Neutral Citation Number: [2010] IEHC 368

THE HIGH COURT

JUDICIAL REVIEW

2009 402 JR

BETWEEN

P. I., P. O., O.O. (A MINOR, SUING BY HIS MOTHER AND NEXT FRIEND P. I.) AND H.O. (A MINOR, SUING BY HER MOTHER AND NEXT FRIEND P. I.)

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND LAW REFORM, REFUGEE APPEALS TRIBUNAL, ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT OF MS JUSTICE CLARK, delivered on the 28th September, 2010

1. The first and second applicants are nationals of Nigeria and are the parents of two children born in Ireland in 2005 and 2007 who are the third and fourth named applicants. Neither child is an Irish citizen. While the applicants originally challenged the legality of deportation orders made against both infants, the only issue before this Court is the legality of a deportation order made by the Minister for Justice and Law Reform ("the Minister") on the 12th March 2009 against the fourth named applicant H.O.

2. Section 3(1) of the Immigration Act 1999 permits the Minister to make deportation orders against a failed asylum seeker who is described in s. 3(2) (f) as "*a person whose application for asylum has been refused by the Minister*".

3. The applicants contend that H.O. - otherwise *H*, the fourth applicant and the couple's younger child - was not such "*a person whose application for asylum has been refused by the Minister*" because her application was never separately investigated by the Refugee Applications Commissioner as she was born after her mother's claim had been investigated and a recommendation made in her case.

4. On the 31st July 2009 Cooke J. in a written decision granted leave to H to challenge the deportation order made against her on the following ground:-

> *"The respondent Minister lacked power to make the said deportation order in respect of the fourth named applicant because the applicant was not a person whose application for asylum had been lawfully refused within the meaning of s. 3(2) (f) of the Immigration Act 1999, there having been no investigation of her claim to refugee status by the Commissioner and no report and recommendation in respect of her claim under s. 13 of the Refugee Act 1996."*

Background

5. The first named applicant ("the mother") was pregnant when she arrived in the State in October 2005 and applied for asylum. She claimed to be an orphan and that her father's brother, who was a widower with one child, was raising her two siblings and herself in his household. The basis of her fear of persecution was that her uncle was forcing her to enter a polygamous marriage with a third party.

6. In December 2005 her son O (the third named applicant) was born in Ireland. O was brought by his mother to offices of the Refugee Applications Commissioner (ORAC) a few weeks later where literally as a baby in arms he was photographed, given an asylum application number and included as a dependent under his mother's asylum application. No individual fear was ever asserted on his behalf. His claim for asylum was joined to his mother's claim in relation to her fear of a forced marriage. Very material credibility issues emerged during the investigation of the mother's claim leading to a negative recommendation in relation to both mother and son by the Commissioner. An appeal in the names of mother and son O was lodged to the Refugee Appeals Tribunal in January 2006.

7. Later in 2006 and while the appeal was pending, P.O. ("the father") who is the second named applicant joined his girlfriend and son in Ireland and he too applied for asylum but on a completely different and unrelated basis. His application failed on credibility issues. In April 2007 their second child H was born and on the 4th July 2007 the mother brought H, who shares her father's family name, to the Commissioner's offices. As had occurred with her son O, she applied for asylum on behalf of H. She completed an ASY-1 asylum application form on H's behalf wherein the infant's status was recorded by the clerical officer receiving the application as "*Dependent Minor – ASY-1 completed*". The mother signed and dated the ASY-1 form and acknowledged receipt of an asylum questionnaire. Each child had now been assigned a separate asylum claim number. On the same date the mother signed a standard ORAC form, which read as follows:

> *"I, wish to have by child H included under my application for asylum. I do not wish to have my child interviewed or considered separately from my asylum application. I understand that the decision which will be made in relation to my asylum application will also apply to my child."*

8. No asylum questionnaire was filled on behalf of either O or H. Both ASY-1 forms relating to O and H were left blank at the line provided for "*reason for claiming asylum*". The Refugee Appeals Tribunal was then notified by the mother's solicitors that H was to be included in the mother and O's appeal.

9. The oral appeal to which O and H had been enjoined before the Tribunal consisted of a repetition of the mother's claim that she was being forced into a polygamous marriage. Again no separate or independent claim to any independent fear of persecution was expressed on behalf of O and H. The oppressive rapist uncle was the only source of persecution feared by the family. The Tribunal affirmed the Commissioner's recommendation, again finding for fairly cogent reasons that the mother's account lacked credibility. The letter by which the Tribunal's negative appeal decision was notified to the mother specifically noted that the two minor children O and H were included as dependents in the appeal and that the appeal decision applied to all three of them. When later that month, the Minister formally informed the mother pursuant to s. 17 of the Refugee Act 1996 that he had decided not to declare her and her children refugees and that he proposed to deport them, he informed the mother of their right to apply for subsidiary protection and of the three options open to her and her children now that their asylum claim had failed.

10. The mother was legally represented at all stages. The appeal documents prepared by her legal advisers referred to the children. The applicants raised no issue at that stage relating to any failure to conduct a s. 11 interview on behalf of H or that no s. 13 report had issued in relation to H. In fact, through her legal advisers the mother applied for subsidiary protection and leave to remain for herself and her two children O and H. No fear in relation to O or H was expressed in either of those applications.

11. Ultimately, the Minister refused subsidiary protection and leave to remain and made deportation orders against the mother and her two infants on the basis that each applicant was a person in respect of whom a deportation order may be made under s. 3(2) (f) of Immigration Act 1999. The letters by which the deportation orders were notified to the applicants stated that the Minister was satisfied that each was a person whose application for a declaration as a refugee had been refused. It was only when the deportation orders directed to all three applicants issued that complaint was made relating to a want of investigation in respect of H's asylum application.

The Applicants' Arguments

12. The applicant argues that if H was ever in fact an asylum applicant, then she could not be considered a person whose asylum application the Minister had refused within the meaning of s. 3(2) (f) of the Immigration Act 1999 unless the Commissioner had investigated her asylum application pursuant to s. 11(1) of the Refugee Act 1996, conducted an interview in relation to her application pursuant to s. 11(2) and prepared a report and recommendation pursuant to s. 13 of the Act. In so doing, the Commissioner ought to have taken account of her individual position and personal circumstances in accordance with Regulation 5(1) of the Protection Regulations (S.I. No. 518 of 2006). The argument was that these mandatory requirements could not be waived by her mother and further that the Tribunal had no jurisdiction to include a minor in an appeal where no investigation had been carried out by the Commissioner. The want of jurisdiction could not be cured by the mother's actions in choosing to make subsidiary protection and leave to remain applications rather than challenging the RAT decision. The applicants rely on the decision of McCarthy J. at the leave stage *in Oloo-Omee v. The Refugee Appeals Tribunal* (ex tempore, Unreported, High Court, 31st March, 2009).

13. The applicant argues that s. 11 (1) and (2) of the Refugee Act 1996 oblige the Commissioner to follow certain procedures insofar as s. 11(1) provides that "*where an application is received by the Commissioner […], it shall be the function of the Commissioner to investigate the application for the purpose of ascertaining whether the applicant is a person in respect of whom a declaration should be given"* and s. 11(2) requires the Commissioner to direct an officer to interview the applicant and requires the said officer to *"comply with any such direction and furnish a report in writing in relation to the application concerned to the Commissioner […]*."

The Respondents' Arguments

14. It is common case that H's claim for asylum was made after the Commissioner had investigated her mother's claim but counsel for the Minister argues that as leave was refused to challenge any part of the RAT decision, the applicants are precluded, pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000, from now impugning either the Tribunal decision or the consequent refusal by the Minister to grant refugee status as s. 5 establishes that when leave is refused, applicants may not thereafter challenge such decisions.

15. Without seeking to diminish in any way the Minister's position under s.5, the respondents' second argument is that H was in fact an applicant when her mother filed an ASY-1 form on her behalf and that the Minister had in fact refused the H's asylum application in his letter of the 28th October 2008 which was addressed to the mother and her two dependent infant dependents in the following terms:

> *"You and your children as named above, applied for refugee status under Section 17 of the Refugee Act 1996 (as amended).*
>
> *Your application was investigated by the Refugee Applications Commissioner (Section 11 of the Act). The Commissioner recommended that your application be refused (Section 13 of the Act). The Refugee Appeals Tribunal agreed with this recommendation (Section 16(2) (a) of the Act). You were notified about that recommendation. The Minister has decided to refuse to give you refugee status."*

16. Acting on the validity of this letter, the mother applied for leave to remain and for subsidiary protection, the latter of which is only open to a failed asylum seeker pursuant to Regulation 2(1) of *the European Communities (Eligibility for Protection) Regulations 2006* (S.I. No. 518 of 2006).

17. The Minister further argued that as the Refugee Act 1996 does not set out any procedure to be followed in the case of accompanied dependent minor applicants, there is nothing to preclude a mother from waiving the Commissioner's investigation of her dependent child's case in circumstances where no individual fear of persecution is asserted on behalf of such minor dependents. The mother was legally represented when she signed the letter consenting to the inclusion of H in her asylum claim on the 4th July 2007 expressing a clear waiver of the investigation of H's case by the Commissioner.

18. The respondent relied on the principles outlined in *Gorman v. Judge Mary Martin & Others* [2005] I.E.S.C. 56 (29th July 2005). The facts were that the applicant was convicted and sentenced in the District Court. Following his sentencing he challenged the jurisdiction of the Court on the basis of a defective return for trial. Kearns J. (as he then was) found that, although he would have accepted the applicant's arguments in relation to the return for trial, the applicant had consented to his sentencing and therefore acquiesced insofar as he never contested his innocence before his sentencing. The respondents also relied on a decision of this Court in *Jacobs v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Clark J., 9th October, 2009) where the Court held that specific written acquiescence by a teenage daughter and her father to join in with the father's Tribunal appeal as a

dependent applicant was lawful.

The Issue in this case
19. If, for the moment, one leaves aside the important question of whether it is possible to attack the Tribunal decision when leave on that point was refused, then the fundamental issues for determination are as follows:-

> (1) Can a single application for asylum be made on behalf of members of a family relying solely on the parent's fear of persecution? and
>
> (2) If so, is it mandatory for each child's circumstances to be individually investigated by an officer designated by the Commissioner in accordance with s. 11(2) and for an individual s. 13 report to issue in respect of each child? and
>
> (3) If so, must each child go through an individual appeal process before each can be considered "*a person whose application for asylum has been refused by the Minister*" within the meaning of s. 3(2) (f) of the Immigration Act 1999?

20. Clearly, important issues are at stake and as Cooke J. said in his leave decision judgment, "*it is desirable that the question be definitively answered in order to clarify the position for the Tribunal in the future, as the circumstances can obviously recur*."

The Court's Assessment
21. Issues similar to those arising in this case have been previously considered. While not referred to in argument, Smyth J. in Emekobum (a minor) & Ors v. The Minister for Justice, Equality and Law Reform (Unreported, High Court, 18th July 2002) considered the situation of a mother whose asylum application was considered under the Hope Hanlan procedures and was taken to relate also to her three accompanied, dependent children. After the Minister proposed to deport the mother and children, the mother purported to apply for asylum on behalf of the children. Before a decision was taken on those purported applications, the Minister proceeded to make deportation orders against each of them. The applicants challenged the deportation orders on various grounds, including the argument that the children were not persons whose applications had been refused by the Minister. Smyth J. considered the following two questions:

> "*1. Does refusal of refugee status of a parent affect the children?*
>
> *2. Is it necessary that minors who enter the State without entitlement have their asylum applications considered separately and be the subject of separate decisions?"*

22. Smyth J. explained the situation as follows:

> *"The law recognizes that minors are persons, but in several branches recognizes (as, indeed, does the Constitution) that persons have differences of capacity. In the instant case, the minors were accompanied by their Mother. She clearly saw no reason for making individual applications on behalf of the children and I am satisfied and find as a matter of fact and of law without the necessity of averments in Mr. Lonergan's affidavit concerning the usual or normal practice that the Mother was well aware of what she was about and that her intendment as the guardian and next friend of the children was that her welfare and that of the children was synonymous and that she wished their concerns to be considered as if they were her own. In my judgment, the word "shall" in Section 8(1) (a) (i) of the Act of 1996 does impose a duty to interview but it does not impose an absolute obligation to do so. To insist on such a provision, irrespective of facts and circumstances, could lead to imposing unnecessary hardship and trauma on persons under a disability (such as minors) which is inimical to the purposes of the legislation. Furthermore, the reference to non - national in Section 3(1) of the Act of 1999 is sufficiently wide to cover all persons, both of full age and minors.[…]"*

23. Having regard to the principle of family unity as set out in the UNHCR Handbook on Criteria and Procedures, Smyth J. continued:

> *I am satisfied and find as a fact that at all material times the Mother intended that her application for refugee status would, so to speak, 'carry the children', whose existence and attachment to her were clear and are clear from the documents which were considered for decision-making purposes and whose interests are pleaded in the representations made under Section 3(6) of the Act of 1999."*

24. Smyth J. observed at the conclusion of his judgment that "*for the avoidance of' doubt in any future case in which there are accompanied minor children, the parent or parents, as the case may be, might be requested to make an express declaration as to whether or not they wish to have the minor children's rights, interests or entitlements included 'with their own application for refugee status.*"

25. A similar issue relating to the requirement to conduct an interview in circumstances where no fear of persecution was asserted came before McMahon J. in *S.Y. and R.Y. v The Refugee Appeals Tribunal & Anor* [2009] I.E.H.C. 18 (13th January 2009). The applicant in that case was a stateless person recognised as a refugee in Italy who then applied for asylum in Ireland. The Commissioner found that the Minister was precluded under s. 17(4) of the Refugee Act 1996 from granting her a declaration of refugee status and that her application would therefore not be admitted or processed as no purpose could be served by investigating her claim. She challenged that decision, arguing that the Commissioner was mandated under ss. 11(1) and (2) to investigate her application and under s. 13 to prepare a report and recommendation to the Minister. McMahon J. accepted that the applicant had not made out any fear of persecution in Italy and he found that:

> *"[…] it has been established that there is no mandatory obligation on the Commissioner to conduct an interview in all cases: See Peart J. in Nwole v. Minister for Justice, Equality and Law Reform (Unreported, High Court, 26th March, 2004) applying the decision of Smyth J. in Emekobum & Ors v. Minister for Justice, Equality and Law Reform (Unreported, High Court, 18th July, 2002). This latter decision of Smyth J. was also approved by Finlay Geoghegan J. when granting leave in the former proceedings: Nwole v. Minister for Justice, Equality and Law Reform (Unreported, High Court, 31st October, 2003). It is also worth noting that the Supreme Court, per Fennelly J., in the L.N. case also approved the principle that there could be an umbrella application on behalf of a number of persons which would not necessitate interviews in all cases: A.N. v. Minister for Justice, Equality and Law Reform (Unreported, Supreme Court, 18th October, 2007). The obligation which the applicant relies on in s. 11, from these authorities, indicates that the obligation in that section does not impose an absolute duty in all cases.*
>
> *If the position were otherwise an application made under s. 8 to the Commissioner by, say a United States citizen for recognition as a refugee which was unaccompanied by a claim of persecution from his own State in any form would have*

to be entertained by the Commissioner even though he clearly does not meet the basic threshold requirements set down in the legislation. It is significant to note also that no argument is made on the legal interpretation advanced by the first named respondent in this connection. Were there a challenge to the interpretation of the subsection, different considerations would apply."

26. The decision of the Supreme Court in *Nwole (A.N.)* referred to by McMahon J. was delivered on the 18th October 2007, just 10 days before the Minister issued his letter refusing the mother and her two children refugee status in this case and 18 months before the decision to deport. Although the issues in *A.N.* were broadly similar, the facts were significantly different from those in this case. The mother in *A.N.* arrived in the State with five children when she sought asylum. Unlike the mother of H, she did not at any stage specifically seek to include her five children in her claim although they were identified and particularised as her children and referred to in her questionnaire and the facts of her claim. Prior to the notification of the Minister's intention to make deportation orders in that case, no previous decisions had been expressly directed towards the children by the asylum authorities. The mother in *A.N.*, unlike the mother in this case whose children were born in Ireland, did not know until the deportation orders were issued to her that her asylum application was being treated as a family application. In contrast, the mother in this case included her son O in her family claim at the earliest opportunity and when H was born the mother specifically requested that H be added to the existing claim. H obviously could not have been referred to in any decision prior to her birth but she was referred to specifically by her mother and her legal representatives in every application thereafter and every notification after she was joined to the claim was expressed stated to apply to her.

27. Two questions were certified to the Supreme Court by Peart J. in the *A.N.* case. The second question posed for determination was on all fours with the issues in this case and was:

"Whether in considering an application for asylum made by or on behalf of an accompanied minor the Minister is obliged to consider the application of an accompanied minor in his or her own right separately and distinctly from that of the accompanying parent and whether for that purpose the Minister is obliged to

(a) Ascertain the views of the minor and more particularly the fears of the minor related to the application for a declaration of refugee status.

(b) Ascertain the capacity of the minor to express his or her views directly and

(c) Interview the minor unless such interview would cause unnecessary hardship and trauma on the minor?"

28. The Supreme Court ultimately found it unnecessary to answer those questions directly as they held that as Ms. N did not make asylum applications on behalf of her children, they therefore were not persons whose asylum application had been refused in accordance with s. 3(2)(f) of the Immigration Act 1999. Whatever about the appropriateness of the mother's actions in not bringing her children's asylum applications at the same time as her own, the Minister acted unlawfully in assuming that the decision taken on the mother's asylum application would also apply to her children, without ever asking whether the children had an independent fear of persecution. It was in those circumstances that Finnegan J. found that the Minister was incorrect to treat the mother's application as also being an application on behalf of her children.

29. The very distinct difference in H's case and that of this family is that three separate ASY-1 applications were made and three preliminary s. 8 interviews took place with the mother providing the information for her very young babies on each occasion. It could not be said that H was not an asylum applicant. It is also necessary to observe that the applicant *A.N.* was the almost adult daughter of Mrs. N who, when she was a party to judicial review proceedings, complained that she and her siblings were not interviewed and were give no opportunity to apply for asylum or assert their claim to fear FGM if returned to Nigeria. When the children in *A.N.* commenced judicial review proceedings they, unlike the applicant here, identified individual fears of FGM. No individual claim to fear persecution has ever been identified in this case where the applicants instead rely on procedural deficits.

30. Fennelly J. expressed the view in *A.N.* that "*a single application could, in principle, be made on behalf of a number of persons, particularly where they are members of one family*". If, as found in that and other decisions, a single family application can be brought, how then is the Refugee Act 1996 and the procedures outlined to be interpreted to provide some clarity for the occasions where infant are included in the parent's claim?

31. One starting point may be to examine the wording of the letter written by the Minister pursuant to s. 17 of the Refugee Act (long after the Supreme Court decision in *A.N.*) when formally informing the mother that her claim had failed and that he proposed to deport her and her two children. He wrote in clear terms:

"You and your children as named above, applied for refugee status under Section 17 of the Refugee Act 1996 (as amended).

Your application was investigated by the Refugee Applications Commissioner (Section 11 of the Act). The Commissioner recommended that your application be refused (Section 13 of the Act). The Refugee Appeals Tribunal agreed with this recommendation (Section 16(2) (a) of the Act). You were notified about that recommendation. The Minister has decided to refuse to give you refugee status."

32. It seems to the Court that as the only claim made and investigated by the Refugee Applications Commissioner was that of the mother who included her family in her claim, the Minister's reference to "your application" was the family application. There is no dispute that if the mother's claim for refugee status had succeeded, her children H and O would have benefited and would have been granted refugee status. This would occur as a general matter of right even if they had never been enjoined to her claim. If, on the other hand, H had a completely independent claim to refugee status which rendered her eligible for refugee status and her mother's claim failed, then she would have been entitled to apply for permission to her mother to reside in the State pursuant to s. 18(3) (b)(ii) of the Refugee Act 1996. The corollary is that as H's claim was dependent on her mother's claim, if her mother's claim failed, then H's claim would naturally fail too.

33. Strictly speaking, an infant of a parent who has made an asylum claim and who does not have an independent claim does not have to make an asylum claim at all as in accordance with the principles of family unity outlined in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, such infant will automatically benefit from the successful claim of the adult on whom that child is dependent. However it is evident that a practice has developed in the office of the Refugee Applications Commissioner where children of asylum seekers, especially children born in the State who have no independent fear of persecution in their own right, do in fact make claims under s. 8 of the Refugee Act 1996. For the most part, it is not the child who makes the

application but the parent who fills in an ASY-1 form on the child's behalf. In such cases, if the child is born after the parent's claim has been refused, even though there is no claim to investigate, a pro-forma interview takes place with the adult on behalf of the child. It sometimes happens that even where no independent fear of persecution is asserted, a fairly pointless s. 13 report issues recommending that the child should not be declared a refugee as the adult's claim has failed. The Court can only infer that there is a view that such a process ought to be followed either to ascertain that the parent does not wish to assert any independent fear of persecution in relation to the infant or as an administrative method of notifying the Minister of the existence of a new asylum dependent.

34. It can readily be understood that when adult asylum applicants are accompanied by their infant children on arrival in the State, the parents also seek asylum for their children as an asylum claim is the mechanism by which those children can legally enter and remain in the State pending the determination of their parents' refugee status. However, as noted above, the practice is not strictly necessary when the child is born in the State under the principles relating to family unity set out in the UNHCR Handbook. If those parents add their children to their claim, the children's situation is neither prejudiced nor enhanced. Paragraph 213 of the UNHCR Handbook states:-

> *"There is no special provision in the 1951 Convention regarding the refugee status of persons under age. The same definition of a refugee applies to all individuals, regardless of their age. When it is necessary to determine the refugee status of a minor, problems arise due to the difficulty of applying the criteria of "well-founded fear" in his case. If a minor is accompanied by one (or both) of his parents, or another family member on whom he is dependent, who requests refugee status, the minor's own refugee status will be determined according to the principle of family unity".* (Emphasis added)

35. The "principle of family unity" is set out in Chapter VI of the Handbook as follows:-

> *"184. If the head of a family meets the criteria of the definition, his dependants are normally granted refugee status according to the principle of family unity. It is obvious, however, that formal refugee status should not be granted to a dependant if this is incompatible with his personal legal status. Thus, a dependant member of a refugee family may be a national of the country of asylum or of another country, and may enjoy that country's protection. To grant him refugee status in such circumstances would not be called for.*
>
> *185. As to which family members may benefit from the principle of family unity, the minimum requirement is the inclusion of the spouse and minor children. In practice, other dependants, such as aged parents of refugees, are normally considered if they are living in the same household. On the other hand, if the head of the family is not a refugee, there is nothing to prevent any one of his dependants, if they can invoke reasons on their own account, from applying for recognition as refugees under the 1951 Convention or the 1967 Protocol. In other words, the principle of family unity operates in favour of dependants, and not against them.*
>
> *186. The principle of the unity of the family does not only operate where all family members become refugees at the same time. It applies equally to cases where a family unit has been temporarily disrupted through the flight of one or more of its members. […]"* (Emphasis added)

36. The Supreme Court in *A.N.* interpreted the underlined event as meaning that the process of adding a child to an extant asylum application was a step available to dependent children who harbour a specific fear of persecution independent of their parents' fears. The Supreme Court neither considered nor discounted the possibility that a minor who fears persecution for himself can arrive at the borders of a state accompanied by parents who themselves have no such fear and in those circumstances the claim for asylum is made on behalf of the minor. The fact that the head of the family unit is not a refugee does not preclude the child from claiming asylum in his own right and invoking reasons on his own account or having his parent's claim on his behalf. It is very doubtful that paragraph 184 of the UNHCR Handbook was intended to create a method by which parents could make a family claim based on a particular fear of persecution to the head of the family and then, if that family claim failed, to make sequential new claims not previously formulated on behalf of each child. Still less was the principle of family unity intended to serve as a formulation for serial, inventive claims on behalf of each child born while their parent's claim is being investigated.

37. The above quoted sections from the UNHCR Handbook are the sole reference to the claims of accompanied minor children but they do not provide or suggest procedures applicable to such claims. Neither the Convention Relating to the Status of Refugees of 1951 (the Geneva Convention) nor the 1967 Protocol make any special provision for processing the applications of minor dependents of asylum seekers. While the Refugee Act 1996 sets out a detailed procedure to be followed by the asylum authorities in the case of adult applicants and sets out separate procedures relating to unaccompanied minor applicants, the Act is completely silent as to the procedure to be followed where an adult makes an asylum application on behalf of accompanied, dependent minors or for infants born subsequently. Similarly the *Asylum Procedures Directive* (Council Directive 2005/85/EC of 1 December 2005) makes no mention of accompanied (as opposed to unaccompanied) minors.

38. It seems to the Court that there may well be an obvious reason for this lack of reference. A child or minor is either an independent asylum seeker, in which case an actual claim is made which is then investigated and assessed, or that child's status is entirely dependent on his / her parent's claim in which case the child makes no individual claim. If the child with a fear of persecution independent of his or her parents is too young to present his own claim then obviously, the accompanying adult family member makes the claim and attends for interview of the minor's behalf. It may also be the case that a child born after an investigation has commenced into his sibling's individual claim could through his parents make a separate claim for investigation on an individual basis if the facts allow. On the other hand, if the parents have no independent fear to express on behalf of the newly born child it makes no difference to the child's chances of success whether or not the child is named and enjoined. While there is a well established practice of filling out ASY-1 forms and applying for asylum for infants where no claim to fear persecution exists, it has no clearly discernible logic apart from ensuring an entitlement to remain pending the determination of the parent's application. It in fact makes no sense to treat a dependent child in such circumstances as a distinct asylum claimant when no independent claim has been made. However, if it is a method of identifying which family members are included in the single claim of the parent, its continued practice is not criticised.

39. The practice of interviewing the parent or guardian of a minor applicant in the circumstances of a family claim is consistent with s. 8 of the Refugee Act 1996 but it does not follow that the Commissioner is obliged to actually interview the minor at the preliminary stages or that a questionnaire must be filled in and a s. 11 interview held with the parent and a s. 13 report prepared on each dependent child. Article 12 of the Asylum Procedures Directive provides that each adult applicant "*shall*" be given an opportunity of a personal interview, that dependent adults "*may*" be given the opportunity of a personal interview and that "*Member States may determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview*." That national legislation in Ireland is found in the Refugee Act 1996. That Act provides procedures for unaccompanied minors who are asylum

claimants in their own right capable of being interviewed but neither the Act nor the Directive imposes any obligation for the interview of all minor dependents.

40. It is therefore difficult to identify the basis of the applicant's challenge which asserts an obligation in all circumstances on the Commissioner to conduct an interview under s. 11(2) with the parent of each minor applicant even if no independent fear of persecution is expressed on behalf of the minor. If one goes to basic principles and examines the object and purpose of national legislation it is clear that the procedures outlined in the Refugee Act 1996 are designed to enable the efficient and fair processing, investigation and determination of asylum claims. The basic obligation under s. 11 is to interview a claimant and to fully and fairly investigate a claim. That obligation cannot be extended to each and every applicant enjoined to a family application where the only claim to be investigated is that of the adult on whose claim the minors are wholly dependent.

41. Section 5(1) of the Interpretation Act 2005 provides that

> *"In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) —*
>
> *(a) that is obscure and ambiguous, or*
>
> *(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—*
>
> *(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2(1) relates, the Oireachtas, or*
>
> *(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,*
>
> *the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."*

42. In those circumstances, to interpret ss. 11 and 13 in a way which attributes an obligation to the Commissioner to interview all minor dependents in all circumstances and to prepare a s. 13 report directed to the minor in every case would produce an absurd consequence.

43. Similarly when a negative recommendation of the Commissioner in a family application is appealed, the Tribunal Member is not involved in considering the recommendation made against the dependent minor members of that family but rather against the single claim made by the parent. Dependent children with no distinct and separate claims for asylum play no role in the appeal as their status is entirely dependent on that of their parents and it makes no sense to argue that a dependent child in those circumstances must be accorded the same procedures as if he / she had expressed a separate and independent fear of discrete acts of persecution.

44. The facts of this case must be recalled. The mother came here as an asylum seeker when she was pregnant with her first child O. She was not accompanied by any dependents. The father then followed also as an asylum seeker and H was born here. The parents never expressed any fear for their children in Nigeria nor were they ever prevented from making any individual claim on behalf of their children if such fears existed. Although there was no reality to either of the children being interviewed or being sufficiently mature to express a well-founded fear of persecution, the mother requested the Commissioner not to interview H and not to consider her separately from her own application. At the preliminary s. 8 interview conducted with the mother in relation to H in July 2007, she described H as a dependent minor and on the same day she signed a form indicating, "*I understand that the decision which will be made in relation to my asylum application will also apply to my child*." At all stages, H's case travelled with her mother's, as was appropriate for an infant of three or four weeks at the date of application.

45. No criticism can be made of the Commissioner for carrying out no investigation into Baby H as no claim requiring separate investigation was ever made. Indeed the same finding applies to her older brother O. At the appeal stage no circumstances or reasons were suggested which would distinguish H's claim from that of her mother or which would identify hers as an "individual claim" which would require investigation by the Commissioner. A valid consideration was made by the Tribunal Member of the mother's claim which included her two dependent infants.

46. The facts of *Oladimeji (J.O.) (a minor) v. The Refugee Applications Commissioner* [2009] I.E.H.C. 478 are very similar to those in this case. An asylum application was made on behalf of a child born after the Commissioner made a negative recommendation in her mother's case. The challenge was to the reliance by the Commissioner on the facts of the mother's claim. Cooke J. refused to quash the decision of the Commissioner in the child's case, noting that if the child had been born earlier, she would have been included with her older sisters as a dependent under her mother's application. He held that the Commissioner was entitled to rely on the findings made in the mother's case and was not required to conduct some sort of pro-forma separate investigation into the child's claim. Cooke J. held as follows:

> *"10. It must be borne in mind that the function and duty of the Commissioner is to examine the application, to interview the applicant, to carry out any enquires that might be appropriate to verify the claim made and then to report on this to the Minister with the recommendation as to whether the applicant has or has not established the ingredients of refugee status. In circumstances where this three month old child's claim is identical to and dependent upon the claim made by the mother, it is difficult to envisage what further investigation or enquiry might have been carried out into the child's claim, nor has any been illustrated or suggested on her behalf.*
>
> *11. Finally, the Court will point out that while asylum applications fall to be examined and determined individually, objectively, and in accordance with law, the asylum process is also to be carried out expeditiously, flexibly, and reasonably. This Court is not required to suspend common sense when asked to review that process. This case is an example of a situation in which the Court ought not to permit formalistic arguments of technical illegality to distract it from the need to apply common sense so as to ensure that the process remains not only lawful but fair, flexible, and expeditious."*

47. This Court goes further and holds that not only is the main argument in this case excessively technical but on close analysis it is plainly wrong. The Court finds no technical illegality or want of jurisdiction in the treatment of H as a dependent in the family claim. Legislation must not be interpreted in the manner suggested by the applicant to provide for manifestly illogical requirements. Neither the Refugee Act 1996 nor the Asylum Procedures Directive imposes an obligation on the statutory authorities to investigate a claim which has not made or, in the absence of changed circumstances, to reconsider a claim that has already been fully considered. There

is no obligation to conduct a separate s. 11 interview or to prepare a separate s. 13 report and recommendation in relation to a dependent infant on whose behalf no independent fear of persecution is asserted. It makes no difference if such a dependent child is born before or after the Commissioner's recommendation on the parent's claim as in either case, the Commissioner's recommendation will also apply to the dependent. Similarly, if the dependent is joined to the parent's Tribunal appeal, the decision on appeal affects the dependent whether the outcome is positive or negative. The Court is satisfied that this interpretation accords with the principle of family unity and that to interpret the Refugee Act 1996 in any other way would be to go beyond any of the key conventions on which the legislation is based.

Decision

48. H was a dependent child with no independent fear of persecution. The claim investigated in accordance with statutory obligations and fair procedures was the family claim and H therefore was a person whose asylum application had been lawfully refused by the Minister within the meaning of s. 3(2) (f) of the Immigration Act 1999.

49. Finally, the Court is satisfied that s. 5(3) (a) of the Illegal Immigrants (Trafficking) Act 2000 is clear in its terms:-

> *"The determination of the High Court of an application for leave to apply for judicial review as aforesaid or of an application for such judicial review shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case except with the leave of the High Court which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court."*

50. The matters supporting the applicants' original challenge to the validity of the Refugee Appeals Tribunal were fully argued before Cooke J. at the leave stage. All reliefs sought relating to the Tribunal decision were refused. The arguments made before this Court were in fact a collateral attack on the Tribunal decision. However, the quite independent legal principle of whether family applications are invalid unless separate and individual investigations are carried out on each dependent minor was an important issue for determination and leave was granted to argue that aspect of the case. For the reasons fully stated above, the Court has held that a joint asylum application can be made on behalf of members of a family relying solely on the parent's fear of persecution. The obligation on the Commissioner is to fairly and fully investigate that claim but there is no obligation or necessity for each dependent child's circumstances to be individually investigated by an officer designated by the Commissioner or for a s. 13 report to issue in order for the child to be *"a person whose application for asylum has been refused by the Minister"* for the purposes of s. 3(2) (f) of the Immigration Act 1999.

51. The relief sought is refused.

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