Neutral Citation [2013] IEHC 203

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 322 J.R.]

BETWEEN

A.L.M. (AN INFANT SUING BY HER MOTHER AND NEXT FRIEND S. P.)

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on the 8th day of February, 2013

1. This is an application on behalf of the respondents for:-

> "an order dismissing the within proceedings as an abuse of process and/or on the basis that they are frivolous and/or vexatious and/or doomed to fail."

pursuant to a notice of motion dated 26th July, 2012.

2. The applicant was born on 27th March, 2010, in Ireland. She is the daughter of her next friend, S.P., and her father is T.M.. She also has a half-brother, B.A.S.. Application was made on behalf of the applicant by her mother who then claimed to be a national of Sierra Leone for asylum under s. 2 of the Refugee Act 1996. At the time, her father claimed to be a Rwandan national. Her claim was assessed on the basis of the respective claims as to nationality by her mother and father. The applicant has never been to Sierra Leone or Rwanda and has not suffered past persecution. The applicant's parents presented her case at the interview carried out in respect of the application for asylum. Further separate applications were made on behalf of each of the parents for asylum. Her mother claimed asylum in Ireland on 10th August, 2006, and her father on 30th April, 2007. Her half-brother claimed asylum on 4th September, 2007. The applicant's parents and half-brother were found not to have a well-founded fear of persecution in relation to their own claims and these decisions were upheld on appeal.

3. The applicant's father claimed that his daughter was at risk if returned to Rwanda because he was a Tutsi and she would be regarded as one also. He claimed that his parents had been killed and feared for the safety of his daughter. He feared that the Hutu people would harm his daughter.

4. The applicant seeks leave to apply for judicial review in this case to quash the decision of the respondent refusing to grant the applicant subsidiary protection dated 10th January, 2012. The application was initially made *ex parte* but by order of Cooke J. on 25th April, 2012, it was directed that it should proceed by way of notice of motion. It is grounded on the affidavit of the applicant's next friend and mother. That affidavit sets out a chronology of the course of events in respect of the minor's application for refugee status. It exhibits the ASY1 form and a copy of the applicant's questionnaire and the s. 11 interview conducted in respect of the application dated 8th June, 2010. It also exhibits a copy of the decision of the Refugee Appeals Tribunal in respect of the claim dated 20th September, 2010, together with the notice of appeal grounding that application. It then exhibits a copy of the child's father's s. 13 report compiled by the Refugee Appeals Commissioner dated 15th September, 2007. It refers to copies of correspondence from the Minister to the applicant dated 7th February, 2012, and a letter from the applicant's solicitors to the respondent dated 20th March, 2012. It also refers to the proceedings involving the next friend bearing Record No. 2011/768 JR, and the judgment of Cooke J. delivered in those proceedings.

5. The grounds upon which reliefs are sought are set out at paras. E1, 2 and 3 of the statement required to ground the application for judicial review.

6. The first ground may be summarised as a complaint that the respondent had a duty to reach a preliminary finding on the question of the minor applicant's nationality "in circumstances where there is clearly a significant doubt in the mind of the first respondent as to the nationality/citizenship of the applicant's parents".

7. Though acknowledging that the respondent "seems to be of the view that both parents are or might be of Nigerian nationality…", it was contended that that question should first be adjudicated upon and "a decision reached as to what country or countries each of them is to be removed to and only then carry out an assessment of the application". It was contended that a failure to proceed on that basis was in conflict with the best interests of the applicant. A further complaint was made that any perceived failings or misrepresentations of the parents in respect of their nationality should not have been visited upon the applicant.

8. Within Ground E1 it was also contended that in the circumstances of this case the respondent was not entitled to "rely on the conclusions of the RAT but was obliged to reach a decision independent of the conclusions of that body".

9. Ground E2 contends that there was a failure on the part of the respondent to cooperate with the applicant in assessing the relevant elements of the claim in breach of the minimum standards mandated by the terms of the Qualification Directive, thus rendering the refusal to grant subsidiary protection *ultra vires* and unlawful.

10. The applicant also claims a declaration that the unavailability of an effective remedy under which the impugned decision refusing subsidiary protection may be challenged is unlawful. The applicant contends that there is no appeal mechanism from the subsidiary protection decision and that it cannot be regarded as impartial, because the Minister has been involved in refusing the applicant refugee status.

The Decision on Subsidiary Protection
11. An application claiming subsidiary protection was made on behalf of the applicant on 10th November, 2010. In accordance with all of the previous applications made in respect of refugee status to the Refugee Applications Commissioner and the Refugee Appeals Tribunal, it was claimed on behalf of the applicant that she was a national of Sierra Leone and/or Rwanda having been born in Ireland. It was claimed that she would be subjected to "torture or inhuman and degrading treatment or punishment in her country of origin". It was claimed:-

> "Ms. M. is a national of Sierra Leone. It is submitted that there are substantial grounds for believing that, if returned to Sierra Leone and/or Rwanda she would face the real risk of suffering serious harm, and is unable, or owing to such risk, unwilling to avail herself of the protection of that country".

The case presented may be summarised in the following way:-

> "The applicant's mother has already given an account of the violence she had to flee due to her arranged marriage with an older Muslim man and whereby a dowry had been paid. The applicant's mother's fear is that the applicant would be subjected to violence and separated from her mother should the arranged marriage proceed in Sierra Leone.
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> The applicant's father has given an account of how he escaped Rwanda as a child as his parents were killed and he feared that his daughter will be persecuted by the Hutu people as she is Tutsi. A more detailed account of the factual background should already be apparent from the file."

12. On 10th January, 2012, notification was given to the minor applicant that the Minister for Justice and Equality had determined that she was not a person eligible for subsidiary protection and enclosed a copy of the report setting out the Minister's determination. That report also is predicated on the applicant's mother's claim to be a national of Sierra Leone and her father's claim to be a Rwandan national; though some doubt was expressed about this in the determination. The consideration of her case proceeded on the basis of these claims. A conclusion was reached that the applicant was a national of Sierra Leone and Rwanda and it was considered whether there was a real risk of her suffering serious harm or death at the hands of her grand-uncle in Sierra Leone or the Hutus in Rwanda. It was noted that her claims were based on those of her parents which had been the subject of negative recommendations by the Office of the Refugee Applications Commissioner which were upheld by the Refugee Appeals Tribunal in both cases. Clearly, given her age, the applicant's claim had to be based upon that of her parents. Insofar as any question arose as to whether the benefit of the doubt should be given to the applicant under Regulation 5(3) of the European Communities (Eligibility for Protection) Regulations 2006, it was stated, notwithstanding the finding as to the applicant's nationality that:-

> "Serious doubts were raised in respect of her mother's credibility at RAT (69/1740/06). Furthermore, there is evidence on her mother's file to indicate that her mother is in fact from Nigeria. S.P. (69/1740/06) was written to on 24/08/2011 indicating that new information was before the Minister that the UK Border Agency had received a visa application from the applicant's mother under the name M.D. O.. As part of this visa application, she provided a Nigerian passport (Passport No. A1692165). This raises serious credibility concerns in relation to the applicant's mother, and by extension, the applicant's own case.
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> In relation to the applicant's father, there were credibility issues raised in relation to his nationality as detailed in the ORAC's report pursuant to s. 13(1) of the Refugee Act 1996 (as amended), and again in the findings of the RAT. The applicant's father claims to have been born in Rwanda but to have lived in Nigeria since the age of four years. The RAT raised credibility concerns in relation to his account of fears he may have relating to Nigeria. This raises serious credibility issues in relation to the applicant's father, and by extension, the applicant's own case.
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> Because of the doubt surrounding the credibility of her parents' claims, and by extension of her credibility, the applicant does not warrant the benefit of the doubt."

It was concluded that substantial grounds had not been shown for believing that the applicant would face real risk of suffering serious harm if returned to Sierra Leone or Rwanda.

The Application of the Next Friend for Judicial Review
13. The respondent in this case relies on the fact that the next friend applied for asylum on the basis that she was a national of Sierra Leone and feared that if returned to Sierra Leone she would be forced into marriage by her uncle, in whose oppressive household she had lived between 2000 and 2004. The mother's judicial review proceedings were initiated by way of notice of motion dated 24th August, 2011. The court refused leave to the applicant's mother to apply for judicial review in a judgment delivered on 20th January, 2012, on the basis that the court was entitled to refuse to entertain an application where it was satisfied that the proceedings were tainted by lack of candour or otherwise involve an abuse of process or misuse of administrative procedure. The history of the mother's proceedings is set out at paras. 3 – 11 of the judgment of Cooke J.. In summary:-

> (a) The applicant claimed to have arrived in Ireland in August, 2006 from Sierra Leone and be a national of that country who had been forced to flee because of threats and violence from an uncle who had been attempting since 2000 to force her to marry an older Muslim acquaintance of his from whom he had received a dowry.
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> (b) On 10th September, 2006, she gave birth to a son whose father was said to be her boyfriend in Sierra Leone who had arranged for her escape from her uncle and her travel to Ireland. She claimed that she later learned that her boyfriend had been stabbed to death by she suspected, her uncle or someone acting on his behalf.
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> (c) The Refugee Applications Commissioner recommended that the applicant's asylum claim be refused in a report under s. 13 of the Refugee Act 1996, dated 15th December, 2006.
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> (d) An appeal to the Refugee Appeals Tribunal following an oral hearing on 19th August, 2008, against this recommendation failed by decision dated 15th June, 2009.
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> (e) The mother's claim of past persecution at the hands of her uncle in which she claimed to have been attacked by him or by others on his behalf or on behalf of the older man she was supposed to marry were rejected as lacking in credibility by the Refugee Applications Commissioner and the Refugee Appeals Tribunal.
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> (f) An application for subsidiary protection under the European Communities (Eligibility for Protection) Regulations 2006, together with an application for leave to remain under s. 3 of the Immigration Act 1999, were made on 14th August, 2009.

(g) These applications were supported by a five page handwritten memorandum from the applicant forwarded to the Minister for Justice and Equality by her solicitors under cover of letter dated 19th October, 2009. The notes contained a series of comments or rebuttals by the mother of the various findings of lack of credibility in her story as contained in the Tribunal decision.

(h) By a letter dated 25th February, 2011, it was determined that the applicant was not eligible for subsidiary protection. A memorandum entitled "Determination of Application" containing the analysis and conclusion reached in respect of the application was enclosed. The Minister considered the question of the applicant's credibility as required by Regulation 5(3)(viii) and quoted the negative findings in the RAT decision.

(i) By letter of 11th March, 2011, the mother was informed of the rejection of her application for leave to remain and furnished with a copy of a deportation order made by the Minister on 2nd March, 2011, together with a memorandum entitled "Examination of File under S. 3 of the Immigration Act 1999" setting out the assessment of her representations and the statutory considerations required to be taken into account under that section.

(j) Though no *ex parte* application was made for leave to apply for judicial review in respect of the decision on subsidiary protection of 25th February, 2011, such an application was included in the application for leave to apply for judicial review initiated by a notice of motion on 24th August, 2011.

(k) In moving the application to seek judicial review of the subsidiary protection decision, Cooke J. noted that particular emphasis had been placed by counsel for the applicant in written legal submissions and oral argument upon the allegedly unlawful, unfair and irrational reliance placed by the respondent on the issues of lack of credibility in the Tribunal decision and on the respondent's use of country of origin information and the alleged disregard by him of representations and submissions presented in the application for subsidiary protection. It was claimed that the rejection of the claim by the Tribunal "was based purely on conjecture without any proper regard to other factors".

14. The return date for the motion was 3rd October, 2011. On 22nd September, 2011, an affidavit sworn by Mr. Chris Carroll on behalf of the respondent was filed and served in the mother's proceedings. This affidavit exhibited correspondence which the respondent had exchanged with the UK Border Agency in August, 2011. Cooke J. stated:-

> "This disclosed that a woman whose fingerprints matched those of the applicant furnished by the respondent had sought to enter the United Kingdom on 23rd November, 2002, using a valid Nigerian passport issued to a M.D.O.. According to the information supplied by the UK Border Agency that passport holder had sought to enter the UK on foot of a visa delivered in person to her in Lagos on 15th November, 2002, and valid for multiple visits to the UK from that date until 15/11/2004. The Agency stated:-
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> > 'The visa was issued on 15th November, 2002, and used to enter the United Kingdom on 23rd November, 2002. The passport holder was then refused entry on 29th November, 2003, as the visa had been subsequently falsified. Removal directions were set for her return to Nigeria but she failed to attend as required and has been treated as an absconder.'"

15. On 24th August, 2011, the Minister wrote to the applicant's mother putting this information to her and inviting her within fifteen days to make observations or comments as to why she ought not to be returned to Nigeria. There was no reply.

16. On 15th December, 2011, the applicant swore a replying affidavit dealing with the information from the UK Border Agency. It provided an explanation for her visit to the United Kingdom whereby she admitted making the trip at a time she claimed to be living with her uncle in Sierra Leone and her non-disclosure of that fact and other related matters at any stage in the asylum process. She stated:-

> "I say and reiterate that I am a citizen of Sierra Leone. In November, 2003, I had a boyfriend in Sierra Leone. His first name was C., I do not recall his surname. He invited me on a holiday and together we left Sierra Leone in November 2003 and we firstly flew to the Cote d'Ivoire, then to Saudi Arabia and then to London. He was wealthy and paid for all the expenses and also supplied me with the documentation for travelling. As far as I can recollect I had a different passport for each leg of the trip and none of them were genuine. On arrival in London the "Nigerian passport" which had been given to me by my boyfriend was taken from me by the immigration authorities. I understand that it was obvious that it was a false passport, because the photograph showed me wearing headgear which would not have been permitted in the normal course for a passport photograph. I was let into the UK and told by the authorities at the airport to "come back tomorrow". My boyfriend became very frightened – I believe he may have been involved in trafficking and that is why he appeared to have a plentiful supply of "travel documents" available. He was anxious to leave the UK quickly and did not take me back to the authorities the following day, but rather took me back to Sierra Leone approximately two days later. This holiday in total lasted only for approximately one week. I accept that I said at part 4 of my questionnaire…that I had not previously travelled out of Sierra Leone and I said this because I was afraid because I thought that short trip would be very hard to explain and also that it was not of any relevance to my claim for asylum in Ireland as it predated the events leading up to my asylum application…Upon my return to Sierra Leone, I went back to my uncle in Kono District and lived there. My uncle was putting pressure on me to marry a friend of his and this is the period that the experience related by me in my asylum claim commenced."

17. Cooke J. considered the contents of this affidavit at para. 15 of his judgment. He stated:-

> "It is thus clear that although the applicant claims to have been in the UK in 2003 rather than 2002 and only for a week, she does not now dispute that she was the woman who attempted to enter the UK using a Nigerian passport and a name other than the name she now uses. Furthermore, she accepts that the visit in question was entirely voluntary for holiday purposes and thus wholly unrelated to any persecution or harm she now claims to have suffered prior to that date. In the view of the court, this is of a fundamental significance for the admissibility of the present judicial review application. In essence, there has clearly been not only a material lack of candour and truthfulness on the part of the applicant throughout the entire asylum and deportation process but the grant of leave to seek judicial review in these circumstances upon the grounds sought to be advanced would require the court to sanction the prosecution of a substantive judicial review hearing upon a basis which would effectively be false. There are numerous factors which compel the court to this conclusion…"

18. The court concluded that the mother's affidavit was "significantly disingenuous and unforthcoming as a response to the

information from the UK Border Agency". Cooke J. stated that it left a series of questions unanswered:-

> "(a) If her passport was confiscated in London how did she leave the United Kingdom two days (or a year and two days) later without a passport?
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> (b) If she had no Sierra Leone passport, how did she re-enter Sierra Leone?
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> (c) By what flights and through which airports did she return? She remembers clearly her route to the UK.
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> (d) What evidence is there that she ever left the United Kingdom?
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> (e) She says the passport was obviously false because "the photograph showed me wearing headgear" but she does not deny that it is her photograph;
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> (f) If it is her photograph, she fails to explain how the passport with the visa was delivered to her in person in Lagos on 15th November, 2002."

19. The court rejected attempts to excuse the non-disclosure in the affidavit as quoted and by counsel at the hearing on the basis, *inter alia*, that there was never any suggestion made in the application for subsidiary protection or in the s. 11 interview that there had been a cessation in the persecution or serious harm threatened by the uncle between 2000 and 2004. He noted that even after the refusal of subsidiary protection had been received, additional representations for the purpose of the s. 3 leave to remain application were made on 11th March, 2011, which again emphasised the continuity of the serious harm she claimed to have suffered from January, 2000 until she arrived in Ireland in September, 2006. He held that the holiday visit to London was clearly incompatible with claims to have been at risk of serious harm between 2000 and 2004. He said:-

> "On her own account as it now stands, she voluntarily left Sierra Leone (if not Nigeria) with her wealthy boyfriend in either 2002 or 2003 and voluntarily returned there without availing of the opportunity to claim international protection in the United Kingdom."

He continued:-

> "22. Accordingly, the applicant has not only lied in the asylum application when she said she had never previously left Sierra Leone, but the deliberate non-disclosure of the London holiday visit means that all of the decisions made throughout the process by the Commissioner, the Tribunal and the Minister had been made on a false basis. Nor as was sought to be suggested, can this situation be excused as a mistake made by a woman coming from a rural African background with little education to a wholly strange country and new culture in circumstances of great stress. Quite apart from the applicant's connivance in the arrangements for the holiday visit to the United Kingdom which she clearly knew to be unlawful, the handwritten memorandum of comment and rebuttal of the Tribunal decision referred to above… clearly demonstrates that the applicant is fully able to read a tribunal decision and to formulate responsible responses to identified findings of credibility.
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> 23. Accordingly, to grant leave in this case for a substantive hearing of a judicial review application would be to countenance an assessment of the validity in law of two contested decisions by reference to the state of information available to the respondents when those decisions were made, when both sides are now aware that a specific fact material to the fundamental basis of the applicant's claims throughout could not be taken into account in the judicial review. It is in that sense that a substantive hearing of a judicial review upon the terms demanded by the present application would be fundamentally false."

20. Cooke J. stated that the mother's counsel when pressed by the court on this issue argued that if the fact of the London visit were to influence the court as to whether the applicant came from Sierra Leone or from Nigeria, the proceedings ought to be adjourned in order to enable the applicant to make inquiries with the United Kingdom authorities as to when and where the applicant's fingerprints had been taken because, it was submitted the only occasion upon which she had given her fingerprints was on arrival in the United Kingdom. Cooke J. concluded that such an adjournment would be unjustified and serve no purpose. He said:-

> "24. The application ignores the significance of the information. The applicant herself admits in her affidavit as quoted above that she did indeed voluntarily visit the United Kingdom using a passport which she claims was false: the UK authorities do not say that it was; only that its visa was falsified. Quite apart from the crucial doubt which is thereby raised for the respondent at this stage as to whether the applicant is indeed from Sierra Leone and not from Nigeria, what is significant is that she admits to having been able to leave Sierra Leone voluntarily in 2002 (or 2003) at a time when she now claims to have been subject of persecution by her uncle. She further asserts that she then returned voluntarily to Sierra Leone to that uncle and that source of persecution.
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> 25. In the judgment of the court it would be manifestly unreasonable and inequitable to require the respondent to meet a case which purports to challenge the reliance on the applicant's lack of credibility in the asylum process as described in para. 11 above when that process has itself been falsified by the applicant's deliberate concealment of a significant event relevant to both her claim and her personal history."

The Mother as Next Friend

21. The applicant's proceedings are brought as a minor suing by her mother and next friend grounded upon her mother's affidavit sworn in April, 2012. The initial ASY1 form was completed and signed on behalf of the applicant by her father, T.M., on 10th May, 2010. The questionnaire submitted as part of the process was completed by both her father and mother on 12th May, 2010. The basis of the application for refugee status was originally set out in the response to question 21 of the questionnaire that it was unsafe for her father, a Tutsi, to return to Rwanda by reason of racial tension between the Hutus and the Tutsis and that he had fear for his safety in that regard. This was repeated in the s. 11 interview conducted with both parents on 8th June, 2010, when the infant applicant was approximately two and half months old. In that interview the applicant's mother also expressed fears for herself and her daughter's return to Sierra Leone. She claimed that her fear of being forced to marry a Muslim man who had given money to her uncle was relevant to her daughter's return to Sierra Leone. She recounted how her uncle wanted her to marry this older man and that she did not wish to do so. She said that she went to live with her boyfriend who helped her to come to Ireland. Subsequently, she learned that he had been stabbed to death and she suspected her uncle's involvement in the stabbing. She feared that her uncle

would harm her daughter if her daughter was brought to Sierra Leone. She did not know what he might do to her, but said that she was scared that she had gone through a lot of things through her uncle and she did not know what would happen. She was scared for her daughter that she might have to face what she faced.

22. These accounts informed all of the decisions made in the course of the asylum process up to and including the subsidiary protection decision now sought to be challenged by the minor applicant. Notwithstanding this difficulty in the case, these proceedings were initiated employing the mother as next friend.

23. The respondent seeks an order dismissing the minor applicant's leave to apply for judicial review on the basis that the applicant is precluded by reason of issue estoppel or abuse of process from maintaining these proceedings because they are moved substantially on the same grounds and facts as those heard and determined by Cooke J. in the mother's proceedings entitled *The High Court between S.P. (applicant) and Minister for Justice and Equality, Ireland and the Attorney General (respondents)* – Record No. 2011/768JR. In essence, the respondents claim is that because Cooke J. dismissed the mother's proceedings on the basis of lack of candour and abuse of process for the reasons already quoted in this judgment, the minor applicant is precluded from initiating proceedings for leave to apply for judicial review. The High Court declared that it could not allow the mother to proceed with her application because there was:-

> (1) A material lack of candour and truthfulness on the part of the applicant throughout the entire asylum and deportation process; and
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> (2) The grant of leave would require the court to sanction the prosecution of a substantive judicial review hearing upon a basis which would effectively be false.

24. It is contended that the reasons furnished by Cooke J. in refusing to allow the mother's application for leave to proceed as set out in paras. 16 – 23 of his judgment, apply equally to the minor applicant's case because her claim for asylum was based in large measure on the story told by her mother. In addition, the asylum and subsidiary protection applications in the minor's case were substantially based upon the mother's story. It was claimed that her mother's story informed the decision making process and the initiation of this judicial review proceeding in the same way as it informed her own claim. It was submitted that the court's finding in the mother's case that it would be manifestly unreasonable and inequitable to expect the respondent to meet a case which purports to challenge the assessment of the mother's credibility in the asylum process when the asylum process itself was falsified by the mother is equally applicable to the applicant's case. This Court is satisfied that the falsification of the applicant's mother's claim is also relevant in this case to the applicant minor's claim as is readily apparent from the account furnished by the mother in the questionnaire and the s. 11 interview conducted in respect of the infant applicant. It is also clear from the Refugee Appeals Tribunal decision that this account was also furnished in oral evidence and in the course of the application for subsidiary protection. The nature and extent of the relevance of the mother's falsehoods to the applicant minor's claim must, however, be viewed in the context of how the child's claim evolved and the precise basis upon which Cooke J. refused to grant leave to apply for judicial review to the mother.

25. In this case a somewhat different scenario evolved in respect of the subsidiary protection decision in respect of the child. It is clear that the United Kingdom Border Agency information became available in August, 2011. On 24th August, 2011, the Minister wrote to the applicant's mother inviting comments from her in respect of this information. Thus, the Minister had the information in his possession at the time of the making of the subsidiary protection decision in respect of the applicant minor on 10th January, 2012, as is clear from the terms of the decision quoted at para. 13 above. Moreover, by that stage the applicant mother had received the affidavit of Mr. Chris Carroll in her own case and filed a replying affidavit in respect of the Border Agency information on 15th December, 2011, already quoted in this judgment.

26. In the meantime, the present application for subsidiary protection was proceeding and was determined on 10th January, 2012. This was shortly after the delivery on the replying affidavit by the applicant's mother and days before the judgment delivered by Cooke J. on 20th January, 2012, in the mother's case. On 7th February, 2012, one month after the making of the subsidiary protection decision, the respondent wrote to the minor applicant's solicitors – the same solicitors who represented the mother in her case – informing them of the UK Border Agency information in respect of the minor applicant's claim and requesting observations and comments from her in respect of same. It will be recalled that the applicant was just short of two years old at this stage. Of course, the reality was that the Minister was dependent upon the mother replying and providing an explanation in respect of the agency information and a reply was furnished on the 20th March, 2012, in the same terms as the mother's replying affidavit of 15th December, 2011. The Minister's letter in this regard requested observations or comments "setting out reasons as to why the Minister should process your subsidiary protection application and your representations under s. 3 of the Immigration Act 1999, on the basis that you are a Nigerian national". If no response was furnished the Minister intended to proceed to consider the case based on information already on file "i.e. the information in relation to the Nigerian passport used in your mother's UK visa application in Lagos, Nigeria, which indicates that she is a Nigerian national". Shortly afterwards the applicant's proceedings issued on 10th April, 2012, grounded on the affidavit of S.P.. Curiously, the decision on subsidiary protection refers to the credibility difficulty in respect of the applicant's nationality and the Border Agency information but was followed by correspondence seeking clarification from the infant, which could only have been supplied by the mother.

The Father's Claim

27. A further complicating element to the applicant minor's claim is that her father has also made an application for asylum. As already noted he claims to be a Rwandan and to have been taken to Nigeria as an orphan at the age of four. It is clear from the applicant minor's questionnaire and s. 11 interview, the determinations of the Refugee Applications Commissioner and the Refugee Appeals Tribunal and, indeed, the subsidiary protection decision that the father's claim in that regard is of equal significance to the determination of the applicant's status in the state. It is also clear that though the mother's application was dismissed, the father has a present intention of pursuing judicial review proceedings in his own case which are presently pending in this Court. Given that the rejection of his claim on the basis of credibility and the various legal issues that surround the making of a decision in his case, place a question over his final status within the state and, given that the same issue of credibility does not arise in respect of his judicial review application as has been determined by Cooke J. in respect of the mother's case, it is not possible to conclude that the issues decided in the mother's case coincide precisely with those that arise in the applicant minor's case. Her case may be affected to a significant extent by the decision of Cooke J. in respect of her mother's case but the court is not satisfied that she is precluded from pursuing her application for leave to apply for judicial review by reason of estoppel based on Cooke J.'s judgment alone. However, the question of issue estoppel or abuse of process in respect of that aspect of the child applicant's claim based on determinations concerning her mother's credibility could well be relevant to the successful pursuit of that aspect of her claim concerning whether she is a national of Sierra Leone.

Issue Estoppel and Abuse of Process

28. The concept of issue estoppel may be invoked by the respondent to protect him from unnecessary or vexatious multiplication of issues arising in a cause of action in civil proceedings. In *Akram v. Minister for Justice* [2004] 1 I.R. 461 Kearns J. (as he then was) held that the applicant was estopped from raising the issue of whether the Minister had a statutory power to revoke his citizenship when in a previous application for judicial review the application had obtained a determination that the process followed by the Minister revoking his citizenship breached his right to fair procedures, a determination that could only have been based on a finding by the trial judge in the first application that such a statutory power existed and could be exercised by the Minister (paras. 22 – 30). (See also *A.A. v. Medical Council* [2003] 4 I.R. 302). Some earlier doubt has been expressed as to whether the court has a power in judicial review proceedings to apply the principle of issue estoppel (see Smyth J. in *Waldron v. Earley* [2004] IEHC 227 and the discussion in Delaney & McGrath on *Civil Procedure in the Superior Courts* (3rd Ed.) paras. 32.98 – 32.99 and Spencer Bower & Handly – *Res Judicata* (4th Ed.) paras. 16.07 - 16.10). Assuming for the purpose of this application that this principle applies in cases of judicial review the respondent would have to establish that the same parties or their privies are involved in the two sets of proceedings and that the same precise point has been conclusively determined in each case. In any cause of action there may be several issues raised which are necessary for the determination of the whole case. In the course of the mother's application for judicial review the High Court determined that it should exercise its discretion against allowing her to proceed with the application by reason of her lack of candour in the asylum process and with the court. It is that determination which the respondent now seeks to rely upon in this case against the child applicant. In respect of issues arising in any two cases, Costello J. in *D. v. C.* [1984] ILRM 173 at p. 192 set out the following test:-

> "A party is precluded from contending the contrary or any precise point which having once been distinctly put in issue has been solemnly and with certainty determined against him."

The court must be satisfied that the issue to be determined in respect of the credibility of the mother in the second action is the same as that determined by Cooke J. in the first action. The issue in respect of that fact must have been necessary to the decision in the case. There is no doubt that the issue concerning the mother's credibility and lack of candour in respect of obtaining a visa in Nigeria, her Nigerian passport and her trip to the United Kingdom when dealing with the state authorities and the court were central to the exercise of the court's discretion refusing her leave to apply for judicial review. The court would not allow a challenge to the subsidiary protection decision made in her case on a false basis and would not allow a challenge to proceed to a decision which was made without the benefit of the Border Agency information which had been deliberately withheld from the decision maker by the mother.

29. The principle of issue estoppel only applies between the parties or their privies. In this case clearly the parties involved in the litigation are not the same. In one case it is the mother whose proceedings have concluded and in the second, the applicant, a minor though suing by her mother and next friend seeks leave in a case that must be considered separately in relation to her status within the country. That case may be closely bound to her mother's in that her mother, by reason of the applicant's age, provides the factual basis upon which the applicant's claim is based. However, it is not correct to say in this case that there is privity between the child and her parent. In *C. v. Hackney L.B.C.* [1996] 1 All E.R. 973 at pp. 977 – 979 it was held by the Court of Appeal in the United Kingdom that a disabled child's dependence on her mother did not create such a sufficient nexus between them that they should be regarded effectively as the same party: what is required is that the proceedings involve the same parties or their predecessors in title. An issue estoppel does not arise in this case against the infant applicant. The court notes that a strict application of the principle of mutuality in issue estoppel may well not be required in the light of more recent authorities (see *Res Judicata and Double Jeopardy,* Paul A. McDermott, Chap. 9 – *The Death of Mutuality in Issue Estoppel*) but it is unnecessary for the purpose of this decision to consider that matter any further for the following reasons.

30. The decision against the mother was one which arose from the exercise of judicial discretion arising out of the facts of her case and her lack of candour with the court. It is clear that there may be wider issues to be canvassed in relation to the applicant's case, particularly having regard to the significance of her father's claim to the disposal of her claim at each stage since her application for asylum was first made. Thus, the court cannot conclude that the concept of issue estoppel precludes the applicant from initiating an application for leave to apply for judicial review in respect of grounds that encompass matters beyond the lack of candour and dishonesty that proved fatal to her mother's application.

31. It should be recalled that leave to apply for judicial review in respect of a challenge to a subsidiary protection decision requires only a stateable case and is not governed by s. 5 of the Illegal Immigrants (Trafficking) Act 2000, and the applicant in this case has yet to make that leave application. It is submitted that the court should in the exercise of its discretion dismiss the application as an abuse of process notwithstanding the failure to establish the strict application of issue estoppel. However, in exercising such a discretion the court must have regard to the rights of the child applicant and any other feature of the case which may entitle the applicant to a remedy by way of judicial review. (See *Smith v. Minister for Justice and Equality & Ors* [2013] IESC 4 at paras .6.1 – 6.6). The court is not satisfied to exercise its discretion to dismiss this case having regard to the wider nature of the issues that may arise in the child's application for leave to apply for judicial review. As already noted, the issue in the child's subsidiary protection claim is enmeshed with issues concerning the representations made by her father whose proceedings remain to be determined.

32. The court is mindful that other submissions may be made in respect of the findings concerning the credibility of the applicant's parents in the course of the asylum and related processes and the mother's credibility in the course of the child's application. In that regard the cases of *B.J.S.A. v. Minister for Justice and Equality, Ireland and the Attorney General* [2011] IEHC 381 and *Mbeng & Anor v. Minister for Justice and Equality & Ors* (Unreported, High Court, Cooke J., 7th June, 2012) may be relevant. The court, therefore, refuses the application to dismiss the child applicant's application for leave to apply for judicial review at this stage. The court will direct that this application for leave to apply for judicial review be heard in early course at the same time as the father's judicial review proceedings.