

**THE HIGH COURT  
JUDICIAL REVIEW**

**2008 1373 JR**

**BETWEEN**

**F. K. S.**

**APPLICANT**

**AND**

**THE REFUGEE APPEALS TRIBUNAL AND MINISTER FOR  
JUSTICE, EQUALITY AND LAW REFORM**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Cooke delivered on the 2nd day of March, 2010.**

1. This application for judicial review of an appeal decision of the first named respondent raises an issue of procedural law which turns primarily upon the construction of the provisions of the Refugee Act 1996 and the Refugee Act 1996 (Appeals) Regulations 2003.
2. The applicant is a national of Cameroon who arrived in the State in 2004 and claimed asylum based upon a fear of persecution if returned as a member of a particular social group. This claim was the subject of a report and negative recommendation of the Refugee Applications Commissioner under s. 13 of the 1996 Act which was duly appealed to the Tribunal. Following a hearing on 25th February, 2008, the appeal was rejected and the negative recommendation of the Commissioner was affirmed in a decision dated 12th November, 2008. ("The Contested Decision")
3. Leave for judicial review of that decision was granted by order of Dunne J. on 27th October, 2009. Leave to seek an order of certiorari in respect of the decision was allowed upon a single ground as follows:

*"The first named respondent acted ultra vires the Refugee Act 1996 (As Amended) and/or the Refugee Act 1996 (Appeals) Regulations 2003 (S.I. No. 424 of 2003) in proceeding with the appeal hearing despite there being no appearance by the Refugee Applications Commissioner or member of the staff of the Commissioner authorised by him or her to attend the oral hearing."*

4. The circumstances out of which this problem arises are described by the Tribunal member in the opening paragraph of the Contested Decision. It appears that shortly before the hearing convened on 25th February, 2008, the Tribunal member was informed by the Commissioner's office that no presenting officer on behalf of the Commissioner was available to attend the hearing. The Tribunal member informed the office that the legal representatives of the applicant would be so informed but that the Tribunal could proceed with the case. The Tribunal member then records:

*"The claimant's representative subsequently entered the room and had been made aware at reception that no presenting officer was available. Counsel expressed his annoyance at this and mentioned that it was occurring too frequently at hearings. The Tribunal informed him that it could proceed without the P.O. but he then sought to adjourn the matter and raised Regulation 9 as the basis for the adjournment."*

The Tribunal member then refers to that provision and to the argument made by counsel to the effect that the presenting officer had to be present at the hearing in order to comply with it. That argument is the principal argument in issue on this application. The Tribunal member then records that the application to adjourn made on behalf of the claimant was rejected by him and the hearing then proceeded.

5. The Contested Decision contains in its section 6 a comparatively lengthy analysis of the three aspects of the applicant's claim to a fear of persecution. The analysis runs to over fifteen pages. Having analysed the personal history and the events that the applicant claimed led to her flight from Cameroon, the Tribunal member concludes that her evidence was not credible.

6. In section 4 of the decision under the heading "submissions" the Tribunal member records a discussion with counsel as to the issue of internal relocation and whether it was possible for the Tribunal member to raise this issue in the absence of a presenting officer when the s. 13 report had concluded that internal relocation was not possible. No finding was ultimately made by the Tribunal member in this regard and the Contested Decision does not depend upon that issue.

7. As the single ground upon which leave was granted indicates, the essential argument advanced on behalf of the applicant is that the Tribunal member has no jurisdiction to proceed with an appeal hearing under s. 16 of the Act if no presenting officer on behalf of the Commissioner is present. The representative of the Commissioner is, in other words, a necessary party to the procedure at that point. It is argued that the role of the Commissioner's representative as legitimus contradictor has been recognised in the case law and that the integrity of the appeal process is effectively jeopardised if that role is not performed due to the absence of the presenting officer. It is said that it would be unsatisfactory that the appeal should proceed in the absence of the officer because the independence of the Tribunal would be compromised should the Tribunal member attempt to compensate for the absence of the presenting officer. Furthermore, it is suggested that the applicant's position is prejudiced when the officer is not present because, for example, matters might arise in respect of which the Commissioner would otherwise make a concession which would have a bearing upon the outcome of the appeal.

8. The Court is satisfied that these and the supplementary arguments advanced on behalf of the applicant on this issue are unfounded. The Commissioner is entitled to be represented at the hearing and to participate in it. The representative cannot be

excluded. Provided, however, the Commissioner has been notified that the hearing is taking place, the absence of the representative at the hearing does not deprive the Tribunal of jurisdiction to proceed and to conclude at the hearing in the event that the Commissioner chooses not to be represented; or is unable to be represented and does not seek to have the hearing adjourned. The Court's reasons for this conclusion are as follows.

9. The two provisions primarily concerned in this issue are section 16 (11) (c) of the 1996 Act and Regulation 9 of the 2003 Appeal Regulations. The former provides:

*"(c) The Tribunal shall enable the applicant and the Commissioner or an authorised officer to be present at the hearing and present their case to the Tribunal in person or through a legal representative or other person."*

10. It is immediately striking that the expression used is "shall enable ... the Commissioner or an authorised officer to be present at the hearing". Had it been intended to stipulate that the representation of the Commissioner at the hearing was mandatory, one would have expected some alternative expression to be employed such as "shall require" or shall "ensure". The same consideration applies, of course, to the fact that the applicant is also to be "enabled" to be present at the hearing and present a case. But the applicant is not obliged to attend and might not need to do so, for example, in a case where an appeal has been taken upon a specific issue of law or some issue of fact for which the applicant's testimony is unnecessary. It is understandable that this approach should be taken because to make the presence of the applicant essential to the valid exercise of the Tribunal's jurisdiction would be to hand an applicant a veto over the progress of the asylum claim. Clearly, the legislative policy was to empower the Tribunal to proceed to determine an appeal without the presence of the applicant at the hearing in the event that the applicant refused to attend. Thus, the Tribunal is required to make it possible for both the applicant and the Commissioner to attend the hearing but s. 16 (11) (c) does not make the presence of either mandatory to the validity of the hearing.

11. It is to be noted that under subs. (2A), where an applicant fails without reasonable cause to attend the oral hearing, the appeal is deemed to be withdrawn unless within three working days following the date of the oral hearing an explanation for not attending is furnished to the Tribunal and is considered reasonable. Thus, while an applicant is entitled to insist upon participating in the oral hearing and presenting a case and can resist the appeal being treated as withdrawn if reasonable cause for non-attendance can be shown within three days, nothing in the combined provisions of subs. (2A) and (11C) deprive the applicant of an entitlement to permit the appeal to be determined in his or her absence if the Tribunal is satisfied that the presence is not necessary. It is also to be borne in mind that where a s. 13 report has included one of the findings referred to in s. 13 (6), the appeal will be determined in any event without an oral hearing.

12. Regulation 9 (1) (a) which was cited to the Tribunal member by counsel at the outset of the hearing reads as follows:

*"In conducting an oral hearing the Tribunal shall ensure that the applicant, his or her legal representative, if any, the Commissioner and the High Commissioner, if present, are informed of the order of proceedings which the Tribunal proposed to adopt."*

13. Here the point made by counsel for the applicant was that this provision should be construed so that the words "if present" apply only to the High Commissioner and not to both the Commissioner and the High Commissioner. Clearly, such a construction requires a distortion of the punctuation of the paragraph. The comma appearing before and after the phrase "the Commissioner and the High Commissioner" clearly requires that the words "if present" qualify both of the nouns. Thus, just as the words "if any" qualify the words appearing between the preceding commas namely, "his or her legal representative", the words "if present" refer to both the Commissioner and the High Commissioner.

14. The Court considers, accordingly, that the two provisions which are directly relevant to the issue do not permit of any ambiguity on the point. Furthermore, that interpretation is clearly consistent with other related provisions and with the scheme applied to the appeal process under s. 16 more generally. It is clear in this regard that the Commissioner is not regarded as a party to the appeal itself notwithstanding the quasi-adversarial nature of the procedure and the facility provided for the authorised officer to be present at the hearing to present a case.

15. Thus, under s. 16 (3) the appeal is brought by an applicant by notice to the Tribunal and under subs. (4) it is the Tribunal which transmits a copy of the notice to the Commissioner. The notice of appeal is not served directly upon the Commissioner by the applicant as if the Commissioner was an opposing party. The effect of furnishing the copy of the notice to the Commissioner is to trigger the obligation of the Commissioner under subs. (5) to furnish the Tribunal with reports, documents or representations which had been submitted under section 11. Again, under subs. (8) it is the Tribunal which then furnishes to the applicant any reports, observations, representations or other documents which have been furnished to the Tribunal by the Commissioner.

16. Finally, the Court considers that this approach to the construction of the Act and the Regulations is consistent with the nature of the roles played by the Commissioner and the Tribunal in the scheme of the 1996 Act. It must be borne in mind that both are engaged in a two stage process of examination of an asylum application with a view to assessing whether or not it is well founded for the purpose of advising the Minister as to whether the declaration of refugee status should be made by him or refused under s. 17 (1) of the Act. Although the procedure before the Tribunal is designated as an appeal and has a quasi-adversarial character in that the authorised officer is present to "present a case", the Tribunal member nevertheless retains a continuing investigative role in that the member is entitled and even obliged to take the initiative where necessary to research appropriate country of origin information or to request the Commissioner to make further inquiries or obtain additional information which the Tribunal considers necessary. The Tribunal member is, in effect, carrying out a review of the basis upon which a negative recommendation has been given by the Commissioner and doing so at the request of the applicant and in the light of the challenges to the report put forward in the notice of appeal as grounds as to why it should be reversed. As this Court has pointed out in previous cases, the authorised officer acts as a form of legitimus contradictor by standing over or explaining the content of the s. 13 report where it is sought to be challenged or contradicted but with a view to assisting the Tribunal member reach an objective and sound view of the asylum application rather than to defeat the appeal as such. Accordingly, it is not inconsistent with the scheme and purpose of the procedure that the presence of the authorised officer is not indispensable if the Commissioner does not require a representative to be present in a specific case and the Tribunal member is satisfied that the hearing can properly be conducted without him. Indeed the Court considers it important to note that in this particular instance the Tribunal member appears to have acknowledged during the course of the hearing that an adjournment might be appropriate if the issue of internal relocation required to be dealt with and the presence of the presenting officer was necessary. As the Tribunal member recorded in s. 4 under the heading "Submissions":

*"The fact that there was no P.O. present was raised again in the context of this issue (internal relocation) and the Tribunal stated that if an issue was being raised again in that regard that the matter be adjourned to allow the P.O. deal with the issue. Counsel stated that the matter had proceeded thus far and he was continuing with the hearing at this*

*stage.”*

As noted earlier, the issue of internal relocation did not subsequently have any relevance to the decision.

17. For all of these reasons, therefore, the order sought must be refused.