Neutral Citation [2016] IEHC 532

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 585 J.R.]

BETWEEN

O. M. R.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY,

AND

THE REFUGEES APPLICATIONS COMMISSIONER, IRELAND

AND

THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 6th day of September, 2016

1. In these telescoped proceedings, the issue to be decided in this case is whether the applicant is entitled to judicial review of the decision of the Refugee Applications Commissioners or whether the complaints about the decision can be dealt with on appeal to the Refugee Appeals Tribunal.

Extension of time
2. A short extension of time was required for the purpose of these proceedings which the court was satisfied to grant.

Background and procedural history
3. The applicant is a Nigerian national. Her claim for refugee status is based on a stated fear of persecution in Nigeria for reasons of religion, specifically her fear of persecution by Boko Haram as a result of her conversion from Islam to Christianity. The applicant claims that she converted to Christianity at the age of fourteen.

4. The applicant's claimed history is that she was born into a Muslim family and that following her birth in 1969 she lived with her family at a named address in Lagos until aged 7. She asserts that thereafter her mother, brother and herself moved from place to place and on occasions stayed in various churches in Lagos. Between 2000 and 2007, they resided at a named location in Lagos. Thereafter, the family resumed a peripatetic lifestyle until, ultimately, in March 2009, the applicant, together with mother and her daughter, moved permanently to Kano State. Shortly after this move, the applicant's mother passed away.

5. The applicant claims that for a number of years prior to her move to Kano State she worked as a prophetess with a named Church in Lagos, and latterly worked in this capacity in Kano State. She asserts that in April, 2010 her Church in Kano State was attacked by Boko Haram. She states that many people were killed as a result of the attack which was reported in the Nigerian media. During the attack the applicant became separated from her daughter. She asserts that she last had contact with her daughter in May 2010. Following the attack on her Church, the applicant sought assistance from the police but they too were fleeing at this time and unable to help her. It is the applicant's primary contention that Boko Haram continue to look for her and that they will kill her if she returns to Nigeria as they know that she comes from a Muslim family and that she converted to Christianity. She states that her Muslim origins are known to Boko Haram by virtue of her name.

6. The applicant claims that her travel to Ireland in May, 2010 was organised by her Church in Lagos and Kano. By arrangement, she travelled with a named Nigerian woman. She was unaware of what documents were used to facilitate her travel to Ireland. Upon arrival in this State, the applicant claims that she was left was in some unknown place by her travelling companion. She asserts that she was homeless between May, 2010 and December, 2011 when she was informed about a Church of a similar denomination to that of her Church in Nigeria. From December 2011 she was provided with accommodation in this Church. At the time she commenced living there, she was advised not to tell the pastor about her problems. In 2014 however her illegal status became known and she was advised to apply for asylum.

7. She made her asylum application on 9th April, 2014. She underwent a s. 8 interview on that date and she completed a questionnaire on 15th April, 2014. She was interviewed pursuant to s. 11 of the Refugee Act 1996 on 11th August 2014.

8. For the purposes of her claim the applicant presented a number of documents comprising:

1) A Church identification card which indicated the applicant's rank as "prophetess" and her duty as a "worker";

2) Death certificates in respect of her parents;

3) Three photographs of the Church attended by her in Kano State; and

4) A letter from a named lawyer with an address in Lagos which referred to the applicant's profession as a prophetess and that her Church in Kano State had been razed by Boka Haram in 2010.

9. The Commissioner's report issued to the applicant on 17th September, 2014.

The section 13 report
10. The report found, *inter alia*, that the applicant's account of events raised credibility issues with regard to her claim:

• It was found there was a contradiction between the applicant's questionnaire and s. 11 interview concerning the accounts given by her as to when she moved to Kano State. At the s. 11 interview, she stated that she moved there permanently in 2009 whereas her questionnaire indicated that she had spent 2000 to 2010 in Kano State.

• The applicant was found to display "basic knowledge of the Islamic faith". The report noted her contention of attending churches against her father's wishes and her claim to have converted to Christianity aged fourteen despite her earlier claim of having stayed in churches from the age of seven. With regard to her work as a prophetess for a Church based in Lagos and Kano for five years prior to her travel to Ireland, it was noted that in a successful application for an Irish visa in 2009 the applicant had listed Lagos her residential address and workplace. The report noted that "when this contradiction was put to the applicant she contended that a Church member filled out her visa application, despite her stating in this visa application form that she did not receive any assistance, and that whilst she was a member of this Church for a long time she was not employed by them until 2005."

• With regard to the applicant's claim that the Church she attended in Kano State was attacked in April, 2010 by Boko Haram, it was noted that she was unable to recall the date when this occurred due to having a "bad memory", despite her claim of having lost her daughter during the incident. While the authorised officer was able to find information confirming the existence of a Church in Kano State of the denomination described by the applicant, no information could be found on an attack by Boko Haram on the said Church in April, 2010.

• It was noted that "despite [the applicant's] ability to read, write and speak English she maintained that she did not know where she was in Ireland during [May 2010 to December 2011], .. [D]espite the fact she had previously travelled to Ireland in 2009, despite her ability to read, write and speak English, and despite feeling secure enough to reside in this Church from December 2011 she did not seek asylum until 9th April, 2014. .. She has provided no evidence to suggest she returned to Nigeria from Ireland prior to the expiry of her Irish visa in 2009. When questioned about her delay in seeking asylum she asserted that the lady who brought her to the aforementioned church in December 2011 advised her not to tell the pastor there about her problems. She went on to contend that she did not know about seeking asylum .. . It is not considered credible that the applicant could travel to Ireland without knowing, or possessing, the travel documents which she used or that she would not know where she resided in Ireland between May 2010 and December 2011. Furthermore, it is considered that the applicant had ample time and opportunity to claim asylum prior to April 9th, 2014 yet failed to do so." With regard to these findings the provisions of s. 11B (C) and 11B (D) of the Refugee Act 1996 where applied to the applicant.

11. The Commissioner then went on to find that state protection in Nigeria was available to the applicant should she require it as country of origin information indicated that "the Nigerian Authorities are willing and able to take action against Boka Haram." It was also considered that the applicant could internally relocate in Nigeria should she require to do so.

The challenge to the decision

12. The within proceedings commenced by way of notice of motion on 9th October 2014 wherein the applicant seeks an order of leave to apply for judicial review for certiorari of the decision/recommendation of the Refugee Appeals Commissioner dated 3rd September, 2014. The applicant has lodged an appeal with the Refugee Appeals Tribunal without prejudice to her application for leave. The appeal has not been embarked on.

13. The grounds upon which relief is sought are as follows:

(a) The core of the applicant's claim was not addressed satisfactorily resulting in a position that if the applicant's claim were to be simply appealed to the Refugee Appeals Tribunal (the Tribunal) then it would be effectively be dealt with there at first instance without there being any appeal therefrom. This would result in a denial of the applicant's right to an effective remedy under domestic, Convention and EU law.

Without prejudice to the generality of the foregoing, it is also pleaded:

(i) The Commissioner failed to provide any comment or finding in relation to the documentation lodged by the applicant, as to whether it was accepted, rejected, whole or in part. It was a failure in duty to simply say that all of the documentation "has been fully considered" without providing what conclusions were reached and the reason or rationale behind such conclusion;

(ii) Numerous matters said to "raise credibility issues" are referred to but no elaboration of the precise nature of these issues is provided, nor what is believed or disbelieved by the decision-maker;

(iii) It is entirely unclear which aspects of the applicant's claim have been "undermined" by "credibility issues" and which have not. It is, for instance, unclear whether it was accepted that the applicant returned to Nigeria prior to the expiry of the visa. It is unclear whether it was accepted the applicant had been originally a Muslim who converted to Christianity. Definite findings must be readily identifiable as to why the application is refused so that an appeal, if appropriate, can be formulated. It is impossible to understand what the decision-maker's true reasoning was without the applicant "constructing a hypothesis" to what in fact may have been meant.

(b) In circumstances where the "cumulative" "credibility" findings are said, together with state protection and internal relocation, to give rise to a conclusion that "the applicant has not demonstrated a reasonable degree of likelihood that she would be persecuted for a convention reason for return to Nigeria" it was incumbent upon the decision maker to apply the mandated minimum standards to such investigation under the European Communities (Eligibility for Protection) Regulations 2006 and the Qualifications Directive. It was irrational to conclude that State protection would be available to the applicant and unlawful to consider "internal relocation" without identifying a relocation site.

(c) Credibility was not assessed in a manner consistent with Refugee Law. Such an assessment should not, initially at least, involve the (seeming) plausibility of a particular story. It should have involved an assessment of the possibility of the applicant's story being capable of happening against the backcloth of objective examination and country information and, only thereafter, assessing the applicant's story against those findings.

(d) No examination of past persecution in the context of Regulation 5(2) of the 2006 Regulations took place rendering the examination of the applicant's claim incomplete and unlawful.

The applicant's submissions
14. In aid of grounds a. and a. (iii), the principal argument advanced on behalf of the applicant is that the authorised officer failed to decide whether the applicant was a convert from Islam to Christianity. The applicant gave an account of her conversion and of the fact that as a convert to Christianity her very name would continue to identify her as of Muslim origin. This fundamental issue was not dealt with. It was crucial that fundamental elements of her claim were dealt with comprehensively at first instance as otherwise in any appeal in respect of those elements that will come before the Tribunal will only be dealt with the first time on appeal. It is submitted that this is an unsatisfactory position and was one of the reasons for quashing a decision of the Refugee Applications Commissioner by the High Court in *M.A.B v. Refugee Applications Commissioner & Ors* [2014] IEHC 64.

15. With regard to ground a.(i), it is submitted that the statement that "all of the documentation furnished in connection with the application has been fully considered" is meaningless as there is no indication in the decision what the result of such consideration was. *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 IR 701is authority for the proposition that the applicant is entitled to know the reasons and rationale for the acceptance or rejection of evidence. Thus, if the applicant appeals to the Tribunal, the applicant's documents would be dealt with for the very first time.

16. It is further disputed that the applicant's claim has been investigated in accordance with the Refugee Act 1996 and relevant EU Regulations, notwithstanding the assertion to the contrary in the s. 13 report.

17. In aid of ground a. (ii) and (iii), it is submitted that insofar as the decision- maker found the applicant's claim to "raise credibility issues" and have been "undermined" by "credibility issues", it is unclear which aspects of the applicant's claim led to this finding. Counsel submits that an applicant should not be expected to have to construct a hypothesis in order to try to understand the reasoning behind a decision directly affecting his or her fundamental rights. In this regard, counsel relies on *D.D.A (Nigeria) v. Minister for Justice, Equality and Law Reform* [2012] IEHC 308:

> *"23. While it may well be that this is an explanation for the thinking that lies behind the conclusion on this issue in the contested decision, it effectively involves constructing a hypothesis as to the Tribunal member's reasoning. The addressee of a Tribunal decision ought not to be required to construct a hypothesis in order to understand why an appeal has been rejected."*

18. Insofar as the Commissioner made credibility findings, with regard to the first of these, it was never the applicant's case that she practiced as a strict Muslim until aged fourteen. Her account of her family history of having lived in churches from aged seven onwards on occasions. This is not inconsistent with her claim to have converted to Christianity aged fourteen. The applicant gave an explanation for having resided in churches from aged seven onwards, namely her mother's then difficult circumstances. It is also submitted that there was evidence before the Commissioner that the applicant was a prophetess in the named Church, as evidenced by her identification document and the lawyer's letter. It is submitted that a close reading of the s. 8 interview, questionnaire and s. 11 interview shows that there were no contradictions in the applicant's story of the type relied on by the Commissioner.

19. While the Commissioner found the applicant's explanation as to why her visa application form stated that she worked seven years and eleven months in Lagos when she claimed to have worked in Kano for five years in that same timeframe, namely that the visa application form was filled out by a third party, was contradicted by the contents of the visa application form itself, it is submitted that this contradiction should not have been held against the applicant.

20. The authorised officer went on to make a credibility finding on the basis that no information could be found on an attack by Boko Haram on the applicant's Church in April, 2010. Yet, the applicant had a lawyer's letter confirming the event took place and photographs of the razed Church. No weight was giving to these documents.

21. It is conceded that the applicant cannot really complain about the findings that it was not credible that she could travel to Ireland not knowing what documents she possessed, or where she was in Ireland between May, 2010 and December, 2011, or with the finding regarding the delay in applying for asylum. Nonetheless, counsel submits that none of these findings went to the core of the applicant's claim such that her claim for protection could be dismissed in its totality.

22. Counsel further submits that without addressing the applicant's core claim, the authorised officer proceeded to make a finding that state protection would be available to her. While the availability of state protection constitutes a complete answer to a claim for international protection, the approach of the Commissioner was to take a cumulative assessment of credibility, state protection and internal relocation in order to reject the applicant's claim. Thus, it is not known in the context of that cumulative assessment what weight was attached by the decision-maker to the credibility finding or the state protection finding or the internal relocation finding in order to reject the applicant's claim. It is thus submitted that if any one of those assessments is found to be unlawful, the Commissioner's decision must fall. In this regard, counsel cites *Keagnene v. Min. for Justice* [2007] IEHC 17.

23. As to the state protection finding itself, the question which arises is whether the state protection found by the Commissioner is effective state protection. In submitting that this is not the case, counsel relies on the 2014 UK Border Agency report on Nigeria which, counsel submits, does not reflect the position adopted by the decision-maker. The applicant is part of a religious minority in northern Nigeria as a convert from Islam to Christianity. It remains the case that she can be identified as a Muslim convert to Christianity by virtue of her name. Counsel argues that the available country of origin information on the issue of state protection makes nonsense of the Commissioner's finding. The country of origin information emphasises the necessity for the Commissioner to have made a finding as to whether the applicant was a convert from Islam to Christianity. This was not done save a comment that the applicant answered questions on the Muslim religion correctly. The Commissioner wrongly refrained from either accepting or rejecting the applicant's core claim of having converted to Christianity. Thus the question to be asked is how is the applicant to know what to appeal to the Refugee Appeals Tribunal.

24. It is further submitted that the Commissioner selectively relied on aspects of the UK Border Agency report as no regard was had to a finding in that report under heading "Discrimination" that the Nigerian Government, in relation to religious violence, "did not act swiftly or effectively to quell communal violence or to investigate and prosecute those responsible for such violence." In selectively relying on country of origin information, the decision-maker failed to meet the requirements of Regulation 5 of the 2006 Regulations. Counsel submits that there was a requirement on the decision-maker to have regard to country of origin information and in this regard cites Eager J. *in M.M.S (Sri Lanka) v. Minister for Justice, Equality and Law Reform* [2015] IEHC 659. Eager J. found that country of origin information had to be looked at in all cases, albeit counsel concedes that a different approach was adopted by Humphreys J. in *R.A. v. Minister for Justice, Equality and Law Reform* [2015] IEHC 830. Counsel acknowledges however that country of origin information was looked at in the present case but nonetheless it is submitted that the decision-maker erred in omitting relevant

portions of the UK Border Agency report of 2014.

25. It is argued that what is clear from the whole of the country of origin information is that there no effective state protection for those such as the applicant who are at risk of persecution. In finding to the contrary, the Commissioner erred.

26. With regard to the internal relocation finding, while it was open to the Commissioner to address the question as to whether the applicant could relocate internally within Nigeria, this assessment was required to be conducted in accordance with Irish and EU Law, and in particular accord with Regulation 7 of 2006 Regulations. This requires, *inter alia*, the identification of a locus. Moreover, the UNHCR guidelines require, *inter alia*, the decision-maker to assess the relevance and reasonableness of relocation. None of those thresholds were met in this case. In this regard, counsel relies on *KD (Nigeria) v. Refugee Appeals Tribunal* [2013] IEHC 481 and *E.I. v. Minister for Justice, Equality and Law Reform* [2014] IEHC 27.

27. It is also submitted that the decision-maker erred in failing to decide as to whether there was a nexus to the Convention in the applicant's case. Insofar as this issue was addressed, it was merely by the statement "the applicant claims to fear persecution in Nigeria for reasons of her religion". That, counsel submits, is not her claim as her core claim is that she converted from Islam to Christianity.

28. With regard to the challenge on the basis that past persecution was not considered contrary to Regulation 5 (2) of the 2006 Regulations, it is conceded that the challenge is rendered moot given the decision-maker's failure to address the applicant's core claim.

The submissions on the entitlement to judicially review the Commissioner's decision.
29. While acknowledging that pursuant to the provisions of the Refugee Act 1996 the applicant has a statutory entitlement to an appeal to the Tribunal, counsel submits that a right of appeal does not cure an unfair first instance hearing, which, it is submitted, occurred in the present case. In this regard, counsel relies on the dictum Denham J. in *Stefan v. Minister for Justice, Equality and Law Reform* [2001] 4 I.R. 203, namely, "*a fair appeal does not cure an unfair hearing*".

30. It is also acknowledged that there is a line of authority commencing with *B.N.N. v. Minister for Justice, Equality and Law Reform* [2009] 1 I.R. 719 which provides that judicial review of the Refugee Applications Commissioner should only lie in "rare and exceptional circumstances". Counsel contends however that this approach is contrary to Article 52 (1) of the EU Charter which provides:

> "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interests recognised by the Union or the need to protect the rights and freedom of others".

31. It is submitted that it is not open to the courts to impose extra restrictions on an applicant's right to seek judicial review of a protection decision over and above the existing statutory restrictions of imposed by s. 5 of the Illegal Immigrants (Trafficking) Act (2000). The EU Charter provides only for limitations prescribed by law and not by judge made rules.

32. In any event, counsel submits that in B.N.N, Hedigan J. addressed the issue of the appropriateness of judicial review in the context of the particular facts and circumstances that arose in that case. Thus, the more general pronouncement of Hedigan J., namely that it is only in rare circumstances that judicial review of a Refugee Applications Commissioner decision will lie, is *obiter*.

33. Counsel submits (citing Hogan and Morgan Administrative Law in Ireland 4th edition) that academic opinion is that the "more rigid approach taken in *Abenglen* and subsequent cases has now been more or less abandoned". It is submitted that in more recent times the courts have treated both the existence of an alternative appeal and the actual exercise of that remedy as simply one factor to be considered in the exercise of the courts discretion to grant leave. It is submitted that were the approach of Hedigan J. in *B.N.N.* to be interpreted as holding as a matter of administrative law that relief by way of judicial review could not be granted unless the defect complained of could not be remedied by way of appeal, such an interpretation would not appear to be consistent with the decision of the Supreme Court in *O'Donnell v. Tipperary (South Riding) County Council* [2005] 2 I.R. 483:

> *"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."*

34. Counsel also submits that if the ex tempore ruling of the Supreme Court in *K.A v. Minister for Justice* (Unreported, Supreme Court, 28th January, 2009), as relied on by the respondents, had intended any particular rule of law be laid down which differed from *O'Donnell v. Tipperary (South Riding) County Council* [2005] IESC 18 then the matter would have been the subject of a reserved judgment.

35. While there are other decisions of the High Court where the approach in *Stefan* has been narrowed (invalidly according to counsel for the applicant), the *dictum* in *Stefan* is apt for the applicant's case, given the failure to address the core claim.

36. Counsel also argues that the reference by MacEochaidh J. in *P.D. v. Minister for Justice, Equality and Law Reform* [2015] IEHC 111 to the "*consistent juriprudence*" of the Superior Courts to the effect that judicial review of the Refugee Applications Commissioner will lie only in rare circumstances is a very general statement and that the case law upon which this statement is grounded does not accord with the approach of Denham J. in *Stefan*.

37. It is acknowledged that the arguments advanced on the applicant's behalf are not consistent with the approach adopted in *P.D.* as to when judicial review of a Refugee Applications Commissioner decision should lie, nor are they consistent with the approach of MacEochaidh J. in *S.F.A. v. Minister for Justice, Equality and Law Reform and Refugee Applications Commissioner* [2015] IEHC 364.

38. Counsel submits however that for the same jurisdictional error which was in fact found in *P.D.* and which led to the quashing of the Refugee Applications Commissioner decision in that case, the decision in the present case merits quashing.

39. It is further submitted that insofar as the respondents seek to rely on the *dictum* of Charleton J. in *M.A.R.A. v. Refugee Applications Commissioner* [2014] IESC 71, consideration of the appropriateness of the judicial review versus an appeal of a Commissioner's decision was acknowledged in that case to be moot by virtue of the fact that the applicant's appeal had been

determined by the Refugee Appeals Tribunal.

40. Article 39 of the Procedures Directive guarantees a protection applicant a right to an effective remedy before a court or Tribunal against "a decision on their application for asylum", a right now underscored by Art. 47 of the EU Charter. Here, the applicant's first instance procedure was the Refugee Applications Commissioner. Counsel cites the decision of the ECJ in *Diouf v.Luxembourg* (C – 69/10) in support of the argument that the reasons justifying the refusal of the applicant's core claim cannot be effectively challenged at a later appeals stage before the Tribunal precisely because the Refugee Applications Commissioner eschewed making a decision on a core aspect of her claim, including a failure to indicate acceptance or rejection of some or all of the documentation lodged by the applicant and statements made by her. Thus, the applicant's complaint is not that her statements were rejected; rather it is that her statements and documents were not considered or decided upon. It is submitted that by analogy with the principles set out in *Diouf*, it would be incompatible with EU law for the court to decline to grant judicial review of the Refugee Applications Commissioner's examination her application for asylum where no proper reasoned determination on the issues raised in the application was made.

41. While in *Diouf*, the ECJ, held that Article 39 of Directive 205/85 and the principle of effective judicial protection do not preclude national rules providing that no separate action may be brought against an accelerated procedure in respect of which there was no appeal, that was subject to the important proviso "*that the reasons which led that authority to examine the merits of the application under such a procedure can in fact be subject to judicial review in the action which may be brought against the final decision rejecting the application.*"

The respondents' submissions

42. It is submitted that the salient question is whether an appeal to the Refugee Appeals Tribunal is adequate for the applicant. The jurisprudence of the superior courts has stated that an appeal to the Tribunal is an effective remedy. Counsel contends that all of the applicant's complaints about the Commissioner's decision can be addressed by way of appeal to the Tribunal. Counsel relies on *M.A.R.A. v. Refugee Applications Commissioner* [2014] IESC 71 where Charleton J. analysed the nature of an appeal to the Refugee Appeals Tribunal, stating, inter alia:

> *"[O]n appeal, there is a complete opportunity to present on behalf of the applicant in aid of this enquiry as to refugee status any new facts or arguments; to reargue the points appealed; to call new evidence for or against the status of the applicant; and to plead the case afresh and in full.*
>
> *…*
>
> *The form of appeal explicitly set out in the Act of 1996 is not merely a review as to whether any error had been previously made: rather, it is a full and thorough enquiry into the relevant documents and observations as previously furnished to the Refugee Applications Commissioner and the hearing of oral evidence and the reception of documentary evidence and submissions in respect of every point on which an appeal has been lodged. It is also apparent that the duty of the Refugee Appeals Tribunal is to make such rulings or finding of fact as are appropriate."*

43. It is submitted that the applicant's complaints do not equate with the situation which presented in *Stefan*. In that case, a key passage in a key document which had been furnished by the applicant and which was required to be considered by the Commissioner was not translated. That was found by Denham J. to be concerned with the process by which the Commissioner arrived at his decision which involved an absence of fair procedures.

44. In reliance on *A.K v. The Refugee Applications Commissioner* (Unreported, Supreme Court, 28th January, 2009), counsel submits that where part of the complaint in the present case relates to the manner of the Commissioner's treatment of the lawyer's letter and the photographs furnished by the applicant, this complaint goes to the weight attached thereto by the Commissioner – a matter which can be appropriately dealt with on appeal to the Tribunal.

45. Counsel cites *A.D. v. Refugee Applications Commissioner* [2009] IEHC 77 where Cooke J. addressed complaints similar to the complaints made in the present case and found all of them as going to the quality of the decision, the approach to the assessment of credibility or to the interpretation and balancing of the evidence, all matters "*eminently capable of being raised and reheard de novo on an appeal to the Tribunal.*"

46. In particular, counsel cites *A.D* as an instance where the applicant's complaint that the Commissioner failed to address the claim of persecution on grounds of race or ethnicity was found to be a flaw which went to the quality of the decision, to the approach of the assessment of credibility, and to the interpretation and balancing of the evidence before the Commissioner. It is thus submitted that the applicant's complaint in the present case that the Commissioner failed to assess her claim of persecution on the basis that she was a convert from Islam to Christianity falls into the category of error which an appeal to the Tribunal can address.

47. The applicant cannot point to any mistake by the Commissioner or any infringement of legal principle or right which is not capable of being cured by a re-hearing before the Tribunal. Reliance is also placed on *R.L.A. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 216. Counsel submits that the case is authority that the proposition that if issue is taken with Commissioner's treatment of country of origin information this can be addressed on appeal to the Tribunal.

48. Counsel relies on *T.T.A. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 215 as authority for the proposition that any alleged defect in the assessment of state protection is capable of being remedied on appeal. In that case, Cooke J. found no reason that the applicant's complaint about the state protection finding "*was not eminently suited to be canvassed and decided on appeal before the Tribunal*." Counsel also submits that a complaint that a finding of the Commissioner was based on hearsay, speculation and conjecture was capable of rebuttal and disproval before the Tribunal, as found by Cooke J. in *T.T.A.* Equally, Cooke J. was of the view that if the Commissioner misconstrued or misunderstood the evidence given in the interview, that could be corrected by the applicant's fresh testimony before the Tribunal. Additionally, in *T.T.A.*, Cooke J. found that issue taken by the applicant with the treatment of country of origin information was capable of being addressed on appeal.

49. The nub of the applicant's case is that her Church was attacked by Boko Haram in April 2010. She also asserts that Boko Haram is aware that she converted to Christianity and that they will track her down and kill her if she is returned to Nigeria. This is what the applicant says caused her to flee Nigeria in 2010 and come to this State, albeit she did not claim asylum until 2014. The applicant asserts that she cannot go back to Nigeria as a convert from Islam to Christianity. Insofar as counsel for the applicant contends that a clear finding was required to be made by the Commissioner as to whether the applicant was a convert to Christianity, while this was an approach the Commissioner might have taken i.e. to say whether or not it was accepted that the applicant was a convert to Christianity, there is, counsel submits, no inflexible approach which is required of the Commissioner in assessing a claim of the type

advanced by the applicant.

50. Without prejudice to the question as to whether the applicant's right of appeal to the Tribunal is adequate, counsel cites *P.D. v. Refugee Applications Commissioner* [2015] IEHC 111 in support of the argument that "*the extent to which elements of a claim are required to be formally decided depends on the circumstances of each case*" and submits that the circumstances of the present case did not require a finding on the issue of conversion since the core claim was in fact addressed, namely the applicant's claim to have been under attack by Boko Haram. In respect of this claim, the Commissioner determined she was not credible.

51. It is submitted that the Commissioner's assessment that the applicant was not credible in her claim that her Church was the subject of an attack in April, 2010 was an assessment which was open to the Commissioner as there was no objective evidence of an attack. The applicant has not put country of origin information before the court showing an attack which was not considered by the Commissioner. This, counsel submits, is telling given that Boko Haram attacks attract widespread media coverage. Thus, in all the circumstances the Commissioner did deal with the core claim. It is submitted that even if there is a flaw in the assessment, it is capable of being addressed on appeal to the Tribunal.

52. Four matters, including the applicant's account of an attack on her Church were identified by the Commissioner as raising credibility issues. Firstly, the inconsistency between what was set out in the questionnaire and at s. 11 interview regarding the applicant's living arrangements at particular times. Secondly, the inconsistency between what she said at s. 11 interview and the information contained in her visa application. Counsel submits that it is difficult for the applicant's counsel to argue that these findings did not relate to the applicant's core claim, given her assertion that she was a high-ranking member of her Church. Thus, the Commissioner was entitled to take account of these matters in assessing her claim. The claimed attack on the applicant's Church was not supported by objective country of origin information. Fourthly, the applicant's professed lack of knowledge as to where in Ireland she was between May, 2010 and December, 2011 and her delay in applying for asylum were matters which went to her credibility.

53. If any of the above findings are flawed, as asserted by the applicant, all of them are capable of being addressed on appeal.

54. Counsel submits that there is no merit in the applicant's assertion that the Commissioner's credibility, state protection and internal relocation findings were all cumulative. A clear reading of para. 3.3 of the decision does not support this contention.

55. The findings on state protection and internal relocation are matters which can be appealed to the Tribunal and the applicant will have the opportunity to persuade the Tribunal that neither is available to her by putting country of origin information or such other actual matters as may be relevant before the Tribunal. In *D.A.,* Cooke J. has found this to be the case.

56. It is submitted that in the within proceedings the applicant has not engaged with the necessary starting point for a consideration as to whether judicial review should lie. She has not said why the Tribunal is an inadequate forum in which to address her complaint. The arguments canvassed on behalf of the applicant bear out her misunderstanding of the nature of the statutory scheme in place for asylum applications.

57. With regard to the applicant's argument that the B.N.N. line of jurisprudence is contrary to EU law, that is not the case. The Irish courts do not preclude judicial review of a Commissioner's decision. This is made clear in paragraph 36 of *P.D.v. Min. for Justice*. Moreover, the applicant's reliance on *Diouf* (C– 69/10) is misplaced. All that the Procedures Directive requires in an effective remedy, as set out by the ECJ in *Diouf* at paragraph 69 of its judgment.

58. *Diouf* is not authority for the proposition that in the absence of some fundamental illegality tainting the Commissioner's decision the applicant is entitled to evade the operation of the statutory scheme set up under the 1996 Act (with its effective remedy of an appeal to the Tribunal) by opting for judicial review. As set out in *M.A.R.A.*, the Tribunal can substitute its own findings for that of the Commissioner, a course which is not open to a court on judicial review.

59. Moreover, as stated by Hedigan J. in B.N.N.,

> *"the existence of a statutory right of appeal to the Refugee Appeals Tribunal - with the exception of cases where s. 13(5) and 13(6) of the Act of 1996 apply - is a fundamental reason not to grant judicial review. This court should not intervene until the statutory asylum process has been completed. To do otherwise would be to usurp the authority that has been granted to the Refugee Appeals Tribunal by the Oireachtas."*

60. It is submitted that the applicant has not demonstrated that the body of jurisprudence upon which the respondent relies is wrong.

The applicant's response to the respondent's submission

61. Contrary to the respondents' arguments, it is not the case that the applicant has not engaged with the case law cited by the respondent. Rather, it is submitted that the only relevant authority for the present case is *Stefan*. Furthermore, the line of jurisprudence relied on by the respondent, namely *B.N.N., D.A.* and *R.L.A.* predate the coming into force the EU Charter and Article 52(1) thereof.

62. It is contended that the applicant's circumstances are distinguishable from *D.A.* They are equally distinguishable from those in *R.L.A.* In the latter case, the Commissioner had expressed disbelief of the applicant's claim. In the present case, the applicant is in the position where she does not know whether her conversion is believed or disbelieved, or whether it's believed that she has a name that could identify her as a Muslim from birth.

63. Counsel submits that in *T.A.A.* Cooke J. accepted that judicial review will lie to correct a significant illegality in the first stage review. This view mirrors the approach adopted in *Stefan*. This approach is applicable to the applicant's circumstances as there is such a significant illegality. In any appeal to the Tribunal, the latter forum cannot substitute a view on the question of the applicant's conversion from that adopted by the Commissioner, as the Commissioner formed no view on the issue.

64. Counsel reiterates his argument that EU law does not provide for any restriction on remedy over and above what is provided for by law. It is submitted that for restrictions on judicial review such as those enunciated in the jurisprudence relied on by the respondent to be valid, same should be enshrined in law. The Oireachtas had an opportunity to do so when amending s. 5(2) of the 2000 Act, yet this opportunity was not taken.

Considerations

65. The issue to be decided in the within proceedings is whether the applicant is entitled to seek leave for judicial review and an order of certiorari of the decision of the Refugee Applications Commissioner, or whether the complaints made on behalf of the applicant with

respect to the decision are capable of being addressed by way of appeal to the Refugee Appeals Tribunal.

In the course of the proceedings, the court was referred to a considerable body of jurisprudence on this issue. Of particular import is the decision of the Supreme Court in *Stefan v. the Minister for Justice* [2001] 4 I.R. 203.

66. In the course of her judgment in Stefan, Denham J. reviewed numerous authorities which addressed the circumstances in which judicial review may lie against a first instance decision, notwithstanding the availability of an administrative appeal. Stefan itself concerned an application for judicial review of the former non-statutory refugee process (the Hope Hanlon Procedure). Mr. Stefan was refused asylum in a process whereby part of the case being made by him had not been translated thus depriving him of having part of his application considered. In the High Court, Kelly J. was satisfied to quash the decision on the basis that *"even if a full rehearing was available … it would be unsatisfactory. An insufficiency of fair procedures at first instance is not cured by a sufficiency on appeal."*

67. On appeal to the Supreme Court, the issue was addressed by Denham J. in the following terms:

> *"It is clear that whilst the presence of an alternative remedy, an appeal process, is a factor, the court retains jurisdiction to exercise its discretion to achieve a just solution.*
>
> *The stage of the alternative remedy may be relevant, though it may not be determinative of the issue. This is a case where an appeal had been lodged but had not been opened. It is therefore a situation to be distinguished from that in (State)(Roche) v. Delap [1980] I.R. 170 .*
>
> *In this case the appeal is pending. It is for the court to determine in the circumstances whether judicial review is an appropriate remedy. The presence of the pending appeal is not a bar to the court exercising its discretion. It is a factor to be considered. It is a matter of considering the requirements of justice."*

She went on to state:

> *"Certiorari may be granted where the decision maker acted in breach of fair procedures. Once it is determined that an order of certiorari may be granted, the court retains its discretion in all the circumstances of the case as to whether an order of certiorari should issue. In considering all of 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 obtain a just result.*
>
> *….*
>
> *The applicant is entitled to a primary decision in accordance with fair procedures and an appeal from that decision. A fair appeal does not cure an unfair hearing. Consequently, I am satisfied that the appeal should be dismissed."*

68. In the course of the within proceedings, counsel for the applicant places considerable reliance on *Stefan* and contends that the circumstances of the applicant's case put her into that category of case where utilising the appeal procedure to the Refugee Appeals Tribunal would not cure the unfairness of the Commissioner's decision in not adjudicating on what is said to be a core aspect of the applicant's claim, namely the issue of her conversion from Islam to Christianity. I will return to this argument in due course.

69. In *A.K. v. the Refugee Applications Commissioner* (Unreported, Supreme Court, 28th January, 2009), Murray C.J. in an *ex tempore* judgment also had occasion to consider when it was appropriate that judicial review of a Commissioner's recommendation would lie as opposed to an appeal to the Tribunal. In *A.K.*, the substantive issue for consideration by the Supreme Court was whether the High Court erred in law in refusing, or alternatively in exercising it's discretion to refuse leave to apply for judicial review on the grounds that the applicant had a statutory right of appeal, and in respect of which an appeal had been lodged.

70. In the course of his judgment, Murray C.J. agreed that the general principles which applied to cases of this nature were as set out by Denham J. in *Stefan* (as quoted above). He went on to make reference to the *dictum* of O'Higgins C.J. in *The State (Abbeyglen Properties) v. Dublin Corporation* [1984] 1 I.R. 381 in the context of the type of cases in which Courts might exercise their discretion to refuse an order for certiorari.

> *"…there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint, or were 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 or with the power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate."*

71. In *A.K.*, the essential basis on which it was argued that there was a want of fair procedures was that the decision of the Commissioner should be treated as unreasonable and irrational because it did not take sufficient account of the fact that the appellant's mother had been granted refugee status. The respondent had argued that this was not an issue of fair procedures but rather a question of the weight which had been attached by the Commissioner to this factor, an issue, the respondent argued, which was more appropriate to be dealt with on appeal.

72. Murray C.J. formed the view that the claimed want of fair procedures was an attack on the merits of the Commissioner's decision and not on the due process adopted in coming to the conclusion arrived at:

> *"33.I am satisfied the applicant's case constitutes an attack on the merits of the decision of the respondent and not on the due process adopted by him in coming to his conclusion. The respondent did not fail to take into account anything which he ought to have taken into account and did not take into account anything which he ought not to have taken into account. Even then whether certiorari, notwithstanding the availability of an appeal, would be grounded would depend on all the circumstances of the case including the degree to which fairness of the hearing was compromised."*

73. Commenting on the applicant's contention that the Commissioner did not take sufficient account of the fact that the appellant's mother had been granted refugee status, he stated:

> *"[T]he question of what weight ought to have been attached to the decision in the mother's case and the facts before*

him, was a matter for the Commissioner, and is quintessentially a matter, when issue was taken with the weight of the evidence, which can be more appropriately dealt with in a full appeal. In such an appeal the appellant will be entitled to make further arguments and call further evidence."

Accordingly, in dismissing the appeal, he ruled:

" [T]he learned trial judge was entitled in law to exercise his discretion to refuse the application in a case such as the present, and hold that the appeal available was a more appropriate remedy, where the issue raised by the applicant principally (but not exclusively) relates to the quality of the decision."

74. In the course of his judgment in *M.A.R.A. v. the Minister for Justice* [2014] IESC 71, Charleton J. noted the *dictum* of Cooke J. in the High Court (who had acceded to a motion brought by the respondent to dismiss the applicant's challenge to the Commissioner's decision):

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

75. In *M.A.R.A.*, Charleton J. did not however address the appropriateness of the challenge to the Commissioner's decision as the challenge was considered to have been rendered moot by virtue of the fact that an appeal to the Tribunal had been prosecuted and determined.

76. Cooke J.'s approach in *M.A.R.A*, namely that an application for judicial review of a Commissioner's recommendation will only be entertained in "*exceptional cases*", harkened back to the judgment of Hedigan J. in *B.N.N. v. Minister for Justice* [2009] 1 I.R. 719.

77. In *B.N.N.,* the applicant applied for leave for judicial review seeking to quash the negative recommendation of the Refugee Applications Commissioner on the basis that the procedure followed was flawed. The applicant claimed that relevant information was not specifically put to her at an interview, that the assessment of her creditability was flawed, that insufficient consideration was given to s. 11b of the Refugee Act 1996 and that she should have been given an opportunity to comment on material which appeared to contradict her claim. The applicant lodged an appeal to the Refugee Appeals Tribunal and subsequently sought leave to issue judicial review proceedings. In the course of his judgment, Hedigan J. reviewed previous jurisprudence (including *Stefan*) on the question of weighing the relative merits of an appeal to the Tribunal over judicial review. He went on to state:

"35.It is clear in the light of this series of recent decisions that it is only in very rare and limited circumstances indeed that judicial review is available in respect of an Office of the Refugee Applications Commissioner decision. The investigative procedure with which the Office of the Refugee Applications Commissioner is tasked must be properly conducted but the flaw in that procedure that entitles an applicant to judicial review of an Office of the Refugee Applications Commissioner decision must be so fundamental as to deprive the Office of the Refugee Applications Commissioner of jurisdiction. The Courts, the applicants themselves, and the general public have a right to expect that no such fundamental flaw should ever occur in such an application. An applicant must 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. If such a clear and compelling case is not demonstrated, the applicant must avail of the now well established procedure that has been set up by the Oireachtas, which provides for an appeal to the Refugee Appeals Tribunal."

78. Earlier in his judgment, he made specific reference to Stefan:

"It is well established that the existence of an alternative remedy does not per say prevent the High Court from granting certiorari. Rather, it is factor that must be considered by the court. As stated by Denham J. in Stefan v. Minister for Justice [2001] 4 I.R. 203, at p. 216, 'it is clear that whilst the presence of an alternative remedy, an appeal process, is a factor, the Court retains jurisdiction to exercise it's discretion to achieve a just solution'."

79. In the course of oral argument before this court, counsel for the applicant submits that the effect of *B.N.N.* and subsequent jurisprudence of the High Court has been to "narrow" the *dictum* of Denham J. in *Stefan*.

80. I am not persuaded by this argument and I concur with the view expressed by MacEochaidh J. in *P.D. v. Minister for Justice* [2015] IEHC 111 that the decision in *B.N.N.* is "*completely consistent with the decisions of the Supreme Court in Stefan and in A.K.*".

The learned judge also states:

"It is not the case that following the decision in B.N.N. that judicial review of ORAC is precluded where the error is remediable by the Refugee Appeals Tribunal. This is to overstate the effect of the decision of the High Court and to ignore the decision of the Supreme Court in Stefan."

80. In *P.D.*, MacEochaidh J. goes on to identify the applicable principles from the relevant authorities, as follows:

"1. The High Court is entitled to grant certiorari or other public law remedy in respect of a decision of the Refugee Applications Commissioner where an error as to jurisdiction is identified.

2. The significance of the error will determine whether the court may exercise its discretion to grant judicial review.

3. Not all errors as to jurisdiction attract judicial review.

4. The court must carefully consider the nature of the error in deciding whether the interests of justice require the first instance decision to be quashed and taken again rather than the error being the subject of an appeal to the Refugee Appeals Tribunal.

5. The court should bear in mind the extent of the Refugee Appeals Tribunal's capacity to provide a remedy and reverse the error. (The nature of appeals to the RAT has recently been fully described by Charleton J. in the Supreme Court in M.A.R.A. (supra))."

81. I am satisfied that the above is a succinct distillation of the relevant principles and that they comprise the backcloth against which the applicant's contention in these proceedings, namely that an appeal to the Tribunal is not sufficient, must be assessed.

The alleged errors in the Commissioner's decision
82. The applicant's principal argument for leave for judicial review is that her core claim of persecution on account of her conversion from Islam to Christianity was not addressed by the first instance decision-maker.

83. Before turning to this argument in the context of whether the Commissioner's failure to adjudicate on this issue warrants leave for judicial review, I propose to address the other flaws which it is alleged attach to the decision.

84. Part of the within challenge comprises the argument that the Commissioner determined the applicant's claim on a "cumulative" assessment of credibility, state protection and internal relocation. Counsel for the applicant points to the part of the decision where, following upon the analysis of the applicant's claim under the heading "well founded fear" wherein adverse credibility findings are made, the Commissioner states:-

"When the above findings are taken cumulatively, together with those under 3.3.1 State Protection & Internal Relocation, the applicant has not demonstrated a reasonable degree of likelihood that she would be persecuted for a Convention reason if returned to Nigeria."

85. It is asserted on the part of the applicant that the findings on credibility, state protection and internal relocation were all "cumulative" findings. It is thus submitted that if any one of these respective findings is found to be flawed, then the whole decision must fall. Obviously, counsel's argument on this point is predicated on the court finding that judicial review is appropriate to the case.

86. Without at this stage pronouncing on whether any aspect of the Commissioner's decision is amenable to judicial review, I should say that I find no merit in the applicant's submission that the rejection of the applicant's claim was based on cumulative findings on credibility, state protection and internal relocation.

87. To my mind, such an interpretation is to misread the decision. It is eminently clear from the structure of the above statement that the matters which were addressed "cumulatively" were matters said to raise credibility issues for the applicant. There is no sense from the above statement or the decision overall that the applicant's claim was rejected on a "cumulative" assessment of credibility, state protection and internal relocation.

88. I turn now to the various individual arguments put forward in aid of the grounds of challenge.

89. Issue is taken with the statement in the decision that "all of the documentation furnished in connection with the application has been fully considered". Counsel submits that this is a meaningless statement as there is no indication in the decision what the result of such consideration was. It is argued that if this matter is appealed to the Tribunal, the applicant's documents will only be dealt with there for the first time. I am not persuaded by this argument. It seems to me that the arguments canvassed on behalf of the applicant in this regard go to the quality of the decision. The alleged failing of the Commissioner is remediable on appeal to the Tribunal where the applicant will have an opportunity to re- argue the relative merits of the documents and urge upon the Tribunal their respective probative value.

In aid of Ground a (ii), the applicant submits that the Commissioner adverted to numerous matters said to "raise credibility issues" without elaboration, and that the Commissioner's approach was based on speculation and surmise without any objective examination having taken place of the applicant's evidence and explanations she proffered for the matters raised with her at interview. In effect, the arguments made on behalf of the applicant in oral submissions to the court seek to make the case as to why the Commissioner's assessment was wrong. Again, I take the view that all of the arguments canvassed on behalf of the applicant by way of challenge to the credibility findings go to the quality of the Commissioner's decision. All of the credibility issues raised on the applicant's behalf are eminently capable of being remedied on appeal. In this regard, I adopt the *dictum* of Cooke J. in *T.T.A v. Minister for Justice* [2009] IEHC 215. Cooke J. stated:-

> *"18. As I have said, it may be highly doubtful whether the matters suggested as findings of fact are such. The entire of Section 4 of the Commissioner's decision seems to be more properly characterized as a resumé of the applicant's own evidence for his claim to a well founded fear of persecution, into which the Commissioner interjects a series of observations or queries. These identify the doubts, implausibilities and inconsistencies which lead the Commissioner to an overall conclusion as to a lack of credibility in the description of the applicant's involvement in spying and other activities in the NDPVF and of his having to flee after the Itsekeris pursued him and broke into his house. If the challenge to the report on this basis is arguable, it is a challenge to the effect that the assessment of the applicant's story is mistaken and wrong and that another assessment should have been made. To so argue is to require another view to be substituted and that is precisely the function and the proper role of the Tribunal on appeal and not the role of the High Court in judicial review.*
>
> *19. The case has been put to the Court on behalf of the applicant that he is entitled under the scheme of the Act to have his case fully and fairly considered at the first stage by the Commissioner, and that he should not have to go before the Tribunal, as it were, already handicapped by an unfair hearing and a defective report. This argument, in the Court's view, is unsound and is based on a mistaken view of the nature of the statutory scheme of the asylum process. That process is indeed in two stages, made up of an investigative stage before the Commissioner at first instance, followed by a second stage, an appeal review in which the Tribunal can either affirm or set aside the report and recommendation. In so doing, the Tribunal is fully entitled to substitute its own appraisal of the facts and evidence, including of any new evidence adduced by the applicant, and also of the credibility of the applicant himself in giving testimony when he appears in a case which has an oral hearing.*
>
> *20. The full scope of that appeal and the latitude for the substitution of an appraisal which is the full opposite to that reached by the Commissioner in the report, is not in any sense restricted or impaired by the fact that the appeal's starting point and the procedural framework for the appeal is the Commissioner's report to which the Appeal Tribunal is required to have regard. Nor is it diminished or circumscribed by the change from an investigative forum to quasi adversarial procedure in which the Commissioner is represented before the Tribunal in order, as it were, to stand over the report. The Commissioner acts as a type of legitimus contradictor who provides the adversarial element which permits the Tribunal to test and tease out the issues, but this in no way inhibits the Tribunal in reaching a conclusion that the Commissioner has made mistakes; that he has relied on wrong or inadequate evidence; that he has misunderstood the applicant, or in deciding in the light of entirely new evidence submitted by the applicant that*

conclusions which might have been tenable before the Commissioner should, on balance, no longer be allowed, and that a new view of the case should be taken.

21. That is the statutory role of the Tribunal as a second stage to the Commissioner's investigation and it is because those roles are adapted to the nature and requirements of an asylum process with all of its complications, uncertainties, its urgencies, and the need for a special understanding of the complex disputes and conflicts in some of the world's most troubled and inaccessible areas, that this Court should be slow to trespass upon the function of the Tribunal. It should confine itself to the necessary correction of significant illegalities in the first stage investigation by the Commissioner when it is indispensable to do so in order to preserve the effectiveness, fairness and integrity of the appeal that is otherwise available to the Tribunal."

90. In *RLA v. Minister for Justice* [2009] IEHC 216, Cooke J. had again occasion to address a number of challenges made to a decision of the Commissioner and, addressing the arguments raised in that case he stated, *inter alia*:-

"As such, a challenge to the appraisal is a challenge to the quality of the decision and can clearly, and more appropriately, be re assessed on the statutory appeal. Moreover, having received this report and the impugned document, the applicant now knows the precise basis for the negative finding of credibility and is in a position to rebut it on appeal and to argue as to why it was mistaken or unbalanced or unfair in the assessment of her situation and personal history."

91. The above *dictum* is pertinent to the applicant's photographic evidence and her lawyer's letter in the context of assessing her claim of an attack on her church in April 2010. The alleged failings of the Commissioner in this regard relate to the quality of the decision and not to any due process failing in the sense understood by Denham J. in *Stefan*, or Murray C.J. in *A.K.*

92. In Ground b. of the statement of grounds, it is alleged that the Commissioner's finding on state protection is flawed. It is submitted that country of origin information which was before the Commissioner, in particular a UK Border Agency Country of Origin Information Report on Nigeria (February 2014, reissue) did not support the finding that state protection would be available to the applicant. This information, which was attached to the s. 13 report, noted, *inter alia*, that the Nigerian Government "did not act swiftly or effectively to quell communal violence or to investigate and prosecute those responsible for such violence" in the context of freedom of religion. The country of origin information noted that "the main targets of such violence include political and ethnic rivals, businesses, homes, churches, mosques, and rural villages".

The report goes on to state;

".. While the Nigerian Government has done little in the legal realm to infringe upon the right of religious freedom protected under the constitution, its inability and unwillingness to effectively address the country's sectarian violence have allowed religious hostilities social discrimination against religious minorities to go unchecked. .. Authorities appear unwilling to address issues bearing on religious diversity and co-existence for fear of provoking further sectarian conflict….Northern Muslims are highly reactive to claims of Christian conversion. In fact they are likely rare. "

93. Moreover, it is submitted that a relevant part of this report was not taken account of by the Commissioner. In this regard, counsel refers to the contents of paragraph 19.9 of the said report which refers, *inter alia*, to "Federal, State, and Local Authorities have not effectively addressed underlying political, ethnic, and religious grievances that lead to violence" and that "an air of impunity exists, as authorities rarely prosecute and punish those responsible for violent attacks [on grounds of religion]."

94. It is further contended that the finding made on internal relocation was flawed by the failure to adhere to Reg. 7 of the 2006 Regulations, in particular by reason of the failure of the Commissioner to specify where in Nigeria the applicant could relocate to.

95. Again, in my view, the alleged flaws in the state protection and internal relocation findings relate to the quality of the Commissioner's decision and do not constitute errors of jurisdiction such as might warrant judicial review. In *T.T.A.*, Cooke J. addressed a complaint of similar ilk in the following terms:-

"There must be some doubt as to whether there is in the relevant passage in the report any actual finding as alleged, as opposed to an expression of doubt as to credibility on the part of the Commissioner together with the expression of a view that, if true, the applicant's claim that he fled because he feared arrest for membership of the NDPVF was a flight from prosecution and not from persecution. There does not appear to be any reason, however, why that ground is not eminently suited to being canvassed and decided on appeal before the Tribunal. The applicant is in effect saying that there was no evidence that State protection in such circumstances is available in Nigeria; that the police are corrupt; that the Itsekiris are members of the police and that the country of origin information produced by the Commissioner contradicts the alleged finding. Indeed, the applicant's position is probably stronger before the Tribunal because he is entitled now to produce new country of origin information which contradicts the Commissioner and proves his own assertion."

96. The above dictum is equally applicable to the shortcomings which the applicant alleges in respect of the internal relocation finding. With regard to the applicant's contention that the Commissioner did not apply the provisions of the 2006 Regulations when assessing the availability of internal relocation, I find the dictum of O'Higgins C.J. in *The State (Abbeyglen Properties) v. Dublin Corporation* apt:

"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 is not adequate".

97. To this juncture, the court's focus has been on the arguments advanced on behalf of the applicant with regard to matters which are specifically addressed in the decision and thus far I am satisfied that the alleged shortcomings, as identified by the applicant, can be adequately addressed on appeal to the Tribunal, relating as they do, by and large, to the quality of the decision.

98. I turn now to the principal argument advanced on behalf of the applicant in aid of the application for leave for judicial review, namely the failure of the Commissioner to make a finding on her claim to be a convert from Islam to Christianity. Counsel for the applicant contends that this court should adopt a similar approach to that adopted by O'Malley J. in *M.A.B v. Refugee Applications*

Commissioner & Ors [2014] IEHC 103. That case concerned a claim by a Sudanese national for refugee status in circumstances where he claimed to be a member of the Zaghawa tribe and who claimed that his village was attacked by the Janjaweed militia during which a number of his family members were killed. The challenges to the decision in *M.A.B.* were the failure of the Commissioner to make a finding as to whether the applicant was a member of the Zaghawa tribe; that the Commissioner erred in impliedly placing the onus on the applicant that "*he as an individual*" would suffer persecution; and the failure to consider the question of future risk. O'Malley J. found "*two serious problems*" with the Commissioner's decision, the first being the failure to state whether the applicant was a member of the Zaghawa tribe. This was found to be "*a core part of the applicant's claim-if it was not believed, then it would appear that he had no case at all. If it was believed, that did not necessarily determine the issue of his status but it would provide a significant substratum of accepted fact."*

99. On the issue of the failure to make a finding about tribal membership she opined:

> *"[T]he appeal [to the Tribunal] would be a full oral hearing before the Refugee Appeal Tribunal, which is independent of the other respondents. In such a hearing the Tribunal would not be bound by the Commissioner's findings in any respect and would be free to conduct a fresh assessment. That means that the question would be determined for the first time at the appeal - in other words, that there would not in the true sense be a rehearing on an issue that is central to the applicant's claim."*

100. O'Malley J. also found that the Commissioner "*fell into fundamental error*" in putting the onus on the applicant to provide "*convincing reasons*" as to why he would be targeted in Sudan.

She went on to find "*that the combination of these two errors explains the lack of any forward looking assessment of future risk, since on the Commissioner's analysis that exercise would not have been relevant."*

101. In the present case, the applicant argues that if she is left only with her appeal to the Tribunal her core claim would be dealt with the very first time on appeal and in circumstances where there is no appeal from that Tribunal to any other forum. It is contended that the applicant would be left without an effective remedy, as is her entitlement under EU law. Counsel asserts that while the authorised officer may well cast doubt on aspects of the applicant's credibility, if, as the applicant says, she is a convert from Islam to Christianity and residing in Northern Nigeria then being a Christian in such circumstances could put her in danger such as to merit international protection.

102. It is submitted that in all the circumstances of the present case where the core of the applicant's claim was not dealt with independently, impartially and objectively at first instance, that any appeal to the Tribunal would not in any sense be a re-hearing of the claim.

103. This is the alleged fundamental error which the applicant principally contends merits the quashing of the decision. It is submitted that this error falls into the realm of unfairness in the sense articulated by Denham J. in *Stefan* and that it is on par with the failings which caused O'Malley J. to quash the Commissioner's decision in *M.A.B.* Counsel for the respondent argues that what is overlooked in the arguments canvassed on behalf of the applicant is that the applicant was not just saying that she was at risk because of her conversion to Christianity, she also made the case that she was actually subjected to attack by Boko Haram, a claim which was assessed by the Commissioner. The respondents submit that while it is the applicant's case that she would be persecuted by Boko Haram if returned to Nigeria and that they know of her conversion to Christianity from Islam, a key aspect of her claim was the attack on her Church in April, 2010. The Commissioner could not find evidence of such an attack and doubts were raised as to her credibility. Therefore, the question as to whether or not she was a convert did not require express attention or an express finding. It is argued that her core claim was addressed notwithstanding the absence of any finding as whether she was in fact a convert.

104. The respondents also contend that if the Commissioner took the view that the applicant's claim lacked credibility, it was within jurisdiction for the Commissioner to take a view of her claim of persecution as a whole.

105. The respondents also assert that it is open to the applicant to pursue her complaint on appeal to the Tribunal and they submit that the Commissioner's failure to make a finding on the applicant's conversion does not go to jurisdiction. Moreover, counsel for the respondent urges on the court the approach of Cooke J. in *D.A. v. R.A.C. & Ors* [2009] IEHC 77. In that case, eight specific instances of errors of law and infringement of the right to fair procedures on the part of the Commissioner were claimed to have occurred, as follows:

> *(i) The wrong test was applied in respect of credibility - the medical evidence which was uncontroverted, stated that the applicant could not be expected to give a coherent account:*
>
> *(ii) ORAC applied part of the UNHCR Handbook but failed to apply the relevant passages at paras. 206 to 212:*
>
> *(iii) ORAC failed to properly apply the medical evidence in assessing credibility - the evidence was corroborative of the applicant's account of torture and physical abuse - it was not applied as an integral part of the credibility assessment:*
>
> *(iv) An improper standard of proof was applied - ORAC erred in impliedly requiring that the applicant to provide medical evidence which would "confirm" the cause of her injuries.*
>
> *(v) An adverse credibility inference was drawn from minor inconsistencies (4.2.2 and 4.2.5 of the ORAC report) despite the medical evidence that coherence could not be expected:*
>
> *(vi) Adverse credibility findings were made that were speculative and/or without proper evidential foundation and not properly based on the context of country of origin information:*
>
> *(vii) No proper regard was had to the corroborative affidavit of the applicant's sister:*
>
> *(viii) ORAC failed to examine and assess the applicant's claim to persecution on the ground of race and/or ethnicity.*

106. Cooke J. viewed each of the alleged flaws as going to:

> *"the quality of the Commissioner's decision, to his approach to the assessment of credibility, to the interpretation and balancing of the evidence before him. The grounds do not as such allege any fundamental mistake of law such as would vitiate the Commissioner's exercise of jurisdiction. He is not alleged to have relied upon material not disclosed to the*

applicant or, as in the Stefan case, to exclude entirely from the consideration material evidence that might have been available."

107. What is of note in *A.D.* is that the eighth flaw, that is the failure of the Commissioner to examine and assess the applicant's claim on grounds of race and/or ethnicity (similar to the argument canvassed here with regard to the Commissioner's failure to make a finding on the applicant's conversion), was found to fall into the three categories as identified by Cooke J. in the foregoing passage, and not go to jurisdiction.

108. The *dictum* of Mac Eochaidh J. in *P.D. v. Minister for Justice* as is also instructive as to how a decision-maker might lawfully decide to approach a claim for asylum: He states:

> *"48. It is an over simplification of this jurisprudence to say that a decision maker must decide on the truth of each element of a claim for asylum. The common thread in the judgments is the need for clearly expressed decisions in relation to the core claim. The extent to which the elements of a claim are required to be formally decided depends on the circumstances of each case. As asylum claims require the establishment of a number of elements, for example: membership of a social group or race or religion or nationality and a well founded fear of persecution — it may be possible to dispose of the application where proof of one of the necessary elements fails. Where, for example, an applicant claims to be a Nigerian who suffered religious persecution and it emerged that persons of that faith suffer no persecution in Nigeria, the decision maker could lawfully decide that the applicant did not have a well founded fear of persecution without the necessity of deciding whether or not she was a member of the particular religious faith claimed. In my view, no illegality would attach to such decision. Ideally it should be clearly stated that no decision is needed on this aspect of the claim and that, in my view, would comply with the Meadows inspired comments quoted above as to the need for clarity in administrative decisions. The difficulty which frequently arises is that it is unclear to applicants what is believed and what is not believed or whether any decision has been taken in respect of an important part of a claim and this may be of some consequence for the purposes of an administrative appeal.*
>
> *49. In this case, the authorised officer has decided that the applicant does not have a well founded fear of persecution for reasons which are not dependent on his sexuality. According to the officer, whatever his sexuality, he does not have a well founded fear of persecution as significant parts of his narrative of events connected with his professed fears were not believed. Having a well founded fear of persecution is necessary in order to be declared a refugee. Once the authorised officer decided the applicant had no such fear, he could not be declared to be a refugee and thus whether he was gay was, according to the officer, 'irrelevant'. The authorised officer expressed this view in clear terms though it was perhaps a little unfortunate that it was said that the issue was 'irrelevant'. It seems clear to me that the officer was saying that the issue was moot because even if he was gay, it was not accepted that he had a well founded fear of persecution. The officer did not decide whether he was gay or not but this does not mean that no decision was taken. The decision taken on this aspect of the claim was that the question did not require resolution because it was possible to dispose of the application without deciding the truth of the asserted sexuality. This was not an error of any kind, much less an error as to jurisdiction and thus no question of granting an order of certiorari arises on this ground."*

109. It is apparent from a reading of the decision in the present case that there is no express finding on the issue of the applicant's conversion from Islam to Christianity. The question is whether that is so fatal as to warrant the quashing of the decision. Adopting the approach of Cooke J. in *A.D.*, such a failing would not appear to go to jurisdiction. Also, on the basis of what is said in the above quoted passage from P.D., the alleged error may not go to jurisdiction such as to warrant *certiorari* if it is lawfully possible to dispose of the claim without determining the conversion question.

110. In *M.A.B.,* O' Malley J. took the view that a failure by the Commissioner to decide, *inter alia,* the issue of whether the applicant was a member of the Zaghawa tribe merited the quashing of the decision. The question which arises in the present case is whether the applicant's complaint is of similar import such as to merit the grant of leave and the quashing of the decision.

111. In the particular circumstances of the present case I am not persuaded that the failure of the Commissioner to expressly pronounce on the question of the applicant's conversion renders the hearing unfair in the sense articulated in *Stefan* or indeed in *M.A.B.*, such that it constitutes an error of jurisdiction.

112. Unlike the situation in *M.A.B.*, in the applicant's case the Commissioner did not cease deliberations after the negative credibility findings. While cumulative credibility issues led the Commissioner to find that the applicant had not demonstrated a reasonable degree of likelihood that she would be persecuted for a Convention reason if she returned to Nigeria, the decision-maker went on to make a finding that state protection would be available to her should she require it. Thus, the consequences for the applicant on a return to Nigeria were considered *via* the analysis of the availability of state protection. Therefore, in this context, it cannot be said that the applicant's circumstances as someone who might face a threat of harm from Boko Haram in the future were ignored. The state protection finding can only have been embarked on in the context of the applicant as someone who may be targeted by Boko Haram in the future. To my mind, this is a sufficiently distinguishing factor from the situation which presented in *M.A.B*, where no forward looking assessment was carried out.

113. Without prejudice to the quality of the finding on state protection (in respect of which I have already said it is open to the applicant on appeal to adduce evidence to demonstrate that State protection in Nigeria is not adequate), it remains the case that in finding that state protection would be available to the applicant, it cannot be said that the Commissioner was oblivious to or disregarding of the potential of harm to the applicant as someone who could be subjected to harm by Boko Haram. Equally, the finding on internal relocation demonstrates that the Commissioner had regard to her claimed circumstances as a Christian convert, whatever about the question as to whether the internal relocation assessment itself was made in accordance with the applicable legal standards, an issue which, as I have said, is capable of being argued and debated on appeal where it will be open to the applicant to persuade the Tribunal that the Commissioner did not apply the law correctly.

114. Had the Commissioner rejected the applicant's claim based on the credibility findings *simpliciter*, such an approach might well constitute an error of jurisdiction. A rejection of the applicant's credibility based on the absence of any objective country of origin information regarding the attack on her church in April 2010, or indeed based on findings peripheral to the core claim such as for example her mode of travel or length of stay in Ireland without claiming asylum might not necessarily absolve the decision-maker of the requirement to make a finding as to whether she was in fact a convert from Islam to Christianity. This is so because of the forward looking nature of the Convention. However, I do not have to pronounce as to whether, in the words of MacEochaidh J. in *P.D., "significant parts*" of the applicant's narrative connected with her professed fears were disbelieved thereby obviating the necessity for the Commissioner to decide whether she was a convert to Christianity or not. As I have said, irrespective of the credibility findings, the applicant's claimed circumstances were assessed by the Commissioner under the ambit, *inter alia,* of state

protection. Thus, insofar as counsel for the applicant argues that there was an absence of due process in that the Commissioner failed to adjudicate on the applicant's claim to be a convert from Islam to Christianity or on whether her name would identify her as a Muslim by birth, I do not find that that this failing was a breach of fair procedures such as deprived the Commissioner of jurisdiction, thereby warranting the quashing of the decision. While it would have been preferable if a finding on the applicant's conversion had been made, for the reasons I have set out above I find that the particular complaint regarding the failure of the Commissioner to make a specific finding on the issue of the applicant's conversion falls more readily into the approach adopted by Cooke J. in *A.D. v. Min. for Justice.*

115. In the course of oral argument, and in making the case as to the limitations of the appeal process for the applicant, counsel for the applicant also pointed to the fact that the Tribunal cannot quash the decision of the Commissioner and he argued that the Tribunal can only affirm it or make a positive recommendation for asylum for the applicant. It is submitted that if the applicant cannot get judicial review of the Commissioner's decision, she has no effective remedy as the Tribunal's hands are tied. I do not accept the proposition that the Tribunal's hands are tied on appeal.

In *M.A.R.A. v. the Minister for Justice* [2014] IESC 71, the Supreme Court had occasion to consider the nature of any appeal taken from a Commissioner's decision to the Tribunal. Charleton J. described the nature of an appeal in the following terms:

> *"Under the Act of 1996, the decision of the Refugee Applications Commissioner is entirely subject to legal and factual review by the Refugee Appeals Tribunal. The purpose of the notice of appeal is to set out the points of fact or law that are important to the applicant and in respect of which he or she disputes the earlier decision. The appeal overturns the record of what has been decided; save and in so far as on appeal it is affirmed. It is only to the extent of that affirmation, if any, on appeal, that the earlier decision stands. In its nature, that appeal is to be regarded as an equivalent change in the record as where a person appeals a criminal conviction in the District Court to the Circuit Court. There, a convicted person may be acquitted on a rehearing or may have their conviction before the District Court affirmed by the Circuit Court. Of course, if a person seeking refugee status on appeal is found not to be a refugee, then the matter is disposed of. If that happens, there has been a hearing at first instance that did not accept that a recommendation be made to the Minister that an applicant should have refugee status and on appeal this will have been affirmed by the tribunal under subsection 16A. In so far as it may be thought necessary by the Refugee Appeals Tribunal, in some cases, to resolve appeals as to the essential point only, or to conclude that a particular issue decides the appeal, while leaving unresolved some other question raised in the notice of appeal, this does not result in any disadvantage to an applicant. Some relevant findings of fact or of law may not be disputed on the appeal. Such findings remain undisturbed notwithstanding the appeal as, under the legislation, there must be a particularisation as to what grounds of the decision of the Refugee Applications Commissioner are disputed. Once the notice of appeal initiates a dispute as to any finding of the Refugee Applications Commissioner, by that appeal such finding is neutralised unless it is affirmed by the Refugee Appeals Tribunal. It would be contrary to the principle of constitutional construction of the legislation, considered in its entirety, for the Minister to be required or entitled to have regard to any aspect of a finding that had been overturned on appeal. A similar consideration applies to any aspect of the original decision which is the subject of an appeal and which is not upheld by that process. Where the Refugee Appeals Tribunal does not consider it necessary to resolve the appeal on any such ground, but decides the appeal either positively in favour of the applicant or negatively against him or her on another ground, so much of the earlier decision as is appealed against is rendered merely historical. There is therefore no remaining or "hovering" disadvantage once an appeal is taken.*
>
> *16. In essence, an appeal within this process is an active rehearing."*

There is thus provision within the statutory framework for a thorough rehearing of all aspects of the applicant's claim.

116. Counsel for the applicant canvasses a separate argument in aid of the case for judicial review in this case, namely the Irish courts' flawed approach to reviewing decisions of the Refugee Applications Commissioner in light of the decision of the ECJ in *Diouf. v.Luxembourg* (C – 69/10).

117. *Diouf* concerned an application for asylum in Luxembourg by a Mauritanian national. The asylum application was subjected to an accelerated procedure provided for under Luxembourg law. The application was rejected as unfounded. There was no appeal provided for under the national law of Luxembourg for an applicant who had been subjected to an accelerated procedure, although an applicant could appeal a substantive decision to refuse asylum.

118. The question before the ECJ was whether the absence of an appeal breached the right to an effective remedy under Article 39 of the Procedures Directive.

At para. 42 of its judgment, the ECJ stated:

> *"42. Accordingly, the decisions against which an applicant for asylum must have a remedy under Article 39(1) of Directive 2005/85 are those which entail rejection of the application for asylum for substantive reasons or, as the case may be, for formal or procedural reasons which preclude any decision on the substance."*

119. The Court went on to find that the accelerated procedure was a "*measure preparatory to the final decision on the application*" and was not therefore covered by the provisions of Article 39. The court held:

> *"45. Consequently, Article 39(1) of Directive 2005/85 must be interpreted as not requiring national law to provide for a specific or separate remedy against a decision to examine an application for asylum under an accelerated procedure. That provision does not therefore preclude, in principle, national rules such as those set out in Article 20(5) of the Law of 5 May 2006.*
>
> *The compatibility of rules such as those at issue in the main proceedings with the right to an effective judicial remedy"*

120. As to the compatibility of the Luxembourg rules with the right to an effective remedy, the ECJ went on to hold:

> *"56. Accordingly, the absence of a remedy at that stage of the procedure does not constitute an infringement of the right to an effective remedy, provided, however, that the legality of the final decision adopted in an accelerated procedure – and, in particular, the reasons which led the competent authority to reject the application for asylum as unfounded – may be the subject of a thorough review by the national court, within the framework of an action against the decision rejecting the application.*

…

58. What is important, therefore, is that the reasons justifying the use of an accelerated procedure may be effectively challenged at a later stage before the national court and reviewed by it within the framework of the action that may be brought against the final decision closing the procedure relating to the application for asylum. It would not be compatible with EU law if national rules such as those deriving from Article 20(5) of the Law of 5 May 2006 were to be construed as precluding all judicial review of the reasons which led the competent administrative authority to examine the application for asylum under an accelerated procedure."

121. Counsel for the applicant submits that in this jurisdiction it would be compatible with EU law to "preclude" an applicant from challenging a decision of the Refugee Applications Commissioner in and around the time of the said decision was made provided that such decision could be challenged later, in any "final decision rejecting the application". Counsel argues however that the system in this jurisdiction does not permit of an opportunity for the applicant to challenge the Commissioner's decision in the manner contemplated by the ECJ in *Diouf*. He asserts that under Irish law it is not possible to "postpone" a challenge to the first instance decision of the Commissioner until there is a "final decision rejecting the application" from the Tribunal. This is because of the statutory limitation on the time within which an application may be made to the court for leave to apply for judicial review of the Commissioner's decision, pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act (2000), as amended.

122. Counsel makes the case that there is no practical possibility that the final decision on the application (that is the Tribunal's decision) would be made within a timeframe to allow for both the Commissioner's decision and the Tribunal's decision to be challenged within 28 days of the former's decision. Thus, the availability of any relief by way of judicial review would always be subject to a judicial discretion to grant an extension of time within which to bring the application.

123. Counsel submits that it is clear from *Diouf* that in order for any preclusion on the bringing of a challenge of a first instance decision to be compatible with the fundamental right to an effective legal remedy as enjoyed by the applicant under EU law, it must be accompanied by the *right* to challenge the basis of that decision at a later stage, as opposed to a hope that a discretion to grant an extension of time by the court would be exercised in the applicant's favour.

124. It is thus submitted that for those reasons, the *B.N.N.* line of authority imposing as it does restrictions on the availability of judicial review of the Commissioner's decisions and insisting on the utilisation of the appeals procedure cannot be compatible with EU law. He argues that the *B.N.N.* line of authority dilutes the applicant's right to an effective remedy beyond the restrictions provided for by Article 52 (1) of the EU Charter. In this regard, counsel cites *Lennon v. HSE* [2015] IECA 92. It is submitted that for these reasons the court should grant leave in this case and quash the impugned decision.

125. I am not persuaded by counsel's argument. The procedures provided for under the Refugee Act 1996, providing as they do for a full *de novo* appeal from the Commissioner's decision to the Tribunal, cannot be equated with the situation which presented in *Diouf*. The decision of the Refugee Applications Commissioner is fully appealable to the Tribunal. Thus, it is open to a protection applicant to pursue at the time of his or her appeal to the Tribunal any error of law or fact on the part of the Commissioner. To my mind, the applicant's arguments as to the difficulties inherent in seeking leave to judicially review of the Commissioner's decision after the Tribunal has rendered its decision on appeal are without merit and indeed moot given the nature of the statutory system which is in place under the 1996 Act. As set out by Charleton J. in *M.A.R.A.,* an appeal "*overturns the record of what has been decided; save and insofar as on appeal it is affirmed. It is only to the extent of that affirmation, if any, on appeal that the earlier decision stands."* Thus, once a decision has been rendered by the Tribunal, the earlier decision of the Commissioner is rendered sterile, save to the extent that same has been affirmed on appeal. Indeed, in *M.A.R.A.*, Charlton J. makes the point that *"once the notice of appeal initiates a dispute as to any finding of the Refugee Applications Commissioner, by that appeal such finding is neutralised unless it is affirmed by the Refugee Appeals Tribunal".* Thereafter, the only decision then in being is the Tribunal's decision which may itself be challenged by an applicant on judicial review.

126. In all of those circumstances, I find nothing in *Diouf* to support the applicant's central premise that the jurisprudence of the Irish courts limiting access to judicial review of the decision of the Refugee Applications Commissioner breaches the applicant's right to an effective remedy under Art. 39 of the Directive and Art. 47 of the EU Charter.

127. Counsel for the applicant also makes what it appears to be a supplementary argument. He asserts that while in *HID v. Refugee Applications Commissioner* (C- 175/11) the ECJ found an appeal to the Tribunal from the Commissioner to be an effective remedy, it does not appear to be the case that when so finding the ECJ was apprised of the judge-made limitations imposed on judicial review of a decision of the Refugee Applications Commissioner.

128. Save what is set out in the judgment in *HID*, this court does not know what was argued before the Court of Justice. However, insofar as it is suggested that the ECJ might somehow have arrived at a different conclusion had the restrictions on judicial review of the decisions of the Refugee Applications Commissioner been made known to it, for the reasons set out above, this court finds no merit in the suggestion canvassed by counsel for the applicant. It is now well established that the statutory procedure in place for the determination of asylum applications in this State has been upheld by the ECJ in *HID* as being compatible with Article 39 of the Procedures Directive.

Summary
I am not satisfied that the applicant has established errors of jurisdiction or the existence of errors of such weight or magnitude that injustice would be caused if the alleged errors in the Commissioner's decision were not subject to review at this stage. Accordingly, the application for leave for judicial review is dismissed