

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2009 No. 854 J.R.]**

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**BETWEEN**

**M. O.**

**-AND-**

**A. O. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND M.O.)**

**APPLICANTS**

**-AND-**

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

**RESPONDENTS**

**-AND-**

**HUMAN RIGHTS COMMISSION**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 27th day of February 2014**

1. These are 'telescoped' applications for leave to seek judicial review of two decisions of the Refugee Appeals Tribunal refusing a mother and her daughter declarations of refugee status. The minor applicant's claim is based on that of her mother.

2. The mother is a Nigerian national who claims to have entered the State on 17th December 2008 as a seventeen year old unaccompanied minor. She states that her date of birth is the 11th August 1991. An age assessment was carried out by the Office of the Refugee Applications Commissioner who determined that the applicant was not a minor. At the time of her arrival she was six months pregnant with her daughter A.O. who was born in the State on 23rd March 2009. The applicant claims that she was raped by her uncle, who is the father of her child, and that she fled Nigeria when he made threats to harm mother and baby.

3. The applicants made separate applications for asylum and separate decisions have issued from the Office of the Refugee Applications Commissioner on 15th May 2009 and the Refugee Appeals Tribunal on 22nd June 2009. The Minister for Justice issued a proposal to deport the applicant dated 22nd July 2009. Only two grounds of challenge were pursued at the hearing of these actions.

**Submissions:**

4. The first challenge relates to the age assessment carried out by the Office of the Refugee Applications. The second ground advanced is that the decision of ORAC to make a finding pursuant to s. 13(6)(b) of the Refugee Act 1996 (as amended) and thereby cause a 'papers only' appeal to the Refugee Appeals Tribunal, was made in error.

5. In relation to the first complaint, Mr. de Blacam S.C. notes that the reasons given by ORAC for the rejection of the applicant's claim to be a minor were that she had not provided a genuine passport to prove her identity; and also that she seemed to be older in her appearance than her asserted age. In particular, the counsel says that the applicant was not given the opportunity to have her age reassessed based on a birth certificate indicating that her date of birth is the 11th August 1991 and which had not been available when her age was first assessed. Such a reassessment was refused on the basis that the birth certificate document could not be authenticated by ORAC who said that a reassessment might be considered if the applicant "submits her passport or any document containing biometric data capable of authentication or medical evidence to confirm her minor status."

6. Counsel referred the court to the decision of Finlay Geoghegan J. in *A.M. v. Refugee Applications Commissioner* [2005] IEHC 317 and specifically to paragraph 25 thereof where the learned judge lists five minimum procedural requirements to be met in making an initial age assessment decision pursuant to s. 8(5) of the Refugee Act 1996. In particular the applicant says that requirement (iv) was not met. This requirement states that: "iv. if the [age assessment] decision is adverse to the applicant, then he must be clearly informed of the decision and the reasons for same. The reasons need not be long or elaborate but should make clear why the applicant's claim to be under eighteen is not considered credible." Counsel for the applicant makes complaint that the Commissioner failed to comply with this requirement and that the decision was opaque and further that the decision on the application for reassessment was not properly reasoned by reference to the standard required in administrative decisions set by Murray C.J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3.

7. The second complaint raised by the applicant relates to the finding made by ORAC pursuant to s. 13(6)(b) of the Refugee Act 1996 which causes the applicant's appeal to the Refugee Appeals Tribunal to be a 'papers only' appeal. The finding pursuant to s. 13(6)(b) is essentially a statement by ORAC "that that the applicant made statements or provided information in support of the application of such a false, contradictory, misleading or incomplete nature as to lead to the conclusion that the application is manifestly unfounded." Counsel for the applicant submitted that ORAC failed to exercise its discretion in making this finding and also submits that the finding was made in a perfunctory or mechanical way, thereby failing to address the fact that the decision maker had discretion not to include the finding.

8. In this regard, counsel opened the decision of Cooke J. in *S.U.N. [South Africa] v. Refugee Applications Commissioner* [2012] IEHC 338 who states, at paragraph 45: "It follows, in the judgment of the Court, that where the Commissioner has a discretion (as has been found above) as to the inclusion or non-inclusion in the s. 13 report of a statutory finding under s. 13(6), the obligation to ensure that an applicant has access to an effective remedy by way of appeal under s. 16 to the Tribunal requires that the finding under paragraph (e) ought not to be included when the effect will be to deprive the applicant of an oral hearing in an appeal against a negative recommendation which is based exclusively or predominantly upon lack of personal credibility." Counsel also refers to paragraph 46, where Cooke J. said: "The denial of an oral hearing which is otherwise available to asylum seekers as part of a statutory appeal remedy in a case where assessment of personal credibility is the sole or central issue challenged in the s. 13 report, by reason only of a factor (nationality,) which has no rational connection to role of a hearing in the appeal, renders the procedure, in the judgment of the Court, unfair to a degree which is incompatible with the guarantee in Article 40.3 of the Constitution."

9. Counsel for the respondent, Ms. McGrath B.L., submits that the applicant has a significant legal hurdle to overcome if she seeks to challenge an issue decided by the Office of the Refugee Applications Commissioner at this late stage. In this regard, counsel refers to the decision of Finlay Geoghegan J. in *Nafisa Abdi Adan v. Refugee Applications Commissioner* [2007] IEHC 54 where the learned judge said that an applicant would have to show "special circumstances" in order for the court to interfere with a first instance decision when an appeal to the Refugee Appeals Tribunal has already been determined. Finlay Geoghegan J. noted that the court retained a discretion to entertain such an application but that 'special circumstances' would need to exist for such discretion to be exercised. The respondent submits that the applicant fails to meet the threshold of showing 'special circumstances' in order for the court to review the finding of the Commissioner in respect of the age assessment conducted in this case.

10. The respondent acknowledges that the principles outlined by Finlay Geoghegan J. in *A.M.* (supra) are applicable to the age assessment to be conducted in these types of cases, however it is the respondent's contention that all such principles were applied. Counsel for the respondent notes that the applicant attended for an age assessment on 18th December 2008, was advised of her right to appeal and given an information leaflet for the Refugee Legal Service. The applicant was represented by the RLS on 11th March 2009 who wrote to ORAC in respect of her birth certificate. The Commissioner replied that a reassessment of her age would not be carried out as the birth certificate submitted could not be authenticated. The matter was not pursued and the applicant attended her s. 11 interview on 13th May 2009. It was confirmed in the s. 13 report that the applicant had been deemed to be an adult for the purposes of her application and a notice of appeal was filed by the applicant with the aid of the RLS on 2nd June 2009. Counsel notes that the age assessment was not raised by the applicant or the RLS by letter or in the notice of appeal.

11. In relation to the second complaint raised by the applicant regarding the s. 13(6)(b) finding, counsel for the respondent notes that no complaint was ever raised by the applicant as regards the need for, or entitlement to, an oral hearing and / or any associated breach of fair procedures in her notice of appeal. It was submitted that the applicant did not criticise the credibility or plausibility issues identified by the Commissioner. Counsel said that the applicant was treated in a manner which was sensitive to her alleged date of birth and that the Commissioner noted that "...while the applicant has been deemed an adult it is appropriate to consider her testimony in the light of the applicant's relative age as a young adult". Further, counsel notes that the Tribunal refers to the fact that the applicant had been deemed to be an adult and that this had not been challenged. .

12. Counsel reiterates that no complaint was made about the absence of an oral hearing and thus the applicant has failed to make out the 'special circumstances' required in order to proceed now against a first instance decision after the appeal has been determined by the RAT.

13. Notwithstanding the above submissions, counsel for the respondent also contended that the applicant's complaint in respect of a defective age assessment is lacking in substance in any event. In this regard counsel points out that Finlay Geoghegan J. in *A.M.* (supra) was of the view that a flaw in the assessment process would not automatically lead to the quashing of the Commissioner's recommendation and also to the decision of Clarke J. in *Odunbaku (A Minor) v. Refugee Applications Commissioner* [2006] IEHC 28 who found that the impugned age assessment decision must be shown to have had a "material and practical effect" on the process before the Commissioner and the Tribunal. Counsel submits that the applicant has failed to show that the decision as to age had a material and practical effect in this case and notes that the Authorised officer in particular found that the applicant's evidence as to even basic matters was "vague and lacking in detail where it was reasonable to expect that she would be in a position to elaborate on the circumstances of her claim."

14. The respondent also addresses the contention made by the applicant with regard to the exercise of discretion by the Commissioner in making a finding pursuant to s. 13(6)(b). In this regard, counsel submits that the applicant failed to plead this ground of challenge. Notwithstanding this failure, the respondent is of the view that it is clear that the Commissioner did in fact exercise a discretion in relation to the application of s. 13(6)(b). Counsel notes that the Commissioner concluded that: "the applicant was given every opportunity to provide as much information as possible during her interview. However, the applicant's statements have been found to be vague and lacking in detail to the point where it is reasonable to consider that the applicant failed in her duty to both cooperate in the investigation of her application and to provide complete information." As such, counsel submits that a finding under s. 13(6)(b) did not apply automatically, the Commissioner clearly exercised its discretion and further that the decision to make the finding was fully reasoned.

#### **Findings:**

15. In relation to the first complaint raised by the applicant that the Commissioner erred in finding that the applicant was not an unaccompanied minor and / or failed to reassess its original decision, I can find no flaw in the manner the assessment was conducted. The requirements set out by Finlay Geoghegan J. in *A.M. v. Refugee Applications Commissioner* [2005] IEHC 317 for the proper conduct of age assessments were met by the Commissioner. In my view the Commissioner was acting within jurisdiction to either accept or reject the applicant's birth certificate as evidence of her age and the Commissioner clearly said that it could not be authenticated. It is of note that in the letter to the applicant of 31st March 2009 refusing the applicant a reassessment of her age expressly stated that a reassessment "may be considered if [the applicant] submits her passport or any document containing biometric data capable of authentication or medical evidence to confirm her minor status." It appears that no biometric documents or medical evidence was offered to the Commissioner and that no evidence, even of an attempt to procure same, was submitted by the applicant.

16. I also reject the claim by the applicant that the decision of the Commissioner in refusing to treat the applicant as an unaccompanied minor was unclear, contrary to the standards set in *Meadows*. I note that the minimum procedural requirements as mentioned by Finlay Geoghegan J. in *A.M.* state that where a finding adverse to the applicant is made "The reasons need not be long or elaborate but should make clear why the applicant's claim to be under eighteen is not considered credible." In my view the Commissioner has complied with this requirement. Further, while it could not be said that the Commissioner's letter of 31st March 2009 went to any great discursive lengths in giving reasons for the refusal of an age reassessment, the reason given is nonetheless clear. The reason supplied by the Commissioner does not leave the applicant in any doubt as to why the age reassessment was refused and

in my view it complies with standards set by Murray C.J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3.

17. I also reject the applicant's second complaint that the Office of the Refugee Applications Commissioner failed lawfully to exercise discretion in making a finding pursuant to s. 13(6)(b) of the Refugee Act 1996 and also that the finding was made in a perfunctory or mechanical way. I note that the Commissioner in a paragraph entitled "4. Section 13(6) Findings" of his decision, first sets out the provisions of s. 13(6)(b) and then proceeds to make the following statements:

"The applicant was given every opportunity to provide as much information as possible during her interview. However, the applicant's statements have been found to be vague and lacking in detail to the point where it is reasonable to consider that the applicant failed in her duty to both cooperate in the investigation of her application, and to provide complete information.

The applicant's statements regarding procedures at Dublin Airport are contradictory to generally known immigration procedures at this airport.

As such, it is considered that the applicant made statements or provided information in support of the application of such a false, contradictory, misleading or incomplete nature as to lead to the conclusion that the application is manifestly unfounded."

18. The Commissioner then proceeds in paragraph 5 to make an overall recommendation, concluding with the words, "I also recommend that Section 13(6)(b) is appropriate to this application." It is my view that the approach taken by the Commissioner is in no way mechanical or perfunctory, but in fact indicates the clear logical thought process in making a finding pursuant to the section. It is evident from the above passage that the Commissioner had regard to all of the findings made in the s. 13 report, including the credibility of the applicant's testimony, before exercising his discretion and reaching the conclusion that the application was manifestly unfounded. I find that no illegality attaches to the decision of the Commissioner in this regard.

19. Lest I am wrong about my conclusions reached in respect of the two complaints raised by the applicant in this case, I am of the view that the applicant has failed to make out the "special circumstances" identified by Finlay Geoghegan J. in *Nafisa Abdi Adan v. Refugee Applications Commissioner* [2007] IEHC 54 in order for this court to exercise its discretion and to permit a late challenge to a first instance decision by ORAC when an appeal to the Refugee Appeals Tribunal has already been determined.

20. In this regard, I note the dicta of Finlay Geoghegan J. at paragraph 68 in *Nafisa* where she states: "It is not appropriate to try and set out exhaustively what might constitute special circumstances which would warrant late interference by the High Court. It will depend on the facts of each application. Relevant considerations may include the nature of the grounds asserted in support of certiorari; whether they could be considered on appeal; when the applicant became aware of such grounds; whether the applicant was prevented from bringing the application for leave to apply for judicial review prior to determination of the appeal; whether the applicant acquiesced in or permitted the determination of the appeal; any relevant statutory scheme; the time which elapsed prior to determination of appeal and fairness of appeal procedure."

21. The applicant has failed to persuade me that any of the relevant considerations, particular to this case, constitute 'special circumstances' which would warrant the late interference by this court in these matters. It was open to the applicant to pursue a new age assessment at the RAT but this did not happen.

22. This being a 'telescoped' application, I formally refuse the applicants leave to seek judicial review.