

**THE HIGH COURT**  
**JUDICIAL REVIEW**

**2008 1074 JR**

**BETWEEN**

**H. P. O.**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND THE REFUGEE APPLICATIONS COMMISSIONER**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Cooke delivered the 11th day of March 2011**

1. This is an application for leave to apply for judicial review of a report dated the 2<sup>nd</sup> September, 2008, made by the second named respondent under s. 13 of the Refugee Act 1996, (as amended) on the applicant's application for asylum.

2. An appeal has been lodged against that report and its negative recommendation to the Refugee Appeals Tribunal under s. 15 of the Act, but no further step has been taken in relation to it pending the outcome of the present application. In these circumstances it is well settled that the Court has discretion to decline to entertain this application and to leave the applicant to the statutory appeal under the Act. In this case the Court has decided not to exercise that discretion but to determine the issues which have been raised in this application for two reasons. First, there has been a long lapse of time since the report was made by the Commissioner and it is desirable that asylum procedures should be concluded as expeditiously as possible. Secondly, having regard to the fact that there will be no oral hearing in the available appeal and the fact that the report under s. 13 turned primarily upon issues of credibility, it is desirable to clarify for the Tribunal the questions that have been sought to be raised in respect of those findings on the present application.

3. The applicant claims to be a national of Malaysia who arrived in the State in 2005. He did not, however, make any application for asylum at that point and it was only when he was detained by the gardai in 2007, that he did so.

4. The applicant claims that he was and is a practising Buddhist and that as such he suffered threats of persecution from members of the majority Islamic community in Malaysia as a result of which he was forced to flee. He claimed to be in fear for his life if returned to Malaysia.

5. In Section 3.2.2 of the report, the authorised officers identified a number of specific matters arising out of the claim and the answers given by the applicant during the course of his interview as the basis for finding that his claim was seriously lacking in credibility and that he had made out no well founded fear of persecution.

6. The particular items thus identified were as follows:

(1) The applicant claimed that he had been attacked on a number of occasions in Malaysia and that the attacks occurred in 2003, 2004 and 2005. In the asylum questionnaire he claimed to have been attacked and beaten but in the interview he stated, on the other hand, that he was never beaten: he had nearly been beaten up and had run away.

(2) The applicant stated that he had been attacked twice, but when it was pointed out to him that he had earlier said he was attacked on separate occasions in 2003, 2004 and 2005, he stated that it happened twice a year.

(3) In his s. 8 interview he had claimed to have left Malaysia in 2000, but in the questionnaire he said it was in 2005. He thus claimed to have suffered persecution at a time which he later stated was at a point when he was not in the country.

(4) He admitted that he had been in the United Kingdom, but no mention of this had been made in his questionnaire. He said that he thought that Ireland was part of the United Kingdom. The officers considered that as he had claimed to have been in Ireland since May 2005, it was not objectively credible that he was unaware that Ireland was a separate State.

(5) He claimed to have arrived in the State in May 2005, but had not applied for asylum until June 2007. When questioned on this he said he wanted to get a job first and work for a while. He had applied for asylum only when detained by the gardai, while attempting to cross the border between the State and Northern Ireland. The officers considered that this was not the conduct of someone with a genuine fear of persecution.

7. The first and primary ground advanced in argument at the hearing was that the report was flawed in that the officers failed to make any determination as to whether the applicant was a practising Buddhist. It was submitted that it was incumbent on the Commissioner to inquire as to whether applicant was of the religion he claimed and accordingly his "core claim" had not been considered.

8. In the judgment of the Court no substantial ground is made out in this regard. The report notes at the outset the applicant's claim that he is a Buddhist and that his fear of persecution was based on the attacks and threats by the Islamic majority community which he said he had suffered. What is significant in construing the effect of the report is that the officers make no finding to the effect that he is not a Buddhist. In the absence of such finding the report must be read as accepting that the applicant is indeed a practitioner in that religion. The fallacy that lies behind this ground is the proposition that, if it is accepted that an asylum seeker is a member of a particular minority group, the claim will be well founded if country of origin information demonstrates that such persons

are likely to be threatened or attacked by some other group in the country of origin.

9. The mere fact that particular types of conduct can occur does not of itself establish the existence of persecution on a Convention ground. The issue before the decision makers in the asylum process is not just whether the persecution claimed could possibly have happened, but whether, when reliance is placed upon past acts of persecution, the particular events claimed did in fact occur and did involve the harm complained of by the individual concerned.

10. In this case the authorised officers have set out in detail, as indicated above, a number of specific issues arising out of the way in which the applicant has made his claim, the content of his interviews and the information given in the questionnaire, as demonstrating that the applicant could not be believed in what he said about having suffered particular attacks at given times. Thus, the s. 13 report can only be read as containing a series of cogent conclusions to the effect that what the applicant claimed to have happened never did happen. Having regard to the nature of the discrepancies and contradictions and the subsequent conduct of the applicant following arrival in the State, it is abundantly clear that the authorised officers had a sound basis upon which to reach those conclusions. The conclusions were, contrary to the submission made, logical and rational if not indeed inevitable.

11. It has been submitted on behalf of the applicant that in the absence of a specific finding in the report on the issue as to whether the applicant's claim to be a practising Buddhist is accepted or not, the applicant is unable to pursue a full appeal given that there is not oral hearing in this case. In the judgment of the Court, this cannot be so. The applicant is entitled to proceed on the basis that, having asserted his claim to be a member of that religion, he can treat that element in the claim as accepted in the absence of any contradictory finding in that regard in the s. 13 report. On that basis any issue before the Tribunal as to credibility will be whether there still exists a real possibility that, if repatriated to Malaysia, the applicant will face a risk of the persecution claimed. The fact that the applicant has been disbelieved in respect of the attempts he made to claim particular incidents of persecution in the past, does not preclude his seeking to persuade the Tribunal by reference to appropriate and up to date country of origin information that the persecution of Buddhists by the Islamic community in Malaysia has now become so pervasive as to raise the inevitability of his being attacked if he is returned.

12. The next argument raised was directed at the fact that the interview under s. 11 of the Act was conducted by one officer of the Commissioner, whereas the report under s. 13 was compiled, written and signed by two other officers who had not been present at the s. 11 interview.

13. Again, the Court is satisfied that no substantial ground arises under this heading. There is no such requirement in the provisions of the 1996 Act. Under s. 8 of the Act, an asylum seeker is initially interviewed by an immigration officer upon arrival in the State and prior to making a claim. Under s. 11, when the application is received by the Commissioner he is required to direct one or more authorised officers to interview the applicant and furnish him with a report in relation to the interview. At the conclusion of the investigation of the asylum claim, it is the Commissioner who is required under s. 13(1) to set out the findings on the investigation in a report and to make a recommendation as to whether the applicant should be declared to be a refugee or not. Thus, the report that is made under s. 13 is not the report which the interviewing officers furnish to the Commissioner under section 11(1). The latter is the report on the interview. The s. 13 report will contain all of the results of the investigation including, possibly, the results of other inquiries and the consultation of country of origin information.

14. Quite apart from the absence of any statutory requirement that the s. 13 report be signed by the officers who conducted the interview, this is not a case in which the report relied upon the demeanour of the applicant in the course of the interview as the basis for considering there was a lack of credibility. In this case the findings on credibility are directly and exclusively based upon clear contradictions and discrepancies in the claims made and the history given as well as upon the conduct of the applicant following his arrival in the State and/or the United Kingdom. In this regard the Court agrees with the distinction made by Birmingham J. in *Konadu v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, 11<sup>th</sup> April, 2008) and Irvine J. in *Azeke v. Refugee Applications Commissioner* (Unreported, High Court, 3<sup>rd</sup> December, 2008).

15. The Court is, accordingly, satisfied that none of the grounds advanced in support of this application for leave have been made out as raising a substantial ground as to why the s. 13 report might require to be quashed. The application for leave is therefore refused.