THE HIGH COURT
JUDICIAL REVIEW
IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000

[2004 No. 465 JR]

BETWEEN

AJOKE KAYODE

APPLICANT

AND
THE REFUGEE APPLICATION COMMISSIONER

RESPONDENT

Judgment delivered by the Honourable Mr. Justice O'Leary on the 25th day of April, 2005.

1. The applicant applied by notice of motion dated 27th May, 2004, on notice to the respondent for leave to apply by way of judicial review for the following orders:

(a) An order of certiorari by way of application for judicial review quashing the decision of the respondent, dated the 27th day of April, 2004 that the applicant not be declared a refugee.

(b) An order of mandamus directing the respondent to assess the applicant's asylum claim ab initio.

(c) A declaration by way of application for judicial review that the respondent erred in law and/or in fact in its decision in respect of the applicant's application for refugee status.

(d) An order allowing for an extension of time within which to bring an application for judicial review, pursuant to Section 5(2)(a) of the Illegal Immigrants (Trafficking Act), 2000.

(e) Such further or other order as to this honourable court shall seem meet.

(f) An order providing for costs.

Pleadings

2. The pleadings and the following evidence was available to the court for its consideration:

Pleadings consisting of:

(1) Notice of Motion.

(2) Statement Grounding Application.

Evidence

(1) Grounding affidavit of Ajoke Kayode (the applicant) dated 27th May, 2004.

(2) Affidavit of service of Susan Hudson on behalf of the solicitor for the applicant dated 28th May, 2004.

3. In order to fully understand the submissions of both parties a full examination of the pleadings and evidence is necessary. The court has conducted such a full examination.

Affidavit

4. The affidavit of the applicant is drafted in a manner that is contrary to the requirements of an affidavit as to facts. It is replete with arguments that are, obviously, the work of the lawyers in the case and contain submissions which are clearly not the words of the applicant. If at any time it becomes necessary to tax the costs of the applicant the taxation should reflect this violation of the rules of pleading. The effect of such incorrect procedure is to complicate and lengthen what should be a straightforward application. It would be unfair, however, to visit the annoyance of this court on the applicant. From the mixture of fact and argument the following matters appear to emerge.

Facts

5. Facts for which there is objective evidence are set out below and facts depending on the unsupported word of the applicant are underlined.

6. The applicant:

1. *Was born on 26th October, 1961. She is married since 1982 and has six children. Her spouse and children remain in Nigeria.*

2. Arrived in Ireland on 18th March, 2004.

3. *Was assisted by a white male, with whom she has now lost contact, in leaving Nigeria.*

4. *Her father was a Muslim who had a dispute over employment policy in his firm and was killed for this reason as were her two brothers, her mother was injured as were other family members including the rape of the applicant's daughter.*

5. *Herself was attacked in her house on 18th February, 2003.*

6. Mother is a person whose asylum application has been granted in 5th December, 2002.

7. *The applicant travelled to Ireland via France where she did not claim asylum.*

8. *Never had a passport and in so far as she may have had the benefit of a passport for her travel this was retained by her white travel companion.*

9. *Had no knowledge at which airport in France she had landed.*

10. Was interviewed on 22nd April, 2004, and the report of the officer assigned to the case was made on that day.

11. An appropriate officer on behalf of the respondent further considered the matter on 27th April, 2004, recommending refusal of application.

12. The decision not to grant refugee status was conveyed to the applicant by letter dated 28th April, 2004.

13. The applicant appealed to the Refugee Appeals Tribunal on 20th May, 2004.

14. The applicant applied for judicial review of the decision herein on 27th May, 2004.

Delay
7. The applicant has pointed out that the application is some two weeks later than provided for in the legislation and has explained the delay by reference to the delay in receiving legal advice though this was sought on 29th April, 2004. The explanation appears reasonable and the court exercises its discretion to extend the time for the making of the application to the extent that this is necessary for the further consideration of the application.

Making of an application for Judicial Review and maintaining a simultaneous appeal.
8. The court notes that the applicant has first in time lodged an appeal against the unfavourable decision of the respondent to the Refugee Appeals Tribunal on 20th May, 2004, and later on the 27th May, 2004, issued a judicial review motion. Is this acceptable? The law in this area has been undergoing a certain refinement culminating in the decision of the Supreme Court in *Angela Tomilson v. Criminal Injuries Compensation Tribunal* [2005] 1 I.L.R.M. This decision has the advantage of summarising the law in a straightforward and comprehensive way. At page 397 Denham J. sets out the current law as follows.

> 'The common law, on the discretion to be exercised by a court when there is an application for judicial review in circumstances where an alternative remedy exists, has been developed over the last two decades. Several different approaches may be seen in *State (Abenglen Properties Ltd) v. Dublin Corporation* [1984] I.R. 381; [1982] I.L.R.M. 590. In that case, O'Higgins C.J. stated at pp. 393/597:
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> > *"The question immediately arises as to the effect of the existence of a right of appeal or an alternative remedy on the exercise of the court's discretion. It is well established that the existence of such right or remedy ought not to prevent the court from acting. It seems to me to be a question of justice. The court ought to take into account all the circumstances of the case, including the purpose for which certiorari has been sought, the adequacy of the alternative remedy, and of course, the conduct of the applicant. If the decision impugned is made without jurisdiction or in breach of natural justice then, normally, the existence of a right of appeal or of a failure to avail of such, should be immaterial. Again, if an appeal can only deal with the merits and not with the question of the jurisdiction involved, the existence of such ought not to be a ground for refusing relief. Other than these, there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint, or where administrative legislation provides adequate appeal machinery which is particularly suitable for dealing with errors in the application of the code in question. In such cases, while retaining always the power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy us not adequate."*

Over a decade later, it was stated by Barron J. in a High Court judgment in *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497 at 509:

> *"The real question to be determined where an appeal lies is the relative merits of an appeal as against granting relief by way of judicial review. It is not just a question whether an alternative remedy exists or whether the applicant has taken steps to pursue such remedy. The true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and principles of fairness; provided, of course, that the applicant has not gone too far down one road to be estopped from changing his or her mind. Analysis of the authorities referred to show that this is in effect the real consideration."*

10. This approach has been endorsed by the Supreme Court. In *Buckley v. Kirby* [2000] 3 I.R. 431; [2001] 2 I.L.R.M. 395, the Court, in a judgment delivered by Geoghegan J., adopted the view of Barron J. in McGoldrick, as expressed above. In *Stefan v. Minister for Justice* [2001] 4 I.R. 203; [2002] 2 I.L.R.M. 134, it was stated:

> "In a judgment of mine, with which the other members of the Court agreed, that the presence of an appeal is not a bar to the Court exercising its discretion but rather a factor for the court in considering the requirements of justice. I referred to the test stated by Barron J. in *McGoldrick*, as set out above, and that it had been adopted by Geoghegan J. in Buckley, and said at p. 217:
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> > *'Once it is determined that an order of certiorari may be granted, the court retains a discretion in all the circumstances of the case as to whether an order of certiorari should issue. In considering all the circumstances, matters including the existence of an alternative remedy, the conduct of the applicant, the merits of the application, the consequences to the applicant if an order of certiorari is not granted and the degree of fairness of the procedures, should be weighed by the court in determining whether certiorari is the appropriate remedy to attain a just result'."*

11. Among the cases considered in this judgment was Buckley v. Kirby [2002] 3 I.R. 431 a Supreme Court case which considered the nuances which arise and which may be helpful in the practical application of the law. Various scenarios were considered in that judgment to illustrate the matters which were relevant and appeal co-exist. In this case the following examples from that judgment

appear to this court to be relevant.

> *Example 1;* Where the applicant has brought an appeal and moved for judicial review in circumstances where either remedy would have been equally appropriate but where, at the stage of the judicial review, the appeal is still pending.

12. Geoghegan J. addressed this question in (as the second of a number considered) in Buckley v. Kirby and held as follows at page 434:

> *"Where the second situation exists in that an appeal is pending but not yet heard, and but for that fact, judicial review would quite clearly be an appropriate remedy, the High Court, on an application for leave, is not bound to refuse leave merely because an appeal is pending."*

13. This represents a departure from the traditionally held view that certiorari will not lie regarding a matter which is pending before an appellate court.

14. Geoghegan J. approved of Barron J.'s dicta in *McGoldrick v. An Bord Pleanála* where he observed that the *real question to be determined where an appeal lies is the relative merits of an appeal against granting relief by way of judicial review.*

15. He continued at page 509, of McGoldrick, Barron J. states:

> *"It is not just a question whether an alternative remedy exists of whether the applicant has taken steps to pursue such remedy. The true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and the principles of fairness; provided, of course, that the applicant has not gone too far down one road to be estopped from changing his or her mind. Analysis of the authorities referred to shows that this is in effect the real consideration."*

> *Example 2;* Where the applicant has both appeal and brought judicial review proceedings in circumstances where at the time of the judicial review hearing the appeal is still pending but were in all the circumstances appeal, rather than judicial review, is clearly the more appropriate remedy.

16. In *Buckley v. Kirby*, Geoghegan J. dismissed the application for judicial review on the grounds that an appeal would have been the more appropriate remedy since *certiorari* ought not to be granted merely on the grounds of an absence of evidence to support a finding. There is not much to be said in relation to this ground other than a court will clearly not allow judicial review where an appeal would be a more appropriate remedy. This is a matter for the Court's discretion and will depend on the facts of the case.

17. In summary, it is clear that the law as set out in the decided cases require the application of these principles in the context of the facts and circumstances of the case under consideration. To that end the court will therefore consider the relevant factors in the present case prior to applying the legal principles.

18. The Court has considered the evidence and has had the benefit of detailed submissions and arguments on behalf of the applicant. The submissions can be summarised as follows.

> 1. The country of origin information (COI) was three years old which time was in excess of what was reasonable and/or normal.
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> 2. The COI information was not properly weighed up and assessed.
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> 3. The assessment of the internal help available to the applicant in the COI was defective and relied on inadequate and selective quotations from documents. Further relevant documents were not considered.
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> 4. There was a lack of expertise in the assessment of the application.
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> 5. The burden of proof was incorrectly applied.
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> 6. The assessment of the credibility of the applicant was flawed.
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> 7. The weight placed on the absence of documents and the lack of explanation for their presence was not appropriate.
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> 8. The travel arrangements leading to the arrival of the applicant are over critically considered in the decision making process and are not properly assessed in the context of the applicant's mothers application and the acceptance of her arrival and refugee status.
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> 9. Failure to assess the application in the context of the earlier successful application of the applicant's mother and other family circumstances.
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> 10. The weight placed on the failure to seek help within Nigeria was wrong.
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> 11. There are other grounds which rely on the above general headings of complaint.

19. The nature and extent of the complaints suggest a trawling of the written decision by the applicant's lawyers. It is long accepted that such practices (even in the case of Court of Criminal Appeal matters) are to be viewed with suspicion. None of the matters raised (ignoring for the moment the points relating to the status of the applicant's mother and the burden of proof considered below) are appropriate to a judicial review application but are exactly the type of matters which might be raised in the course of an appeal. The question of the mother's status is unusual but the apparent lack of consideration and/or lack of weight given to it by the respondent lies within the quasi-judicial discretion of the respondent. The applicant might well hold the opposite view of the weight to be given by applications by other family members if in the event of the earlier refusal of her mother applications this was used to support a refusal in her case. She would rightly demand that her application be assessed with reference to the facts relevant to her.

20. The burden of proof is considered further herein under and in the light of that assessment is not a proper ground for judicial review.

21. The Court is, therefore, of the view that substantial grounds do not exist to grant leave in this case. This is sufficient to decide the application but the court did further consider the issue of the use of judicial review procedure.

Judicial Review V Appeal
22. Despite the Court's conclusion that judicial review is not properly available in this case the court also considered the matter as if judicial review did potentially lie.

23. The Court has no doubt at all that applying the principles enunciated by Barron J. in *Mc Golderick v. Bord Pleanála* [1997 1 I.R. 497] as to what is the *more appropriate remedy* in this case, an appeal rather than a judicial review is more appropriate. The points raised by the applicant are, by and large, matters relating to the quality of the decision rather than the defective application of legal principles. The one submission which appears to raise a legal point relates to the burden of proof. The State is alleged to have a shared burden of proof in so far as it may have unique access to certain information. In the view of the court this submission confuses an obligation to produce and disclose (the burden of production) with a burden of proof. The existence of an obligation to produce evidence (not deciding whether in this case the State has such an obligation) in no way disturbs the burden of proof, which burden continues in this case to rest with the applicant.

24. The court further believes that the application of the correct legal principles to this and similar applications will lead to speedier decisions which will assist in maintaining the integrity of the statutory scheme established by the Oireachtas.

Decision
25. The court has no doubt for the reasons set out above the application for leave should be refused both because of the absence of substantial grounds and that the appeal process is a more appropriate remedy. That remedy is still open to the applicant.