

**THE HIGH COURT  
JUDICIAL REVIEW**

**2007 1265 JR**

**BETWEEN**

**A. N. M.**

**APPLICANT**

**AND**

**THE REFUGEE APPEALS TRIBUNAL**

**RESPONDENT**

**AND**

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL**

**NOTICE PARTIES**

**JUDGMENT OF MS. JUSTICE M. H. CLARK, delivered on the 16th day of July, 2009.**

1. This is an application for leave to apply for judicial review of the decision of the Refugee Appeals Tribunal (RAT), dated the 31st August, 2007, to affirm the earlier recommendation of the Office of the Refugee Applications Commissioner (ORAC) that the applicant should not be granted a declaration of refugee status. Mr. Hugo Hynes S.C. with Mr. James Healy B.L. appeared for the applicant and Ms. Siobhán Stack B.L. appeared for the respondent. The hearing took place at the Kings Inns, Court No. 1, on the 31st March, 2009.
2. The essential question in this case is whether the RAT decision should be quashed by reason of the Tribunal Member's alleged refusal to allow the applicant's legal representative to cross-examine the Presenting Officer at the oral hearing.

**The Asylum Application**

3. The applicant claims to be a national of the Democratic Republic of Congo. He made an application for asylum in the State in 2005. In the context of the issue to be determined in these proceedings the only aspect of the applicant's biographical details that is of any relevance is that he says that his first language is Lingala and he also speaks French. He attended for a s. 11 interview, which was conducted in French. A s. 13 report was compiled in July, 2006 in which a negative recommendation was made. The applicant appealed to the RAT. An oral appeal hearing took place at which the applicant was represented by Mr. James Healy B.L. and a member of the Refugee Legal Service (RLS) and at which a Lingala interpreter was present. An attendance note of the hearing taken by the applicant's RLS caseworker is exhibited in these proceedings. The Tribunal Member made a negative decision on the 31st August, 2007.

**Extension of Time**

4. The applicant was notified of the RAT decision by letter dated the 31st August, 2007. These proceedings issued on the 3rd October, 2007. The applicant was therefore outside of the fourteen day period allowed by s. 5(2) of the Illegal Immigrants (Trafficking) Act 2000 and has applied for an extension of time. In his grounding affidavit the applicant seeks to explain the day by day reason of the requirement to obtain a private solicitor to act on his solicitor, his poor financial situation and his difficulty in finding a solicitor who was familiar with asylum law.

**The Issue in the Case**

5. The issue in these proceedings arises out of paragraph 28 of the applicant's grounding affidavit:-

"I say and am so advised and it is a matter of serious concern to me that the Respondent, on request of my legal representative, refused him permission to be allowed to put any questions to or cross examine the Presenting Officer, who was representing the Commissioner at my hearing, in relation to my asylum application."

6. Mr. Hynes S.C., counsel for the applicant, argued that in refusing permission to cross examine the Presenting Officer, the Tribunal Member erred in law and acted in breach of natural and constitutional justice and in breach of Regulation 9(1) (e) of the *Refugee Act 1996 (Appeals) Regulations 2003* (S.I. No. 424 of 2003).

7. Ms. Stack B.L., counsel for the respondent, relied on *Towanuo (a minor) (J.T.) v. The Refugee Appeals Tribunal* [2009] I.E.H.C. 156 (31st March, 2009) in which this Court found that no breach of fair procedures resulted from the Tribunal Member's statement at the oral hearing that it was unusual for the applicant to seek to cross-examine the Presenting Officer. She argued that, as the Presenting Officer at the oral appeal hearing was not the same person as the authorised ORAC officer who conducted the s. 11 interview or who compiled the s. 13 report, it is difficult to see what information the Presenting Officer could have provided over and above the documentation that was before the Tribunal Member. Counsel argued that there is no factual basis for the applicant's submission that the Presenting Officer could have had relevant evidence such that a refusal to permit the applicant to cross-examine her could amount to a breach of fair procedures. Reliance was placed on *A.M.R. v. The Refugee Appeals Tribunal* (Unreported, High Court, McGovern J., 25th April, 2008) where it was held that the refusal of permission to call a witness whose evidence did not appear to be relevant to the issues before the Tribunal was not in breach of fair procedures.

8. In addition Ms. Stack noted that the attendance note compiled by the RLS caseworker does not record that any application to cross examine was made or refused. She also pointed out that the applicant's grounding affidavit does not contain any averment that its contents have been translated from French or Lingala and no affidavit of translation has been filed. She pointed out that no affidavit has been sworn by the Lingala interpreter to the effect that submissions made by counsel at the oral hearing were translated to the applicant. She submitted that in the absence of such an affidavit, it is not open to the applicant to swear an affidavit stating

what occurred at the RAT oral hearing. She objected to the clarification of the matter by way of a further affidavit, as was suggested by counsel for the applicant, on the basis that these proceedings were initiated in 2007 and to put in an additional affidavit at this stage, some two years later, would breach the fourteen day time-limit set out in s. 5 of the *Illegal Immigrants (Trafficking) Act 2000*. In that regard she relied on *Muresan v. The Refugee Appeals Tribunal* (Unreported, High Court, Finlay Geoghegan J., 8th October, 2003).

9. In reply Mr. Hynes argued that this case is distinguishable on the facts from the case of *Towanuo* on the basis that no comment of the nature made in *Towanuo* was made in this case.

### **The Court's Assessment**

10. This is one of three cases that have come before this Court during one legal term on the issue of the cross-examination of a Presenting Officer at the oral hearing before the Tribunal Member. The Court refused leave in the case of *Towanuo (a minor) (J.T.) v. The Refugee Appeals Tribunal* [2009] I.E.H.C. 156 (31st March, 2009). In the case of *Emmanuel (O.H.E.) v. The Refugee Appeals Tribunal* (Unreported, High Court, Clark J., 7th July, 2009), when it became apparent that the issue was to arise frequently, the Court granted leave on the basis that the matter should be fully argued. The applicants ultimately failed at the substantive stage in *Emmanuel*. It is in that context that the Court now considers the arguments raised in this case.

11. This being an application to which section 5(2) of the *Illegal Immigrants (Trafficking) Act 2000* applies, the applicants must show substantial grounds for the contention that the decision ought to be quashed. As is now well established, this means that grounds must be shown that are reasonable, arguable and weighty, as opposed to trivial or tenuous.

12. The applicant has not established any grounds on which leave could be granted in this case. There is no reliable evidence before the Court to allow it to determine that an application to cross-examine was ever made or refused at the oral hearing. The only evidence that has been adduced in support of the contention that an application was made and refused is the applicant's grounding affidavit which states that he was "advised" that an application to cross-examine was made. The Court afforded the applicant an opportunity to have an affidavit sworn by the RLS caseworker who attended the hearing and compiled the attendance note, clarifying what occurred at the hearing, but the Court was informed that the applicant's legal representatives have been unable to contact the caseworker and that no such affidavit would be forthcoming despite two adjournments being granted for that purpose.

13. A further difficulty is that the applicant's evidence was that he speaks Lingala and French - a French interpreter was present at the s. 11 interview and a Lingala interpreter was present at the RAT hearing. The applicant's grounding affidavit however is in English and it contains no averment to the effect that it has been translated. No affidavit of translation is before the Court. Moreover, no affidavit has been sworn by the Lingala interpreter who was present at the oral hearing to the effect that the request to cross examine made by counsel for the applicant was translated to him. In the circumstances it is not at all clear that the applicant had the capacity to swear the affidavit grounding this application or to make the averment upon which the submissions made are entirely reliant.

14. Even accepting that such a request was made and refused there is no evidence that Mr. Healy B.L., who acted for the applicant at the oral appeal hearing, made any submission to the Tribunal Member as to what might be achieved from the cross examination. It is clear from the Notice of Appeal that the applicant did not seek to call the Commissioner or his representative as a witness in accordance with the Regulations which provide for procedures to be adopted during RAT hearings.

15. As this Court held at para. 29 in *Emmanuel (O.H.E.) v. The Refugee Appeals Tribunal* (Unreported, High Court, Clark J., 7th July, 2009),

"The extent to which the Tribunal Member allows questioning must be a matter left to each Tribunal Member to ensure that order is maintained, that fairness and justice are applied and that the object of the appeal is achieved. The Tribunal is entitled to refuse irrelevant or repetitive questioning or, as occurred in this case, an attempt to cross examine a person who was not a witness. The Court is of the view that the Tribunal Member was, as the decision maker in charge of the conduct of the appeal, quite within his powers to refuse the cross examination of someone who had not been listed as a possible witness or directed by the Tribunal to attend as a witness in accordance with the Regulations of 2003. A fortiori in this case, he was perfectly within his powers to refuse to permit cross examination of the Presenting Officer who represented the Commissioner, who did not give evidence at the hearing and who in any event was simply not a witness."

16. The Presenting Officer in this case, as in *Emmanuel*, was not the same person as the authorised ORAC officer who conducted the s. 11 interview and compiled the s.13 report. She was not called as a witness and she gave no direct evidence and the issue of cross examination does not arise. As was noted in *Emmanuel*, her function was to ensure that the Tribunal Member is fully aware of the Commissioner's reasons for recommending that an applicant should not be granted refugee status. She was representing the Commissioner at the hearing and was in effect a *legitimus contradictor*. In that capacity it would not have been functional for her to give direct evidence or to be cross examined.

17. I am not satisfied that the applicant was in any prejudiced by the Tribunal Member's alleged refusal to allow him to cross-examine the Presenting Officer. His appeal failed on the basis of the credibility issues identified in the RAT decision. The Tribunal Member described the reasons for which he had "considerable hesitancy" in believing the applicant. The applicant did not seek leave to challenge the decision of the Tribunal Member; instead he argued that the conduct of the oral hearing was flawed. The Court is not satisfied that any grounds have been shown for that contention and accordingly, I refuse leave. In the circumstances the issue of the extension of time does not fall to be determined.