejected. If the quoted paragraph is indeed a finding that the applicant was not of Somali nationality and/or Bajuni ethnicity, it is in terms so opaque and obscure as to render such finding undetectable to me. It is noteworthy that these proceedings do not comprise a complaint that the Refugee Appeals Tribunal erroneously found that the applicant was neither Bajuni nor Somali. It seems to me that had such a finding been made, it would have been the first port of call for the applicant in any challenge to the decision of the RAT. Though I disagree with the respondent that the decision of the Tribunal rejects the applicant's asserted Somali nationality, if I am wrong on that, then I find that the decision is flawed by reference to the standard of decision making required in these cases as described by Murray C.J. in Meadows v. Minister for Justice, Equality and Law Reform [2010] IESC 3: "An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context. Unless that is so then the constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective. In my view the decision of the Minister in the terms couched is so vague and indeed opaque that its underlying rationale cannot be properly or reasonably deduced." If the Tribunal's decision is one rejecting Somali ethnicity, it is of no legal effect because of its opacity. In rejecting the respondents' case, I uphold the applicant's complaint that the Tribunal failed to decide the central controversial issue which was before it - the ethnicity and nationality of the applicant. On the facts of this case, it seems to me that such a decision was required in clear and reasoned terms. The evidence advanced by the applicant in support of his ethnicity and nationality required assessment and commentary-though not necessarily on each item. Rejecting the respondents' interpretation of the decision and upholding the applicant's complaint that the Tribunal did not assess whether the applicant had a well-founded fear of persecution in Somalia due to his Bajuni ethnicity and failed to make a specific finding on the issue of his ethnicity and nationality, I order that the decision in suit be quashed."*

48. It is an over simplification of this jurisprudence to say that a decision maker must decide on the truth of each element of a claim for asylum. The common thread in the judgments is the need for clearly expressed decisions in relation to the core claim. The extent to which the elements of a claim are required to be formally decided depends on the circumstances of each case. As asylum claims require the establishment of a number of elements, for example: membership of a social group or race or religion or nationality and a well founded fear of persecution - it may be possible to dispose of the application where proof of one of the necessary elements fails. Where, for example, an applicant claims to be a Nigerian who suffered religious persecution and it emerged that persons of that faith suffer no persecution in Nigeria, the decision maker could lawfully decide that the applicant did not have a well founded fear of persecution without the necessity of deciding whether or not she was a member of the particular religious faith claimed. In my view, no illegality would attach to such decision. Ideally it should be clearly stated that no decision is needed on this aspect of the claim and that, in my view, would comply with the Meadows inspired comments quoted above as to the need for clarity in administrative decisions. The difficulty which frequently arises is that it is unclear to applicants what is believed and what is not believed or whether any decision has been taken in respect of an important part of a claim and this may be of some consequence for the purposes of an administrative appeal.

49. In this case, the authorised officer has decided that the applicant does not have a well founded fear of persecution for reasons which are not dependent on his sexuality. According to the officer, whatever his sexuality, he does not have a well founded fear of persecution as significant parts of his narrative of events connected with his professed fears were not believed. Having a well founded fear of persecution is necessary in order to be declared a refugee. Once the authorised officer decided the applicant had no such fear, he could not be declared to be a refugee and thus whether he was gay was, according to the officer, 'irrelevant'. The authorised officer expressed this view in clear terms though it was perhaps a little unfortunate that it was said that the issue was 'irrelevant'. It seems clear to me that the officer was saying that the issue was moot because even if he was gay, it was not accepted that he had a well founded fear of persecution. The officer did not decide whether he was gay or not but this does not mean that no decision was taken. The decision taken on this aspect of the claim was that the question did not require resolution because it was possible to dispose of the application without deciding the truth of the asserted sexuality. This was not an error of any kind, much less an error as to jurisdiction and thus no question of granting an order of certiorari arises on this ground.

50. That is not, however, the end of the matter. It is recalled that paragraph (f) of the applicant's pleadings asserts that "no analysis of the treatment/ persecution of homosexuals in either Zimbabwe or Malawi was undertaken". This plea is a particularisation of the more general plea that "no proper objective or subjective analysis of the applicant's claim has been undertaken" and arises in the context of general pleas which alleged that there was an error in law and fact and breach of fair procedures and a failure to have due regard to the obligations which arise under the European Communities (Eligibility for Protection) Regulations 2006 and/or Council Directive 2004/83/EC.

51. The authorised officer has not acknowledged that the applicant's fear of persecution was not limited to the mistreatment he feared from his family. A review of the s.11 interview, which was conducted by the same authorised officer who wrote the s.13 report, indicates that the questions asked and the answers given dealt primarily with the circumstances in which he allegedly suffered from his family and sought to escape their negative attentions. However, the questionnaire, the statutory prescribed form by which one applies for asylum and in which an applicant is required by law to state why asylum is sought, indicates that the applicant seeks protection because criminal sanction allegedly applies to homosexuals in Malawi and Zimbabwe. There are references in the questionnaire (and in answers to questions posed in the s.11 interview) to persons being jailed for lengthy periods of time owing to their homosexuality and to the applicant's personal fear of being jailed. I have no hesitation in finding that the applicant's claim for refugee status was based upon a stated fear of being jailed and being sought by the police because he was gay. It must be recalled that he completed his questionnaire without legal assistance. It is hardly surprising that he did not mention the particular statutes (if they exist) which criminalise homosexuality in Zimbabwe and Malawi. It is perfectly clear that he said that persons were being jailed because they were gay and that the police were hunting down gay people. This can only mean that the applicant was saying that there is a legal regime in Zimbabwe and Malawi which creates criminal sanctions for gay people. In my view, the failure to acknowledge and investigate this aspect of the applicant's claim for asylum was unlawful. In order to assess the nature and consequences of the error, it is necessary to consider the rules governing the duty of investigation of asylum claims.

52. Article 9 of the EC (Eligibility for Protection) Regulations 2006, which transposes the parent EU directive in this area provides as

follows;

> *"Acts of Persecution*
>
> *9.(1) Acts of Persecution for the purposes of section 2 of the 1996 Act must:*
>
> > *(a) Be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which delegation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or*
> >
> > *(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in subparagraph (a).*
>
> *(2)Acts of Persecution as qualified in Paragraph (1) can, inter alia, take the form of –*
>
> > *…*
> >
> > *(c) prosecution or punishment, which is disproportionate or discriminatory;*
> >
> > *…*
>
> *(3) There must be a connection between the reasons mentioned in Regulation 10 and the acts of persecution referred to in paragraph 1."*

53. I note that in regulation 10, sexual orientation is the basis of membership of a particular social group for the purposes of that regulation.

54. Article 5 of the regulations provides that

> *"5.(1) The following matters shall be taken into account by a protection decision maker for the purposes of making a protection decision:*
>
> *(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of the country of origin and the manner in which they are applied;"*

55. In this regard it should be noted that Article 4 of the Qualification Directive (Council Directive 2004/83/EC) provides that:

> *"Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for International Protection. In co-operation with the applicant it is the duty of the Member State to assess the relevant elements of the application."*

56. Article 4(3)(a) expresses the rule (reflected in the Irish Regulations) that the assessment of an application for protection must take into account the laws and regulations of the country of origin and the manner in which they are applied.

57. Having regard to the pleadings, the legal duty on the respondent to investigate an application, the legal duty to assess relevant laws in the country of origin and the definition of persecution as embracing discriminatory laws as they might apply to persons of a particular sexual orientation, the question which arises is whether the authorised officer in this case was obliged, as a matter of law, to investigate the legal regime for homosexuals in Zimbabwe and Malawi once the applicant indicated he feared prosecution for being gay. I accept of course that he did not use these words on his application form but his repeated references to a fear of being jailed can only mean he feared criminal prosecution.

58. When a claim such as the applicant's is presented as the basis of an asylum application, the duties of the deciding authorities have recently been described by the Court of Justice of the European Union in a decision entitled (C-199/12, C-200/12 & C-201/12) *X,Y,Z v. Minister Voor Immigratie en Asiel.* The applicants in those cases claimed asylum in the Netherlands on account of their homosexuality. As stated by the CJEU:

> *"They claim, in particular, to have been subject, in different respects, to violent reactions by their families and entourage or to acts of repression by the authorities in their respective countries of origin on account of their sexual orientation."*

Their claims for asylum were rejected because they failed to prove that on return to their countries of origin they might or would be persecuted.

59. The Supreme Administrative Court in the Netherlands referred questions to the Luxembourg court. One of the questions posed was whether the existence of criminal statutes relating to homosexuals constituted an act of persecution within the meaning of Article 9 of the Qualification Directive. The court answered that question as follows:

> *"By its third question, referred in each of the cases in the main proceedings, which must examined before the second question, the referring court asks essentially whether Article 9(1)(a) of the Directive, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the mere fact that homosexual acts are criminalised and accompanying that criminalisation with a term of imprisonment is an act of persecution. If the answer is negative, that court wishes to know in what circumstances an act is to be classified as an act of persecution.*
>
> *In order to answer that question, it must be recalled that Article 9 of the Directive defines the elements which support the finding that Acts constitute persecution within the meaning of Article 1(A) of the Geneva Convention. In that regard, Article 9(1)(a) of the Directive to which the national court refers, states that the relevant acts must be "sufficiently serious" by their nature or repetition as to constitute a "severe violation of basic human rights", in particular the*

unconditional rights from which there can be no derogation, in accordance with Article 15(2) of the ECHR.

Moreover, Article 9(1)(b) of the Directive states that an accumulation of various measures including violations of human rights, which is "sufficiently severe" as to affect an individual in a manner similar to that referred to in Article 9(1)(a) of the Directive, must also be regarded as amounting to persecution.

It is clear from those provisions that, for a violation of fundamental rights to constitute persecution within the meaning of Article 1(A) of the Geneva Convention, it must be sufficiently serious. Therefore, not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach that level of seriousness.

In that connection, it must be stated at the outset that the fundamental rights specifically linked to the sexual orientation concerned in each of the cases in the main proceedings, such as the right to respect for private and family life, which is protected by Article 8 of the ECHR, to which Article 7 of the Charter corresponds, read together, where necessary, with Article 14 ECHR, on which Article 21(1) of the Charter is based, is not among the fundamental human rights from which no derogation is possible.

In those circumstances, the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution within the meaning of Article 9(1) of the Directive.

However, the term of imprisonment which accompanies a legislative provision which, like those at issue in the main proceedings, punishes homosexual acts is capable, in itself of constituting an act of persecution within the meaning of Article 9(1) of the Directive, provided that it is actually applied in the country of origin which adopted such legislation.

Such a sanction infringes Article 8 ECHR, to which Article 7 of the Charter corresponds, and constitutes punishment which is disproportionate or discriminatory within the meaning of Article 9(2)(c) of the Directive.

In those circumstances, where an applicant for asylum relies, as in each of the cases in the main proceedings, on the existence in his country of origin on legislation criminalising homosexual acts, it is for the national authorities to undertake, in the course of their assessments of the facts and circumstances under Article 4 of the Directive, an examination of all of the relevant facts concerning that country of origin, including its laws and regulations and the manner in which they are applied, as provided for in Article 4(3)(a) of the Directive.

In undertaking that assessment it is, in particular, for those authorities to determine whether, in the applicant's country of origin, the term of imprisonment provided for by such legislation is applied in practice.

It is in the light of that information that the national authorities must decide whether it must be held that in fact the applicant has a well founded fear of being persecuted on return to his country of origin within the meaning of Article 2(c) of the Directive, read together with Article 9(3) thereof."

60. I have no doubt but that the applicant in this case presented a claim for asylum which relied on the existence in Zimbabwe and Malawi of legislation which criminalised homosexual acts. Once such a claim was presented it was the duty of the authorised officer to investigate that claim by examining the legal regime in those countries. The authorised officer was also required to consider what punishment is provided for relevant crimes and whether the law is actually applied. It is to be recalled in this case that the applicant positively asserted that a person he knew had been given a 14 year prison sentence because he was gay.

61. I have no hesitation in concluding that the failure of the authorised officer to carry out the precise investigation required by law and described in the *X,Y,Z* case constituted an error. Such an investigation, needless to say, could have been carried out independently of an investigation as to whether the applicant was homosexual. If, on investigation, it emerged that there were no relevant criminal statutes in Zimbabwe or Malawi or if it emerged, for example, that the criminal statutes existed but were never applied, it might well be unnecessary to decide on the sexual orientation of an applicant and the deciding officer could conclude that there was an absence of a well founded fear of persecution because the feared criminal sanction is not applied in the country of origin.

62. Having decided that an error has been identified by the applicant in the decision, the nature of that error must be addressed because, as the description of the case law above establishes, only rarely will errors in first instance decision making attract the remedy of judicial review.

63. I find that the failure of the deciding officer to carry out an investigation of the applicant's claim in accordance with s.11 of the Act and Article 4 of the Directive (requiring the authorised officer to investigate the alleged anti-gay laws in the country of origin) and the failure to bear in mind the provisions of Article 9 of the Directive and of the Irish Regulations, constitutes significant error as to jurisdiction. The investigation of the claim relating to anti-gay laws required by European and Irish law was not attempted in this case. There was a failure to identify that a claim relating to a fear of prosecution was made. There was no recognition whatsoever in the decision of the authorised officer of the obligations which arise when a person makes a claim such as that raised by the applicant in this case. In this sense an appeal, to borrow the phraseology of Cooke J identified in *M.A.R.A* (supra. Para 37), would be 'inapt'.

64. That the error might be remedied on appeal is not, in my view, an adequate response to the level of illegality identified in this case. I acknowledge that it may be possible to persuade the RAT as to the proper approach in cases such as this and that body may accept such submission. In that sense the RAT could undo the effects of the first instance error but it cannot reverse the error. Sometimes - probably very rarely - it is necessary to have an error as to jurisdiction reversed. I note in passing that it could readily be said that the error identified in *Stefan* (supra) could have been addressed by the appellate body, yet the Supreme Court permitted judicial review of the first instance decision.

65. An applicant for asylum may receive a lawful decision with which he disagrees and an administrative appeal is provided for such situations. But where the applicant not only disagrees with the result but says that the decision maker ignored the rule book or seemed not to know that certain rules existed, consideration must be given to whether he is entitled to have the first instance decision taken again. In my opinion the more an applicant can establish that the decision maker was unaware of the applicant's claim or was unaware of the rules governing such claims, the greater the possibility that judicial review rather than administrative appeal should be permitted. In this regard I accept the point made by senior counsel for applicant that the Oireachtas has expressly provided that applicants may seek judicial review of decisions of ORAC (see s.5 of the Illegal Immigrants (Trafficking) Act 2000). In my view such judicial review is not limited to cases where the error is incapable of being addressed by the RAT.

66. Exercising the discretion vested in the court to permit judicial review of a first instance decision and acknowledging the exceptionality required in order so to do, I am persuaded that the comprehensive failure of the decision maker to acknowledge the claim made and the failure to apply the detailed rules as to how asylum claims of this nature should be investigated must, in this instance, attract an order of *certiorari*.

67. Finally I should record the respondent's not unreasonable view that the applicant has been permitted to litigate a legal issue which almost certainly was not contemplated when the proceedings were initiated. It is clear that the issue was not addressed in either the original written submission or in the supplemental written submissions delivered by the applicant. The applicant came to court to say that his core claim had not been decided and in particular that it had not been decided whether he was gay. The point having been raised by the Court, he has been permitted to also argue that another part of his core claim alleging fear of prosecution was not decided. I was influenced in my decision to permit this point to be advanced by remarks I had made at the end of the decision in *E.P.A* as follows:

> *"14. The other matter which caused some concern was the provisions of Regulation 9(2)(b) of the European Communities (Eligibility for Protection) Regulations 2006, which provides that:*
>
> > *"(2) Acts of persecution as qualified in paragraph (1) can, inter alia, take the form of (a) acts of physical or mental violence, including acts of sexual violence; (b) legal, administrative, police and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner."*
>
> *15. I raised the question as to whether the criminalisation of homosexuality in Ghana could constitute persecution per se for the purposes of Regulation 9. The Ghanaian code is probably an administrative measure or a legal measure which is discriminatory.*
>
> *16. In relation to matters not pleaded but raised by the Court, I was referred to the decision of JK (Uganda). v. Minister for Justice and Equality (Hogan J. Unreported, 6th December 2011), where the learned judge concluded that the Court could, in certain circumstances raise grounds at the leave stage. As in J.K., the court itself identified the issue in Regulation 9(2)(b). However, it does not seem appropriate to add this to the grounds in respect of which I have already granted leave. In the first instance, it is a pure legal point which was not pursued as part of the applicant's claim, either at first instance or on appeal. This is not a case where the Tribunal has decided that the criminalisation of homosexuality does not constitute discrimination and is not per se a form of persecution. A decision on this point must await full argument following the raising of the matter ideally at first instance and then on appeal."*

68. The applicant, no doubt, was fortunate in that the pleadings were undoubtedly specific enough - perhaps inadvertently so - to embrace this issue. I found that the applicant had raised the issue as to persecution caused by fear of prosecution in his claim for asylum. The Court had the benefit of the decision of the CJEU in *X,Y,Z (supra)* which could not be ignored. No serious complaint was maintained by the respondents as to the pursuit of the issue. I have no doubt but that an adjournment would have been sought had the enquiry into these matters caused prejudice. It is ironic that an applicant who has suffered a wasted costs order for failure to address jurisprudence in written submissions ultimately succeeds on a point raised by the court and not addressed by the applicant until prompted. However, the first omission was in relation to jurisprudence which is so well established as to require comment in any case seeking to challenge a first instance decision; failure to include argument on the *XYZ* decision was considered more understandable as the decision was of more recent vintage and had not yet, to the best of my knowledge, been the subject of judicial analysis in Ireland.