Neutral Citation: [2010] IEHC 127

THE HIGH COURT

JUDICIAL REVIEW

2008 814 JR

BETWEEN

M.Y.G.

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of Mr. Justice Herbert delivered on the 28th day of April, 2010.

In Camara v. the Minister for Justice, Equality and Law Reform (Unreported, High Court, 26th July, 2000) Kelly J. adopted the statement of Prof. Guy S. Goodman-Gill, (The Refugee in International Law: Oxford University Press: 2nd Ed. 1988 p. 354) that in assessing credibility, simply considered there are just two issues: First, could the applicant's story have happened or could his or her apprehensions come to pass, on their own terms, given what we know from available country of origin information? Secondly, is the applicant personally believable?

In the Report and Recommendation made pursuant to the provisions of s 13(1) of the Refugee Act 1996, (as amended), the second named respondent accepted that the applicant was a Chinese Citizen. The second named respondent accepted that the ill-treatment which the applicant claimed had been inflicted upon him while he was in the custody of the police in his country of origin could be deemed to be of a persecutory nature. The second named respondent also found that if the applicant's claim of a fear of persecution had been deemed to well-founded it would have followed that the protection of his state of origin not have been available to him.

However, the second named respondent found that there were a number of issues in the applicant's story recorded, in the Application for Refugee Status Questionnaire, completed by him in Chinese, and in the Notes of his Interview, held pursuant to the provisions of s. 11 of the Refugee Act 1996 (as amended), conducted in Mandarin through an interpreter, which tended to undermine the credibility and/or the substance of his case for a declaration of refugee status.

> *These issues were identified by the second named respondent as follows:-*
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> *"The applicant stated that he became Vice-Director of "X" Printing in March 2003. He said that his role as Vice-Director included repairing the printing machines and 'sending out products (see Q. 34 Interview Record, p. 7). He stated ten staff were employed by his company. When asked about the make and the model of the machines he repaired, he said 'The brand is Jiefang' (Q. 30 Interview Record, p. 6). It is reasonable to expect any competent mechanic to be more specific; for example, he should, at least, know the exact make and model of the machines he repaired.*
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> *The applicant has claimed that the police came to his place of business on March 13th 2004, and discovered pro-democracy 'Bibles' on his premises (see his reply to Question 21 Questionnaire). It would seem from his description that these publications were not real Bibles but material which the authorities might regard as politically-inspired anti-government propaganda. In any event, the applicant's claim is that he was completely unaware that these 'Bibles' were being printed on his premises. As Vice-Director of this company, whose duties allegedly extended to repairing the printing machines and supplying products to his customers, it is very difficult to believe that he did not know that such potentially dangerous material was being produced on his premises.*
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> *The applicant stated that he is a Christian. Although he claims to have attended church both in China and Ireland, he was unable to name the church he attended in Ireland. The applicant went on to say 'I'm not really interested in the Christian religion, if my friends go I go' (Q. 60 Interview Record Sheet 11). He did not appear to know much about the Christian commandments or sacraments (Qs. 61 and 62 Interview) which would suggest that, if he has any interest in one of the Christian religions, his knowledge and commitment to the faith is non-existent. The applicant stated that he arrived in Ireland on October 7th 2004. However, he did not apply for refugee status until May 6th 2008 and the only reason he did so then was because he was arrested for residing illegally in the State. When asked for an explanation for the inordinate delay in applying for asylum the applicant stated 'Because I got some information that someone applied and wasn't successful and was sent back to China so I was afraid' (Q. 27 Interview Record Sheet 6). This explanation is not only unacceptable it is unbelievable."*

In relation to this latter conclusion, the second named respondent expressly referred to the provision of s. 11B(d) of the Refugee Act 1996, as inserted by s. 7(f) of the Immigration Act 2003, which provides that in assessing the credibility of an applicant, where the application for asylum was made other than at the frontiers of the State the second named respondent shall (the emphasis is mine) have regard to whether the applicant had provided a reasonable explanation to show why he did not claim asylum immediately on arriving at the frontiers of the State.

In my judgment it is for the trier of fact to determine, on the evidence whether or not the explanation offered by the applicant is a "reasonable explanation". He or she is not bound by the applicant's belief, however genuinely held, that it is reasonable. I am satisfied that the second named respondent dealt properly and sufficiently with this matter.

The second named respondent went on to make a finding pursuant to the provisions of s. 13(6)(c) of the Refugee Act 1996, (as replaced by s. 7(h) of the Immigration Act 2003), that the applicant, without reasonable cause, failed to make an application for asylum as soon as reasonably practicable after his arrival in this State. It is provided by s. 13(5) of the Refugee Act 1996, (as

amended), that where a Report pursuant to subsection (1) of the Section includes an recommendation, - as in the instant case, - that the applicant should not be declared to be a refugee, and includes a finding pursuant to subsection (6)(c), any appeal to the Refugee Appeals Tribunal will be determined without an oral hearing.

Senior counsel for the applicant submitted that the second named respondent failed to observe fair procedures in arriving at the conclusion that the credibility of the applicant was undermined for the four reasons given, because it was clear on the face of the s. 13(1) Report that the assessment of credibility had no been made in the context of country of origin information and the applicant had not been invited to explain these indicted contradictions in his story.

In response counsel for the respondents relied upon the decisions of this Court in Imafu v The Minister for Justice, Equality and Law Reform and Ors. [2005] I.E.H.C. 416, per. Peart J. and J.X. v Refugee Appeals Tribunal (Unreported, High Court, 2nd June, 2005), per. Dunne J. Echoing what was held by Cooke J. in Olunloyo v. Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal (Unreported, High Court, 6th November, 2009), Counsel for the respondents submitted that neither the provisions of the Refugee Act 1996, (as amended) or the provisions of the European Community (Eligibility for Protection) Regulations 2006,

(S.I. 518/2006), as both have been interpreted by the Courts, require country of origin information to be consulted for its own sake. Where an applicant has been found to be not credible, based upon inherent implausibilities in his personal story, general information of conditions in his country of origin is unlikely to explain away these specific implausibilities.

When invited by the Court, Senior Counsel for the applicant accepted she could not say how the country of origin information might explain away the inconsistencies and implausibilities in the applicant's story identified by the second named respondent as the basis for the finding that the applicant was not credible. She submitted however, that there was a possibility that it might and therefore, ought to have been considered by the second named respondent. Senior Counsel for the applicant also sought to distinguish the decision of this Court in the Imafu case and in the J.X. case, on the grounds that in those cases the court was concerned with a decision of the Refugee Appeals Tribunal and not a decision of the Refugee Applications Commissioner and, the latter has an investigative role, arising from the provisions of s. 11 of the Refugee Act 1996 (as amended), but the former does not.

In Olunloyo v. The Minister for Justice, Equality and Law Reform and The Refugee Applications Commissioner (above cited) Cooke J. at para. 18 of his judgment held that the Refugee Appeals Tribunal in conducting an appeal, is not relieved of an investigative role, at least so far as further investigation or inquiry may be necessary in a given case and, that this is reflected in the provisions of s. 16(6) of the Refugee Act 1996 (as substituted). In addition, I am satisfied that the qualification of what has become known as the "Horvath Principle", that the probative value of evidence in an asylum case must be evaluated in the light of what is know about the conditions in the claimant's country of origin, [Horvath v. The Secretary of State for the Home Department [2000] 3 A.E.R. 577], by Peart J. in the Imafu case (above cited), was intended to apply whether the decider of fact was the Refugee Applications Commissioner or the Refugee Appeals Tribunal. It would, I believe, be a somewhat extraordinary result if the Refugee Appeals Tribunal on an appeal to it, could decide an issue of credibility on one basis while the Refugee Applications Commissioner was obliged to determine the same issue on a wholly different basis.

Having regard to the decisions of this Court in Nguedjdo v. The Refugee Appeals Tribunal (Unreported, High Court, White J., 23rd July, 2003), Idiakheua v. The Minister for Justice, Equality and Law Reform (Unreported, High Court, Clarke J., 10th May, 2005), and Moyosola v. The Refugee Applications Commissioner and Ors. [2005] I.E.H.C. 218 per. Clarke J., I am satisfied that the appropriate test to be applied in considering whether an inquisitorial body, such as the second named respondent, had complied with fair procedures and constitutional justice is to ask whether a person who may be adversely affected by a decision of such a body is afforded a reasonable opportunity of knowing and addressing the matters which may be likely to effect the judgment of that body against his or her interests.

Having carefully considered the citations from the Questionnaire and from the Record of the applicant's Interview referred to by the second named respondent in reaching each of the four conclusions upon which the finding of lack of credibility is based, I am fully satisfied that each of these matters was comprehensively addressed and, the four identified inconsistencies and implausibilities in his story were clearly indicated to the applicant and he was given a full opportunity of correcting or of explaining them.

The court is not satisfied that the applicant has established substantial grounds for contending that the decision and recommendation of the second named respondent is invalid or ought to be quashed. This being so, the issue of whether substantial grounds are shown for contending that the statutory right of appeal from the decision and recommendation of the second named respondent to the Refugee Appeals Tribunal does not afford the applicant a sufficient alternative remedy to certiorari by way of judicial review, does not require to be addressed.

It was submitted by Senior Counsel for the applicant that the decision of the second named respondent to make a finding, pursuant to the provisions of s. 13(6)(c) of the Refugee Act 1996, (as amended) which, by reason of the provisions of s. 13(5) of that Act had the effect of depriving the applicant of an oral hearing of his appeal before the Refugee Appeals Tribunal, infringed the applicant's right to fair procedures and constitutional justice in circumstances where the second named respondent had previously made a negative finding against the applicant on grounds of lack of personal credibility. Senior Counsel for the applicant submitted, that this decision had the effect of depriving the applicant of an effective appeal because an issue of lack of credibility could not be properly addressed other than by oral testimony. Senior Counsel for the applicant referred to the decision of this Court in Moyosola v. The Refugee Applications Commissioner and Ors. [2005] I.E.H.C. 218, per. Clarke J. and A.D. v. The Refugee Applications Commissioner and Ors. (Ex tempore, Unreported, Cooke J., 27th January, 2009).

Counsel for the respondents referred to the decisions of the Supreme Court in Stefan v. The Minister for Justice, Equality and Law Reform and Ors [2001]

4 I.R. 205 and V.Z. v. The Minister for Justice, Equality and Law Reform and Ors [2002] 1 I.R. 135. Counsel for the respondents submitted that there was no general right to an oral hearing on any appeal. In all cases the onus lay on the applicant to satisfy the Court that on the circumstances of the individual case an oral hearing was necessary in order to do justice. The applicant, counsel submitted, had failed to advance any rational basis for contending that an oral hearing was necessary in the instant case.

In A.D. v. The Refugee Applications Commissioner and Ors., (Ex tempore, Unreported, High Court, 27th January, 2009), Cooke J. reviewed a large number of decisions of this Court and of the Supreme Court on the issue of the availability of an alternative remedy by way of a statutory appeal and, its bearing upon the exercise of its discretion by this Court to grant relief by way of judicial review, both generally and in asylum cases in particular, including the following: State (Abenglen Properties Limited) v. Dublin Corporation [1984] I.R. 381; McGoldrick v. An Bord Pleanála [1997] 1 I.R. 497; Gill v. Connellan [1988] I.L.R.M. 448; Buckley v. Kirby [2000] 3 I.R. 431; Stefan v. The Minister for Justice, Equality and Law Reform [2001] 4 I.R. 203; V.Z v. The Minister for Justice, Equality and Law

Reform [2002]

2 I.R. 135; Koyode v. The Refugee Applications Commissioner [2005[I.E.H.C. 172 and B.N.N. v. The Minister for Justice, Equality and Law Reform (Unreported, High Court, Hedigan J., 9th October, 2008).

At paragraph 19 of his judgment in the A.D. case, the learned judge held that one of the main principles distilled from these cases is that the fact that an appeal does not provide for an oral hearing while relevant, is not in itself a ground for granting relief. An oral hearing is not always an essential ingredient of a fair appeal. In this respect I believe that it is salutary to recall what was held by the Supreme Court in V.Z. v. The Minister for Justice, Equality and Law Reform and Ors. [2002] 1 I.R. 135. Delivering the judgment of the Supreme Court McGuinness J. held at pp. 161/2 as follows:-

> *"I now turn to the second appeal. Here I would accept the submission on behalf of the Respondents that there is no authority to establish that an oral hearing on appeal is necessary in all cases. The Applicant is not in the position of an accused person facing prosecution. There are no witnesses against him. He is not in a position to cross-examine the assessors of his claim and it is difficult to see how in these circumstances a right to cross-examine is relevant. He may certainly wish to expand on either his own evidence or independent evidence concerning the conditions prevailing in his country of origin but it is open to him to provide this information in writing. His appeal was drafted on his own instructions by his solicitor and did not challenge the factual matters set out in the papers provided to him.*
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> Hogan and Morgan in Administrative Law in Ireland (3rd Ed) at p. 556 discuss the right to an oral hearing, the right to summon witnesses and the right to cross-examine. They state:-
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> 'Plainly whilst these issues may need to be considered independently, there is often a substantial connection between them. In any case, with each of them, as with other aspects of the audi alteram partem rule it may be misleading to speak of a 'right' since in such an amorphous area, entitlement to the advantage sought will depend on all the circumstances of the case. On the question of whether they apply, deSmith states:
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> 'A fair 'hearing' does not necessarily mean that there must be an opportunity to be heard orally. In some situations it is sufficient if written representations are considered."
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> The authors draw attention to the comments of Keane J in The State (Williams) v. Army Pension Board [1981] I.L.R.M. 379 at p. 382:-
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> 'Whether [there must be an oral hearing] in any particular case must depend on the circumstances of that case . . . . the application in the present case was capable of being dealt with fairly . . . . in the manner actually adopted by [the Board]'
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> It should be noted that in these references the authors are dealing with situations where there is no oral hearing even at first instance. Here there has already been an oral hearing at first instance.
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> The Hope Hanlan letter itself deals with the matter of appeals in the context of the accelerated procedure and provides for an appeal in writing. An oral appeal is, therefore, not considered necessary in the system set up by agreement between the UNHCR and the first respondent.
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> The High Court Judge held that the absence of provision for an oral hearing of the appeal from a decision that an application for refugee status is manifestly unfounded did not infringe the right of an applicant for refugee status to natural and constitutional justice. In this he was, in my view, correct.
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> I would also dismiss the applicant's second appeal."

In this respect the decision of Smyth J. in Akinyemi v. The Minister for Justice, Equality and Law Reform (Unreported, High Court, 2nd October, 2002), is also relevant.

It is essential to bear in mind in considering these authorities that the courts where they are concerned, with deciding whether to grant certiorari by way of judicial review or, to refuse that relief on the basis that an available statutory appeal afforded an effective alternative remedy. In the instant case however, the court is not satisfied that the applicant has established substantial grounds for contending that relief by way of certiorari should be granted, so that the issue of alternative relief and whether or not it is adequate does not arise for decision.

In my judgment, the onus is on the applicant to satisfy this Court that there are substantial grounds for contending that the advantage of an oral hearing before the Refugee Appeals Tribunal is necessary if fair procedures and the dictates of constitutional justice are to be observed. Unless this Court is satisfied that there are such substantial grounds, the question of whether the second named respondent, as a matter of fair procedures, should not have deprived the applicant of such an oral hearing before the Refugee Appeals Tribunal by the finding that the applicant was not personally credible does not arise. Certiorari is a discretionary remedy and the Court should not permit an application for this great remedy to be used in order to determine a moot.

The Court is not satisfied that the applicant in the instant case has raised substantial grounds for contending that an oral hearing rather than written representations is necessary in order to ensure fair procedures and to comply with the principles of natural and constitutional justice. The applicant has already had a full opportunity of giving testimony and of addressing the interviewer's expressed concerns in relation to each of the four matters material to the finding of lack of credibility. On appeal to the Refugee Appeals Tribunal this evidence will be before the Tribunal. The applicant will, in addition, have a full opportunity to make additional statements explaining or expanding on what he has already offered and, may submit entirely new material to the Refugee Appeals Tribunal. The probative value of any such written evidence is not devalued because of the absence of an opportunity to test it by cross examination which is also necessarily excluded by the operation of s. 13(5) and s. 13(6) of the Act of 1996 (as amended). The applicant has not pointed to any special circumstances which could at least arguably render the absence of an oral hearing unjust or unfair, circumstances such as a particular medical condition, identified by Cooke J. in A.D. v. The Refugee Applications Commissioner and Ors. (above cited) or complex issues of nationality identified by Clarke J. in J.G.M. v. The Refugee Applications Commissioner and Ors [2009] I.E.H.C. 352.

It was submitted on behalf of the applicant that the corollary of a finding of lack of credibility by the second named respondent must in the majority of cases be a right to an oral hearing on appeal before the Refugee Appeals Tribunal. In my view the judgment of Clarke J. in Moyosola v. The Refugee Applications Commissioner and Ors. [2005] I.E.H.C. 218, is not, as asserted by the applicant, an

authority for such a proposition. The passages relied upon by the applicant are found at p. 12 of the judgment in that case and are as follows:-

> *"I therefore express no view on the question as to whether the procedures now mandated by s. 13 (as amended) would be inconsistent with the principles of constitutional justice in a case where the report of the RAC made no finding in respect of any of the matters specified in s. 13(6) so that the applicant concerned would have the opportunity to have a full oral hearing before the RAT at a time subsequent to the receipt by them of all of the relevant materials which were likely to be relied on at such a hearing. Nor does it necessarily follow from the view which I have expressed above that the relevant procedures would be inconsistent with the principles of constitutional justice in cases where the view taken by the RAC so as to bring the application within the ambit of s. 13(6) was not one based upon the credibility of the applicant but rather was based on, for example, a finding under*
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> *s. 13(6)(d) that the applicant had lodged a prior application in a Geneva Convention country or that the factual grounds put forward by the applicant concerned were not such that even if accepted same would give rise to a finding consistent with the granting of refugee status. In many such cases the applicant might not be said to be at any impermissibly distinct disadvantage in not having the opportunity to have an oral hearing. Neither might, in all such cases, all of the materials before the RAC be relevant to its determination.*
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> *For the purposes of this case it is only necessary for me to find, as I do, that where a report of the RAC contains a finding in relation to one of the matters specified in s. 13(6) so as to deprive the applicant concerned of an oral appeal in circumstances where that finding is at least in material part influenced by a finding of lack of credibility on the part of the applicant concerned, it is necessary, in accordance with the principles of constitutional justice, that prior to the making of any such recommendation including any such finding the RAC will have afforded the applicant concerned the opportunity to deal with any matters which might influence such adverse credibility findings."*

In my view these reflections of the learned judge on the procedures mandated by s. 13(6) of the Act of 1996, (as amended) are obiter and in any event do not support such a general conclusion as that contended for by the applicant.

Senior counsel for the applicant further relied on the judgment of Cooke J. in A.D. v. The Refugee Applications Commissioner and Ors [2009] I.E.H.C. 77 and in particular p. 5, para. 25 where the learned judge held that:-

> *". . . Thus, it is open to the applicant and his representatives to urge on the Tribunal the need to apply the correct standard of proof, to consider the relevant passages in the UNHCR Handbook, and to properly reconsider the medical evidence. It would include an oral hearing, so it would be possible to insist that the applicant's account be assessed in the light of her distressed medical condition. It was submitted that the applicant was entitled to have her credibility fairly determined at the very outset. That cannot be a ground for requiring certiorari as opposed to a rehearing on appeal. To so hold would be to deprive the oral hearing on appeal of its purpose. Part of that purpose is to permit the member of the Tribunal to hear and see the applicant and, if appropriate, to substitute his or her view of credibility – something the High Court cannot do."*

Undoubtedly, this is part of the purpose of any oral hearing, provided of course that such a hearing is necessary in the particular circumstances of the individual case. But in my view, the learned judge was not deciding that because an oral hearing may serve that purpose it is therefore mandated in every case where the credibility of an applicant for refugee status has become an issue.

In discussing witness assessment by judges, Sir Richard Eggleston in his work, "Evidence, Proof and Probability" (2nd Ed. 1983, Weidenfeld and Nicholson, London) makes the following remarks:-

> *"Observation of witnesses: this will include physical manifestations of truthfulness or mendacity, or of uncertainty and also characteristics observable in the witness box are capable of being tested there (hearing and eyesight, capacity to judge distance or height) . . . ."*

In the case of asylum seekers these observations would have to be tempered by reference to, for example paras. 195 to 202, especially para. 199 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status. It is also important in this context to be mindful of the distinction pointed to by Bermingham J. in Konadu v. The Minister for Justice, Equality and Law Reform and Anor., between a decision based on the manner in which evidence was given and the decision based upon an assessment of the recorded contents of an applicant's s. 11 Interview.

In the instant case the conclusion of the second named respondent that the applicant lacked credibility is based upon four specific identified factual findings arising out of the Questionnaire and the s. 11 Interview. The conclusion is not in any way dependent upon an impression made by the applicant as a narrator of alleged events. The second named respondent found it unbelievable that the applicant:-

> *"(1) As Vice-Director of this small printing operation, with technical training and experience and, with stated responsibility for repairing the printing machines, did not know the make and model of the machines which he claimed to have repaired.*
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> *(2) As Vice-Director with stated responsibility for customer supply did not know what was being printed on the premises and supplied to customers.*
>
> *(3) That a person who professed to be a Christian and who claimed to have attended Christian Churches in China and in this State did not know even the most basic facts about the Christian Religion.*
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> *(4) That even though the applicant was present in this State for three years and seven months, he only sought asylum when arrested and claimed that this was because he had got 'some information' that 'someone applied' and was not successful and had been sent back to China."*

The applicant will have a full opportunity, should he wish to avail of it, of further addressing each of these matters as comprehensively as he wishes in written statements to the Refugee Appeals Tribunal and of submitting such further statements and documents as he or his advisers would consider relevant. The court is satisfied that no substantial ground has been advanced why this could only, or more effectively, be done by way of an oral hearing. For these reasons, the Court is not satisfied that the applicant has demonstrated substantial grounds for contending that the decision and recommendation of the second named

respondent is invalid or ought to be quashed on this s. 13(6)(c) basis.

During the course of the hearing of this application for leave to seek judicial review the applicant moved the court to allow an amendment of his statement of grounds to include the following:-

> *"The applicant's claim for a declaration of refugee status under s. 17(1) of the Refugee Act 1996, (as amended) has not been lawfully determined by means of a procedure which complies with the minimum standards required to be met by Council Directive 2005/85/EC of 1st December, 2005, in that:-*
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> (a) The said procedure deprives the applicant of an effective remedy against the first instance determination of his application for asylum before a court or Tribunal in compliance with the requirements of Ch. V of the said Directive;
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> and;
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> (b) The procedures for the determination of asylum applications provided for the in the Refugee Act 1996 (as amended) and the European Communities (Eligibility for Protection) Regulations 2006, failed to comply with the minimum standards described by Council Directive 2005/85/EC of the 1st December, 2005, by depriving the applicant of an effective remedy against the first instance determination of the application as required by Article 39 of the Directive."

In an affidavit sworn on the 2nd February, 2010, grounding this application the solicitor acting for the applicant stated that leave to seek judicial review on these grounds had been granted by this Court in the case of Dokie (a minor) and Ajibola v. The Refugee Applications Commissioner and Ors, (Unreported, High Court, Cooke J., 19th January, 2010). At paragraphs 4, 5 and 6 of this affidavit, the solicitor for the applicant avers as follows:-

> "(4) I say that the same considerations that were applicable in the above case in regard to the proposed amendment are equally applicable to the within case in that the provisions Council Directive 2005/85/EC of 1st December, 2005, are applicable to the within case as the Application for asylum in this case was made on or about the 6th May, 2008, a date which post-dated the operative date of the said Directive (1st December, 2007).
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> (5) In the circumstances I say that it would be appropriate to allow the proposed amendment sought herein as, in the event of substantive relief being granted in the Dokie case it would be a saving of Court time and possible costs should this matter be the subject of further judicial review proceedings. This is especially so in circumstances where leave has not been granted and the issue before the court is an application for leave. Moreover, it would appear that the case now being made by the applicant is covered by the reliefs already set out in the Notice of Motion.
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> (6) I further say that the Respondents would not be prejudiced by allowing the amendment in the within proceedings and that I notified the Respondents of our intention to apply for the amendment sought by letter dated the 29th January, 2010, (sent by facsimile transmission). I beg to refer to a true copy of the said letter upon which marked with the letter and numbers 'IW 1' I have signed my name prior to the swearing hereof."

The exercise of its jurisdiction of this Court to permit amendment of a Statement Grounding Application for Judicial Review has been considered in very many cases. However, where, as in the instant case, the applicant must demonstrate the existence "substantial grounds" and make the application for leave to seek judicial review within a specified period of time, a stricter approach is adopted than in the general run of cases decided under the provisions of O. 84, r. 23 of the Rules of the Superior Courts. It was held by Laffoy J. in Lelimo v. The Minister for Justice, Equality and Law Reform [2006] 2 I.R. 178 at 184 as follows:-

> *"In M. v. The Minister for Justice, Equality and Law Reform (Unreported, High Court, 8th October, 2003), Finlay Geoghegan J. . . . stated that, if an applicant seeks to amend so as to introduce an entirely new ground of challenge, the intention of s. 5(2) of the Act of 2000 appears to be that he or she must satisfy the High Court that there is good and sufficient reason for extending the period within which such new challenge may be made."*

It was averred at para. 4 of the Grounding Affidavit of the applicant sworn on the 6th July, 2008, that the negative recommendation of the second named respondent was received by him on the 30th June, 2008. By virtue of the provisions of s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000, the time permitted for making an application for leave to apply for judicial review in this instance expired on the 13th July, 2008. The Motion on Notice seeking such leave is dated the 7th July, 2008, and was filed on the 9th July, 2008. The issue of what may amount to good and sufficient reason for extending the fourteen day time limit was addressed by the Supreme Court in Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 I.R. 360 at 393: G.K. v. The Minister for Justice, Equality and Law Reform [2002] 2 I.R. 418; S. v. The Minister for Justice, Equality and Law Reform [2002] 2 I.R. 163 and C.S. and Ors. v. The Minister for Justice, Equality and Law Reform and Ors. [2005] 1 I.R. 343 at 358.

The reasons advanced on behalf of the applicant for seeking this nineteen month extension of time to add this entirely new ground to the existing Statement of Grounds, is that the grounds upon which leave to seek judicial review maybe granted have yet to be determined by the court, that the respondents would not be prejudiced by allowing the proposed amendment and, that there would be a saving in Court time and costs should the substantive application in the Dokie case ultimately prove successful, as the same considerations apply.

The Court will not allow the proposed amendment for the following treasons.

There has been a delay of nineteen months in bringing this application from the date when the time allowed by s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000, expired on the 13th July, 2008. I am not satisfied that good and sufficient reason has been shown for extending the time over such a period. Opportunity and coincidence do not in my judgment constitute good and sufficient reasons. The application is not based upon the discovery of material facts which despite the exercise of all due diligence and care could not have been known or discovered at the date of the motion seeking leave to apply for judicial review, which is the 7th July, 2008. The application is posited upon a legal argument the basis for which has existed since Council Directive 2005/85/EC of 1st December, 2005, became operational on 1st December, 2007, and, the applicant has had the services of solicitors and counsel from at least the 7th July, 2008.

In my judgment, to permit the proposed amendment would be to defeat and circumvent the clear legislative policy expressed in s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000. It would also be a breach of the principle that there should be an end to litigation. If an amendment of the type sought were to be permitted every time leave was granted in some other application on some

consideration which it could be claimed was also applicable to the instant case, judicial review applications would become interminable and the great remedy for an alleged abuse of due process would itself become such an abuse.

Contrary to what is submitted on behalf of the applicant, I find that there would be prejudice to the first named respondent, as representative of the State in these proceedings, if the proposed amendment were permitted. In the present case the Court has already held that it is not satisfied that there are substantial grounds for contending that the decision and recommendation of the second named respondent is invalid or ought to be quashed. Additionally, there is general prejudice to the State, represented by the first named respondent, in that the asylum process would be even further prolonged. This applicant's sole basis for being permitted to remain in this State is his connection with the asylum seeking process. In the case of the applicant in the instant case the Court is entitled to take further into account the fact that he was for three years and seven months illegally in this State before claiming asylum here and claimed it only when arrested by An Garda Síochána.

The refusal of this application to amend the Statement of Grounds will not cause irremediable injustice to the applicant. Should the Dokie case proceed to a substantive hearing and ultimately prove successful, it remains open to the applicant in the present case to apply to the first named respondent under the provisions of

s. 17(7) of the Refugee Act 1996, (as amended), for consent to make a new application seeking refugee status. Alternatively, the first named respondent might, in such circumstances exercise the discretion vested in him by the provisions of

s. 17(1)(b) of the Refugee Act 1996, (as amended), and give the applicant a declaration that he is a refugee.

Since the decision of this Court in Dokie was only to give leave to seek judicial review, the submission that the proposed amendment in the instant case would have the beneficial effect of saving Court time and saving legal costs is based on mere speculation, and the converse is equally true.

The court will therefore refuse this application for leave to seek judicial review and to amend the Statement required to Ground Application for Judicial Review.