Neutral Citation [2013] IEHC 616

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 1351 J.R.]

BETWEEN

D.O.O. (AN INFANT SUING BY HIS FATHER AND NEXT FRIEND E.O.)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on 19th day of December, 2013

1. The applicant in these proceedings is a minor and a Kenyan national now aged three years and seeks leave to apply for judicial review of the Refugee Applications Commissioner's ("the Commissioner") recommendation that he not be given a declaration of refugee status following a consideration concluded on 1st October, 2010. The proceedings were initiated on 20th October, 2010. The intended respondents issued a notice of motion dated 7th November, 2013, whereby they seek an order dismissing or striking out the proceedings as frivolous and/or vexatious and/or doomed to fail and/or an abuse of the process of the court pursuant to O. 19, r. 28 of the Rules of the Superior Courts, or alternatively on the exercise by the court of its inherent jurisdiction to dismiss the proceedings.

2. The applicant seeks the following reliefs:-

(i) An order of *certiorari* quashing the Commissioner's decision;

(ii) A declaration that the procedures in place for the processing of refugee applications in the State by the Refugee Act 1996 (as amended) are not compliant with the minimum standards required to be met by Council Directive 2005/85/EC of 1st December, 2005;

(iii) A declaration that the decision is wrong in law having regard to the provisions of the Refugee Act 1996 (as amended) and having regard to the absence of fair procedures and incomplete consideration applied by the second named respondent in arriving at the decision;

(iv) A declaration that the Commissioner misdirected himself having regard to the provisions of the Refugee Act 1996 (as amended);

(v) An order of *mandamus* compelling the Minister for Justice and Law Reform and the Commissioner to refer the applicant's asylum application for full reconsideration *ab initio* under the substantive procedures of the Refugee Act 1996 (as amended);

(vi) An injunction restraining the Minister from taking any further steps in relation to the applicant's application for refugee status pending the determination of the proceedings;

(vii) A declaration that the decision was reached in breach of statute.

3. The relief is sought upon grounds (a) – (k) inclusive as set out in the statement of grounds. Ground (a) simply recites relevant facts. The following are the grounds upon which reliance is still placed by the applicant:-

"(b) The RAC (the Commissioner) erred in law and in fact and in breach of fair procedures in linking the applicant's claim to those made by members of the applicant's family. The second named respondent should have assessed the applicant's claim independently.

(c) No independent assessment of the applicant's claim took place. No reliance should have been placed on the applicant's parents or siblings failed asylum claim.

(d) The RAC (the Commissioner) erred in law and in fact and in breach of fair procedures in failing to have due regard for its obligations pursuant to the European Communities (Eligibility for Protection) Regulations 2006 and/or Council Directive 2004/83/EC of 29th April, 2004.

(e) The applicant's claim for a declaration of refugee status under s. 17(1) of the Refugee Act 1996 (as amended), has not been, nor cannot be by reference to the terms of the Refugee Act 1996 (as amended), and Council Directive 2005/85/EC of 1st December, 2005, lawfully determined by means of procedure which complies with the minimum standards required to be met by Council Directive 2005/85/EC of 1st December, 2005, in that the said procedure deprives or will deprive the applicant of an effective remedy against the first instance determination of his application for asylum before a court or tribunal in compliance with the requirements of Chapter V of the said Directive.

(f) No adequate regard has been had to the minimum standards mandated by the Procedures Directive and/or the Qualification Directive and/or S.I. 518/2006. In particular and without prejudice to the generality of the foregoing no regard was had to the effectiveness of laws in Kenya but only to the existence of such laws. The decision maker is required to have regard not only to the laws enacted but also to how those laws are implemented. No analysis was given

to state protection beyond the mention of the outlawing of the Mungiki Sect in 2002 and a BBC country report stating the square kilometre area and population size of Kenya. In addition, no evidence was relied upon by the Commissioner to contest the applicant's father's claim that the Mungiki Sect were present outside of Kenya, despite his claiming that these countries included Somalia, Tanzania, Uganda and Ireland. Quoting the mere geographical size of Kenya is not sufficient reason for a conclusion that the applicant would be able to move to another location within Kenya or that the applicant would be safe from persecution from the Mungiki Sect or that state protection would be available to the applicant there. Furthermore, no proper consideration of the availability of state protection in Côte-d'Ivoire was undertaken.

(g) No regard was had to the applicant's next friend's medical condition despite evidence in that regard being before the Commissioner.

(h) No proper objective or subjective analysis of the applicant's claim has been undertaken.

(i) No proper assessment of the availability of state protection that might be available to the applicant if he were to be returned to Kenya was addressed. Furthermore, the decision states that the applicant would be entitled to Ivorian nationality by virtue of his mother being an Ivorian national. The decision makes no mention or assessment of state protection that may be available to the applicant in Côte d-Ivoire. It is not sufficient for an applicant to be entitled to citizenship or (*sic*) another state but that the applicant is capable of taking up the citizenship of the state.

(j) No proper forward looking test has been carried out. The decision looks at the applicant not being able to claim asylum because of his father's political opinion. Without prejudice to the current decision, the applicant may suffer current or future persecution because of the applicant's race. While this was mentioned in paragraph 3.4 of the decision, the decision makers were under a duty to assess this risk that was identified by them, but failed, in breach of paragraph 67 and 196 of the UNHCR Handbook to do so.

(k) Insofar as the refusal of the applicant's claim is based on the availability of internal relocation (which is unclear) no regard was had to the appropriate burden of proof or to the provisions of the relevant UNHCR Guidelines and/or the UNHCR Handbook and/or the Procedures Directive and/or the Qualification Directive and/or S.I. 518/2006. No proper assessment of the question of internal relocation took place."

4. The respondent's motion is brought pursuant to O. 19, r. 28 of the Rules of the Superior Courts which states:-

> "The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court may order the action to be stayed or dismissed, or judgement to be entered accordingly, as may be just."

Order 125, r. 1 provides:-

> ""Pleading" includes an originating summons, statement of claim, defence, counterclaim, reply, petition or answer. An "action" means a civil proceeding commenced by originating summons or in such other manner as may be authorised by these Rules."

5. Alternatively, the respondent relies upon the inherent jurisdiction of the court to strike out the proceedings on the basis that they are frivolous or vexatious or because it is clear that the plaintiff's claim must fail. That jurisdiction was considered in *Barry v. Buckley* [1981] I.R. 306 in which Costello J. reaffirmed the distinction between an application under O. 19, r. 28 and the inherent jurisdiction of the court. The court's jurisdiction under O. 19, r. 28 is limited to a consideration of the pleadings of the parties at the time the application is made, whereas when invited to exercise its inherent jurisdiction, the court is entitled to hear evidence on affidavit relating to the issues in the case. Thus, a jurisdiction exists to ensure that an abuse of the process of the courts does not take place but it should only be exercised sparingly and in clear cases (*Davey v. Bentinck* [1893] 1 Q.B. 185 at 187 and *Goodson v. Grierson* [1908] 1 K.B. 761).

6. The respondent moved the application on the affidavit of Ms. Helen Maguire, a State Solicitor, who sets out the pleadings and proceedings in the case and gives her belief that the claims are frivolous and/or vexatious and doomed to fail, because, *inter alia*, a number of the grounds relied upon by the applicant are already the subject of decided case law. She asserts that two further grounds are too vague and imprecise and amount to general assertions containing no particulars. It is contended in the affidavit that the remainder of the grounds are manifestly matters which can be dealt with by way of an appeal to the Refugee Appeals Tribunal which would involve an oral hearing. In addition, it is submitted in the affidavit that any complaint about the effectiveness of the appeal to the Refugee Appeals Tribunal could not invalidate the recommendation of the Commissioner pursuant to s. 13 of the Refugee Act 1996. These are all matters which add nothing to the facts of the case and, in effect, amount to legal submissions presented by way of affidavit.

7. The only additional fact relied upon in the affidavit beyond the pleadings and submissions already referred to, is contained in para. 4 in that, on 22nd August, 2013, Ms. Maguire wrote to the applicant's solicitors proposing a compromise of proceedings allowing the applicant to withdraw them with no order as to costs whilst also stating that it was the respondent's view that the proceedings did not come within a category of "exceptional cases" challenging the recommendation of the Commissioner which have been identified in the relevant judgments of the High Court as offering a basis for judicial review of a Commissioner's decision where a statutory right of appeal exists. In that regard, the letter relied upon the cases of *Aransi v. the Minister for Justice and Equality, the Refugee Applications Commissioner & Ors* [2011] IEHC 485, and *Diallo v. Refugee Applications Commissioner & Ors* (Unreported, High Court, 27th January, 2009, ex-tempore, Cooke J.).

8. In Aransi a notice of appeal to the Refugee Appeals Tribunal had been lodged as a precautionary measure notwithstanding the initiation of judicial review proceedings. Cooke J. stated:-

> "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 then only when the report is shown to have some potentially independent consequence for an applicant which is incapable or inapt to be dealt with by the statutory appeal."

In that case since the only issue was whether there was any reality to the alleged fear that the child applicant might be exposed to a risk of forcible circumcision against her mother's wishes if returned to Nigeria, the court was satisfied that no valid reason had been

advanced as to why the statutory appeal in that case would be inadequate, ineffective or inconvenient. The issues that arose were more conveniently and adequately dealt with by the statutory appeal.

9. In *Diallo*, Cooke J. rejected the applicant's argument that the availability of an alternative remedy by way of appeal should not be dealt with at a preliminary leave application stage, but only upon the hearing of the substantive application following the granting of leave. He stated:-

> "15. The court cannot accept this last submission. The question as to whether a substantial ground is raised which justifies the grant of leave is itself bound up with the question as to whether the available appeal to the Tribunal is the appropriate remedy and whether the court would exercise its discretion to order *certiorari* to issue on a hearing of the application. A ground of challenge may be substantial as against a final decision of the RAT but while arguable, may be unreasonable and without weight if raised as an alternative to an appeal against the report of the Commissioner.
>
> 16. What falls to be considered is whether the case proposed to be made advances a substantial ground as to why the measure ought to be quashed. When it is clear that the complaints to be raised are capable of being adequately or more appropriately dealt with by means of the statutory appeal remedy, it must follow that there is no substantial ground for the issue of *certiorari.*
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> 17. Thus, if it is evidenced at leave stage in the light of the settled case law on this issue, that the case is one where the discretion should clearly not be exercised in the applicant's favour, then it is clearly consistent with the statutory scheme and with the economy of the administration of justice that leave should be refused."

10. Cooke J. summarised the principles applicable as follows:-

> "A. Where the legislature has put in place an administrative and quasi judicial scheme postulated on a limited recourse to the courts, *certiorari* should not issue if that statutory procedure is adequate and more suitable to meet the complaints upon which the application for judicial review is based.
>
> B. The fact that an appeal against the impugned decision or measure is available to an applicant is not of itself a bar to the issue of *certiorari* by the High Court.
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> C. The court should not exercise its discretion to refuse *certiorari* to quash a bad decision if its continued existence may produce damaging legal effect.
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> D. For the High Court to intervene in a statutory two stage procedure such as is provided in planning and asylum matters, it is not sufficient to point to an error within jurisdiction on the part of the decision maker at first instance. Some extra flaw in the decision must be shown such as to indicate that the decision maker has acted out of jurisdiction and in disregard of one of the principles of natural or constitutional justice.
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> E. The essential question is whether the available remedy by appeal is the more appropriate remedy.
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> F. A variety of factors fall to be considered in assessing the appropriateness of the remedies including the nature and scope of the appeal and the stage in the statutory scheme at which it arises; whether it concludes (*sic*) an oral hearing; the type of error sought to be challenged in the decision and whether it can be remedied on appeal.
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> G. The fact that the appeal does not provide for an oral hearing, while relevant is not itself a ground for granting relief. An oral hearing is not always an essential ingredient for a fair appeal.

11. In *B.N.N. v. The Minister for Justice* [2008] IEHC 308, Hedigan J. reviewed the relevant case law and concluded that it would only be in very rare and limited cases that judicial review would be available in such circumstances. The defect in the procedure would have to be "so fundamental as to deprive ORAC of jurisdiction". He held that an applicant would have to 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". As Cooke J. noted in *Diallo*:-

> "Leave to apply for judicial review to quash a reported recommendation of the Commissioner should only be granted in exceptional cases and that to bring an application within the category of such cases it is necessary to advance substantial grounds for the existence of some fundamental flaw or illegality in the Commissioner's report such that a rehearing upon appeal before the Tribunal will be inadequate to remedy it."

It is in that context that the court must consider whether the grounds advanced in this case fall into the category of rare and exceptional cases in which *certiorari* is the appropriate and only adequate remedy for the illegalities alleged.

The Commissioner's Decision

12. The child applicant's claim was advanced by his father. It was claimed that the child could not return to Kenya as he would be harmed by the Mungiki Sect. This Sect tried to recruit his father and he refused and as a result received death threats. He claimed that his son's life was also at risk. His application for asylum was linked to his mother's, his father's and two siblings' applications and was based on a stated fear of persecution for reasons of political opinion.

13. It was claimed that the child was from Kenya and he was considered to be Kenyan in the examination of his claim. The applicant's mother claimed to be from the Côte d'Ivoire. Her application and that of the child's two siblings were processed on the basis that they were Côte d'Ivoire nationals. The issue to be determined in this applicant's case was whether there was a well founded fear of persecution under s. 2 of the Refugee Act 1996 (as amended). The Commissioner found as follows:-

> "3.3 ***Well founded Fear***
>
> The applicant's father claims that the applicant would be in danger in Kenya from the Mungiki because they wished to harm him for not joining them….In this regard the applicant's father is basing the applicant's claim on his own fears about returning to Kenya. The applicant's father's case was investigated by ORAC in 2008. The recommendation of ORAC was upheld at appeal stage and his claim was considered not to be well founded. The applicant's father did not mention during his interview with ORAC the extent of his fears of the Mungiki, however, this issue was addressed at the applicant father's appeal and his failure to mention his fear of the Mungiki led to a finding that this element of his claim was not credible. In

light of this, the applicant's case is also considered not to be well founded. The applicant's father submitted a letter from his GP detailing the scarring on his leg and arms. However, as the reasons for the scars given in the letter are provided by the applicant's father himself and cannot be verified, the letter's relevance to the applicant's claim is negligible.

The applicant's father was asked if the applicant could go to the Côte d'Ivoire in order to avoid any problems in Kenya. He replied that the applicant could not go there because his mother has problems there. As in his father's case, the applicant's mother's, sister's and brother's cases have all been investigated by ORAC and have been considered as not well founded. These recommendations have also been upheld by the Refugee Appeals Tribunal. Therefore, it follows that any reasons why the applicant cannot go to the Côte d'Ivoire that are based on his mother's claims to be in danger of persecution in the Côte d'Ivoire must also be considered as not well founded."

14. The Commissioner then considered the issue of state protection and questioned whether the applicant could get help from the police in Kenya if his son were to be threatened by the Mungiki. The report continues:-

"The applicant's father replied that he did not trust the police as they could not protect him or his parents. However, the applicant's father did not explain why his son could not access state protection in Kenya. The Mungiki Sect was outlawed in 2002 and it is considered that should the applicant be in danger from the Mungiki that the applicant's father has not demonstrated that the police would be unable to help the applicant.

The applicant's father was also asked if the applicant could go to a part of Kenya away from K (his home village) - to avoid any threats from the Mungiki. He replied that he could not as the Mungiki are everywhere, including Somalia, Tanzania, Uganda and even all over world and in Ireland. However, as the applicant's father's claim in relation to the Mungiki was considered as not being well founded, the reasons why the applicant's father says the applicant would not be able to find a safe place in Kenya are not accepted. Kenya is a very large country with an area of 582,000 square kilometres and a population of over 39 million people. (Appendix C – BBC Country Profile: Kenya)."

15. The Commissioner went on to conclude that the applicant being a child of four months could not have a political opinion, nor could it be demonstrated that his father had a well founded fear of persecution in Kenya because of political opinion. The Commissioner was not satisfied that the applicant had established a well founded fear of persecution under section 2.

Section 5 of the Illegal Immigrant (Trafficking) Act 2000

16. Under s. 5 an applicant must demonstrate "substantial grounds" if the court is to grant leave to apply for judicial review in respect of a Commissioner's decision. It is clear that, as Carroll J. stated in *McNamara v. An Bord Pleanála* [1995] 2 ILRM 125:-

"A ground that does not stand any chance of being sustained (for example, where the point has already been decided in another case) could not be said to be substantial."

In the same case Carroll J. noted that:-

"In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous."

This test was endorsed by the Supreme Court in *Re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360.

17. Section 5 of the Act provides that a challenge must be made to the Commissioner's decision by way of application for judicial review under O. 84 of the Rules of the Superior Courts. This is a statutory filtering process calculated to ensure that frivolous, vexatious, trivial or tenuous grounds may be identified at the leave stage thereby ensuring that leave will not be granted on such grounds. The court must be particularly cautious having regard to the strictures that apply to such applications before countenancing the dismissal or striking out of such an application at a very early stage before the leave application has even been considered. As noted by Finlay Geoghegan J. in *K.A. v. Minister for Justice* [2003] 2 I.R. 93, the section requires that the application be commenced by an initiating notice of motion on notice to the Minister and any other person specified by the court. As in *K.A.* no other person has yet been specified as a notice party in this application or as a respondent and leave to apply for judicial review has yet to be considered and/or granted. In accordance with the practice that has developed, however, the Commissioner has been put on notice of this application and was at all material times represented by solicitor and counsel. However, the moving party on this motion to dismiss or strike out the pleadings must be regarded as the Minister. For the purpose of the leave application, therefore, the Minister has been nominated as the respondent to the motion for leave and has, in the court's view, the *locus standi* to take all such steps as are open to the Minister under the statute and the Rules of the Superior Courts to address the case which, as the statutory notice party, he is obliged to face. Thus, the fact that other parties were not joined as respondents in the *K.A.* case did not prevent the court from making an order for discovery in the terms sought.

18. The court has reservations as to the extent of its jurisdiction to entertain an application under O. 19, r. 28 based on a review of the notice of motion submitted by the applicant grounded on affidavit and the statement of grounds furnished, to consider whether the grounds advanced in the application are frivolous and/or vexatious and/or certain to fail and/or an abuse of process. Unlike *Aransi* and *Diallo*, this motion is brought prior to the pre-leave hearing. The basis upon which the respondent seeks to apply this rule in his case overlaps to a significant degree with the statutory jurisdiction vested in the court to determine whether leave should be granted to the applicant to seek judicial review on the basis of the low threshold set out in section 5. By invoking O. 19, r. 28 the respondent seeks to apply the filter at an earlier stage. This would appear to be more appropriate to plenary and/or other forms of proceedings or cases in which no such statutory threshold is applicable. At the very least the procedure under s. 5 suggests that the rule should be used very sparingly. Otherwise, an applicant's opportunity to seek leave to apply for judicial review under the section may be unfairly restricted. In this case, I am satisfied that it is more appropriate to consider whether the applicant's case should be dismissed or a stay placed on proceedings as an abuse of process on the basis of the court's inherent jurisdiction.

19. The inherent jurisdiction of the court to dismiss or strike out these proceedings as an abuse of process is invoked for three reasons which may be summarised as follows:-

1. A number of the grounds advanced have been the subject of previous decisions of this Court, the Supreme Court and the European Court of Justice.

2. A statutory appeal remedy already exists for the applicant in this case and ought to be fully utilised on his behalf in accordance with previous decisions of the court.

3. A number of the grounds advanced are so lacking in clarity or precision as to be certain to fail and the court has an inherent jurisdiction to regard the framing of grounds in such a way as an abuse of process.

The issues described at 1 and 3 are normally appropriate for consideration in the course of the s. 5 procedure. The respondent contends that the court should exercise its inherent jurisdiction when the procedure followed by the applicant in seeking to initiate judicial review proceedings has been disapproved of by the High Court in *Aransi* and *Diallo* and, moreover, is based on other manifestly unfounded grounds.

20. The question is posed whether the court is obliged to set aside valuable court time for the hearing of an application, if the grounds advanced are manifestly unfounded and unlikely to succeed. The practice in asylum cases now is to assign a date for a telescoped hearing in which an application for leave to apply for judicial review may be made and, if leave is granted on any particular ground, the court may then consider on the basis of all the materials and arguments submitted at that hearing whether to grant the relief claimed. In effect, if leave is granted, the application for leave is treated as the hearing of the action and judgment is then delivered. The intention is to ensure that court time is more efficiently utilised. The delay caused by pursuing a case on manifestly unfounded grounds cannot be regarded as something that is in the interests of justice or in the interests of the child applicant or his family. It may be, therefore, in the interests of good court management that such cases be removed from the list by striking them out or dismissing them. The court should not allow its procedures to be misused and, in an appropriate case, will act to ensure that its machinery does not become the conduit of vexatious or oppressive cases or those that are absolutely groundless or initiated for the purpose of delay. In such cases the court has the obligation to prevent the time of the public and the court from being wasted. However, in judicial review cases, it must be remembered that the applicant is obliged to submit his case to the court under s. 5 precisely for the purpose of a critical examination of the grounds advanced before being granted leave to apply for judicial review. Therefore, if due regard is to be given to the statutory framework provided by s. 5, the respondent must demonstrate if he is to succeed in this motion that the applicant's case is manifestly and completely groundless in order to justify the making of an order dismissal which carries with it the consequence that the applicant is thereby deprived of the statutory right to make his application for leave to apply for judicial review. In that context it is appropriate to consider whether an appeal to the Refugee Appeals Tribunal is, in all the circumstances, the appropriate avenue which should be taken by the applicant and whether, having regard to the existence of that right of appeal and the manifest of substance in the grounds advanced, the invocation of the judicial review procedure constitutes an abuse of process.

21. I am satisfied that this approach accords with the legislative history and nature of the prerogative writs as they have evolved into the present forms of judicial review. They differ fundamentally from the cases in respect of which the rules of pleading and practice (including O. 19, r. 28), have for the most part been constructed. It would be somewhat incongruous if the Minister could apply in advance of the court's consideration of the application under s. 5 to dismiss the application before that jurisdiction is invoked and exercised. I consider that it is more appropriate in most cases in which the issue arises that the matter should be left until the hearing of the application for leave. When the only challenge to an application for leave on notice amounts, in effect, to an argument that the grounds are unstateable or otherwise not substantial grounds, that argument should be reserved for the hearing of the application for leave under section 5. However, if, as in this case, the challenge is based on a claim that the grounds advanced are manifestly ill-founded and that the procedure adopted is an abuse of process by reason of the existence of an entirely adequate appeal process, the court is entitled to determine whether the application should be dismissed as an abuse of process in the exercise of its inherent jurisdiction.

Assessment of the Grounds
22. A great deal of argument has been focused upon the nature of the grounds advanced in this case. It is submitted that three of the grounds are now settled by previous case law. It is said that four grounds relate to the quality of the Commissioner's decision and that the statutory remedy of an appeal to the Refugee Appeals Tribunal is available and has been invoked, though without prejudice to the initiation of these proceedings. A further ground is criticised as patently unsustainable as it is contended that medical evidence was not considered, when it was. Finally, it is said that two further grounds are so vague and lacking in specificity as to be incapable of justifying a grant of leave.

Ground (e)
23. Since the institution of these proceedings the issue as to whether the asylum procedure under the Refugee Act 1996 (as amended), to which the applicant was subject, was compliant with the minimum standards required under Council Directive 2005/85/EC of 18th December, 2005 has been addressed by the European Court of Justice and the High Court. The procedure was found to be compliant in *H.I.D., B.A. v. the Revenue Application Commissioner & Ors* Case C-175/11, C.J.E.U. 31st January, 2013, and *H.I.D. & B.A. v. Refugee Application Commissioner & Ors* [2011] IEHC 33. This ground is now moot and could not form the basis of any grant of leave to apply for judicial review of the Commissioner's recommendation.

Grounds (b) and (c)
24. I am satisfied that the grounds set out at (b) and (c) which relate to the reliance placed by the Commissioner upon decisions reached in respect of the child applicant's father, mother and siblings in their respective applications for refugee status by the Refugee Appeals Tribunal, are unstateable and insubstantial. Previous decisions of the High Court permit reliance by a decision maker upon decisions reached in asylum applications in respect of the parents of very young children in circumstances where the child applicant's claim must, by necessity, be based entirely on the experiences of the child's parents and/or siblings. The Commissioner was entirely correct to rely upon decisions reached after full appeals in respect of the child's parents and siblings and any other approach would be contrary to logic and commonsense. (See *J.O. v. Refugee Applications Commissioner & Ors* [2009] IEHC 478).

Grounds (f), (i), (j) and (k)
25. The respondents submit that these grounds relate to the quality of the Commissioner's decision and that the statutory remedy of appeal to the Refugee Appeals Tribunal is a more appropriate remedy for the applicant. It is said that the appeal procedures have been availed of, in that a Form 1 notice of appeal dated 15th October, 2010, has been lodged, albeit without prejudice, to the applicant's claimed right to bring these proceedings.

26. Ground (f) complains that the Commissioner was required to:-

(1) Examine the effectiveness of the implementation of anti-Mungiki laws in Kenya as well as the terms of those laws;

(2) Analyse the availability of state protection against members of the Mungiki Sect in 2002;

(3) Give adequate weight to the fact that the father's claim that the Mungiki had an Africa-wide and worldwide presence;

(4) Give proper consideration to the availability of state protection in the Côte d'Ivoire;

(5) Do more than consider the geographical size of Kenya and its population of 39 million when determining whether relocation was permissible and the Commissioners should have focused on the particular place suitable for relocation.

27. Ground (i) contains further criticism of the consideration of the facts of the application and, in particular, the issue of state protection in the Côte d'Ivoire. Ground (j) complains that the Commissioners were under a duty to assess the risk of future persecution on the basis of paragraphs 67 and 196 of the UNHCR Handbook. It was acknowledged that the issue of race was mentioned at para. 3.4 of the consideration, but it was claimed that this was inadequately analysed. Ground (k) complains in very general terms of a failure to comply with the UNHCR Guidelines without propounding any particulars as to how that might have been done or specifying any deficiencies in that regard in the applicant's case.

28. It is submitted that all of these facts were matters that could be taken up in pursuing the statutory appeal available to the child applicant. However, it should be noted that there are no details or particulars set out in grounds (j) or (k) relating to the circumstances of the child applicant's case. I am satisfied that, as in *Diallo*, the complaints levelled at the consideration go to the quality of the decision. No fundamental matter of law is raised that would render the decision by the Commissioner fundamentally flawed or otherwise undermine the jurisdiction and basis of the decision. I am not satisfied that the applicant has demonstrated in respect of any of these matters that they could not be addressed appropriately on an appeal. It is also instructive to note that each of the decisions relied upon by the Commissioner made by the Refugee Appeals Tribunal in respect of the child applicant's parents and siblings were considered in the "well founded fear" section of the report. The court and the Commissioner are entitled to have regard to the realities of this case and the close connection between the family members and their respective claims. The court has not been informed that any of these findings were challenged by way of judicial review in any respect. I have no doubt that each element of these complaints could properly be advanced on a full appeal to the Refugee Appeals Tribunal.

29. I am satisfied that the principles set out by Cooke J. already quoted and considered by Clarke J. in *Harding v. Cork County Council* [2006] IEHC 295 as applied by MacEochaidh J. in *T.R.O. v. Refugee Applications Commissioner & Ors* (Unreported, High Court, 19th February, 2013, *ex-tempore*) apply. There is a statutory appeal in which these matters may be considered. None of the points raised in these grounds is a point that could only be raised by way of judicial review and they do not raise illegalities of such a nature as go to the jurisdiction of the consideration such as to render the recommendation invalid. To seek leave to apply for judicial review on these grounds is an abuse of process which I am satisfied may be dealt with at this stage.

Grounds (d) and (h)
30. It is clear from the materials before the court that the applicant cannot hope to establish that substantial grounds exist in respect of grounds (d) and (h). These grounds do not disclose any particulars and lack the precision required for a ground upon which the court might act. No attempt has been made to furnish particulars to support the generalised claims made. They could not possibly succeed as drafted.

Conclusion
31. For the reasons set out above, I am satisfied that the grounds advanced in support of the application for leave could not possibly succeed and are manifestly ill-founded. Other grounds concern the quality of the decision and may be pursued by an appeal to the Refugee Appeals Tribunal. I am, therefore, satisfied on the basis of these combined factors that the proceedings should be dismissed as an abuse of process. I do so mindful of the caution which must be exercised before dismissing proceedings as an abuse of process, the statutory scheme applicable to judicial review in such cases, and the fact that the applicant is a minor.