Neutral Citation Number: [2005] IEHC 470

THE HIGH COURT
JUDICIAL REVIEW

[2004 No: 531/JR]

IN THE MATTER OF THE REFUGEE ACT 1996, AND
THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000

BETWEEN

IDERA LYDIA OKEDAIRO

APPLICANT

AND
REFUGEE APPEALS TRIBUNAL (BERNADETTE CRONIN MEMBER) AND
MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

RESPONDENTS

Judgment of Mr.Justice John McMenamin dated the 28th day of July, 2005.

1. The applicant is these proceedings seeks leave to apply for an order of certiorari of the decision of the first named respondent made on the 27th May, 2004, to affirm the decision of the Refugee Applications Commissioner not to recommend that the applicant be granted a declaration of refugee status, together with a number of various ancillary reliefs.

2. The Statement of Grounds sets forth sixteen areas of complaint.However, the applicant has confined herself to six essential complaints in the course of the oral submissions made on her behalf.

The standard or threshold for the grant of leave to seek judicial review

3. Under s.5(2)(b) of the Illegal Immigrants (Trafficking) Act, the applicant must establish that there are substantial grounds for leave.In assessing this claim the court will adopt the test set out by Carroll J.in McNamara v.An Bord Pleanála (No.1) [1995] which sets out the test that the applicant must meet.The grounds must be "reasonable", "arguable" and weighty.The grounds must not be frivolous or tenuous.

Facts

4. A substantial number of the facts of this case are not in issue.

5. The applicant states that she was born in Nigeria in 1966 and was a member of the Yoruba tribe.She states she is a Christian and was educated to 'O' level standard at high school.She states that she was married to an old man who was the chief of the area in which she lived.In the course of information provided to the respondent she states that she married this man in 1989, at which point she would have been approximately 23 years, having been born on 13th February, 1966.On the basis of the information supplied to the respondents she states that it was a traditional marriage but that she (the applicant) was forced to marry him because of his position as the chief priest of the village.She states it was her parents' decision.At the time she was living in a village called Sagamu in Ogun state in Nigeria.

6. The applicant further states that her husband had many wives.She says that she herself met a teenaged boyfriend when she was in school and they began to meet.She stated that she continued her affair with this boy for about ten years and became pregnant.She said that her husband did not realise that he was not the father of her child.While he was suspicious when she became pregnant on the second occasion, she states that she was confronted by her husband and she denied any relationship with her partner.The applicant states that when she had a third child a member of her husband's family told him in front of her that the baby was not his.

7. The applicant states that her husband used juju to make her swear and take an oath as to whether the baby was his or not and the applicant said she knew she would die if she took this oath so she refused to do so.She said the man told her parents that he was going to kill her so she had to run away.No evidence was adduced of any assault upon her.However, she states that she ran away to Lagos in February, 2003 and remained there for about two weeks.

8. During the course of her interview the applicant states that her husband found out about the affair in October, 2002.However, it will be seen that she did not leave Nigeria until February, 2003 and thereafter claimed refugee status in this country on 4th March of that year.

9. She stated in interview that the elapse of time between October, 2002 and February, 2003 was accountable to the fact that she denied what had occurred for a while but ultimately ran away to a friend's house and, when her husband found out that she was there, her friend told her that her husband's people were coming for her and she had to leave for Lagos because her friend would have been in trouble.

10. The applicant stated that her husband was the chief of the village and would have had the power to do what he liked.She said that she stayed with her partner or boyfriend in Lagos and he in turn introduced her to a woman who brought her to Ireland.She stated that her boyfriend was a banker and he discovered that her husband and his entourage were en route to catch her so he organised her travel to Ireland.

11. The applicant stated that she knew her husband was planning to kill her because he was still looking for her when she went to Lagos and he had told her parents that he would still be looking for her ten years on.

12. In the light of its importance to the applicant's submission it is as well to quote the next finding of the Tribunal in full:

> "She was asked if she reported her problems to the police and she said she did at the time, when he was trying to force her to take an oath and the police went to her parents' house and they took a statement but there was nothing else they could do except watch her husband for a while.She said that if anybody offended her husband they would be killed and she had heard of people being killed previously.She said she could not move to any other part of Nigeria because Nigeria was not a safe place."

13. The applicant had informed the Tribunal that prior to her marriage in 1989 she had had a baby in Lagos in 1988.She then returned to her home town and then realised her parents wanted her to marry this old man who was the chief priest, so she ran away and went to live in Lagos again for a further year.She then became pregnant again by a different man.Eventually, she states, her parents convinced her to return to the village and they would sort things out.She stated that she had met her boyfriend in school.

14. She states that her boyfriend or partner has custody of her two younger children.However, she states she does not know where they are or the whereabouts of her boyfriend.She states that her boyfriend was constantly moving around because he was being pursued by the applicant's husband.

15. There were a number of findings made by the first named respondent and it is as well to refer to them specifically.These are:

(1) Her conclusion: "This is undoubtedly a family matter".

(2) Her finding that "the police took action by taking a statement and watching her husband".

(3) That the matters set out above "are not matters relating to a Convention reason for the seeking of refugee status".

(4) That the applicant did go to the police when she feared her husband and they took action.

(5) "Country of origin information clearly indicates that if there is a threat of a serious nature made to a person the police will take action and this is indeed confirmed by the applicant in her own evidence, that when she complained about the threatening behaviour of her husband they immediately took action."

(6) In the course of her finding the Tribunal member refers to a quotation obtained from the Research Directorate of the Immigration and Refugee Board of Ottawa by Mr.Walson-Jack.This was to the effect that reports of threat to violence or to life, maim or harm, are promptly dealt with by the police.However, the applicant states that the first named respondent selectively excluded portions of a quotation.It is as well that this is set out in full.The full quotation reads:

> "Indeed, the first port of call for someone threatened with violence or extortion by a member of a cult is definitely the police; not just for protection but for the arrest and prosecution of the suspect …"

The applicant complains that the underlined portion was excluded from the quotation.

(7) The respondent found that there was no reason to believe that if she moved to another part of Nigeria, perhaps Lagos where her partner and children live, that the police would not also take action if her husband tried to do her any harm.

The respondent's finding was:

> "Accordingly, having examined very carefully all the issues raised by this applicant, I am satisfied that she is not a refugee, has not been persecuted, and the various elements of her fears do not amount to persecution.I am satisfied that the protection of the State would be available to her should she seek it.I think that in this case relocation is a viable proposition for this applicant, especially in the light of her profession.She claims that she is an auxiliary nurse and undoubtedly would be able to acquire a job in many different parts of the country."

(8) The respondent makes reference to the fact that the applicant was nine months pregnant when she made her application for refugee status.

(9) Ultimately she concluded:

> "Overall the whole story given by the applicant is neither plausible for believable and whatever reason brought the applicant to this country, I am satisfied it is not for the reasons she gave at her interview or provided in her questionnaire."

On foot of these findings the member of the Refugee Appeals Tribunal stated:

> "I am not satisfied that the applicant, Idera Lydia Okedairo, born on 13th February, 1966, has demonstrated to a reasonable degree of likelihood that she has a well founded fear of persecution for one of the reasons set out in section 2 of the 1996 Act, or that she would be persecuted, if returned to her own country."

Pursuant to s.16(2) of the Refugee Act, 1996, Miss Cronin therefore affirmed the recommendation made by the Refugee Applications Commissioner in accordance with s.13(1) of the Refugee Act (as amended) and dismissed the appeal.

Previous Proceedings

16. While the matter in suit in these proceedings is the determination of the Tribunal member made on 27th May, 2004, it is relevant to point out that a previous decision was made by the Tribunal dated 7th January of that year.This decision was the subject of judicial review proceedings.While the precise dates of these proceedings do not appear from the applicant's affidavit sworn herein, it appears that it was a term of the settlement and therefore of the order of this Court, that the applicant's appeal would be remitted for determination by a member of the Tribunal other than the member who had previously adjudicated on the appeal.

17. However, it appears that the first set of judicial review proceedings did not at all set aside the entire appeal procedure.They were directed only at the first decision.The appeal of the applicant which had been lodged in December, 2004 was, the respondents contend, fully constituted at that stage and available for determination under the accelerated procedure which had been applied to it.The respondents further contend that the quashing of the first decision did not entail the recommencement of the appeal from the beginning but rather entailed the fresh determination of an appeal already constituted.This is in fact what transpired.

18. On 29th December, 2003, a letter was transmitted from the Tribunal to the applicant's solicitor.In that letter the Tribunal advised the applicant that the accelerated appeal procedure did not envisage the filing of additional documentation after the notice of appeal and that the appeal could and would be determined on the basis of the papers as they stood.The applicant's solicitor, nonetheless, filed detailed grounds of appeal shortly thereafter (5th January, 2004).These grounds were accepted by the Tribunal and placed on the file.The respondents point out that the first decision of 7th January, 2004, was notified to the applicant by letter dated 21st

January of that year.There is a time lapse of approximately four months between this date and the making of the second decision.In that interim period judicial review proceedings were taken, served and compromised, relating to the first decision.The respondents contend that the applicant has not been able to point to any change of circumstances during that time which was such as to make it a necessity, as an aspect of fair procedures that she would be entitled to lodge fresh grounds of appeal or submissions.In particular, the respondents contend, there is no suggestion in these proceedings that the situation in the applicant's country of origin had changed in any material respect during the period which might have prompted her to submit updated information which was unavailable four months earlier.

19. Under s.16(8) of the Act it is provided:

> "The Tribunal shall furnish the applicant concerned and his or her solicitor (if known) and the High Commissioner whenever so requested by him or her with copies of any reports, observations or representations in writing or any other document furnished to the Tribunal by the Commissioner, copies of which have not been previously furnished to the applicant or as the case may be the High Commissioner pursuant to s.11(6) and an indication in writing of the nature and source of any other information relating to the appeal which has come to the notice of the Tribunal in the course of an appeal under this section."

20. The applicant contends that the reference to the material referred to previously is a denial of fair procedures.That the applicant is entitled to such procedures is clearly established in the matter of law in *Re Illegal Immigrants (Trafficking) Bill 1996*, [2000] I.R.p.360, (Keane C.J.) and in the judgment of Barrington J.in *The State (McFadden) v.Governor of Mountjoy Prison* (No.1) [1981] I.L.R.M.113 at p.117.In the course of the latter judgment Barrington J.stated:

> "Once the courts have seisin of a dispute, it is difficult to see how the standards they should apply in investigating it should, in fairness, be any different in the case of an alien than those to be applied in the case of a citizen."

21. In the Illegal Immigrants (Trafficking) Bill, 1996 reference Keane J.points out that there is a presumption that the Refugee Act, 1996 and the Immigration Act, 1999 are applied in accordance with the principles outlined by Barrington J.

22. The applicant quotes a number of authorities which appertain to the issue of failure to disclose information.These include *Karanakaran v.Secretary of State for Home Department* [ ] 3 A.E.R.449 (Sedley J.); *Macharia v.The Immigration Appeals Tribunal* [2000] I.N.L.R.267.

23. I fully accept that there is an obligation upon a tribunal decision maker to disclose any relevant or material documentation upon which he proposes to rely.

24. This fundamental principle is also recognised in the decision of Gilligan J.in the case of Uselis v.ORAC & Another, unreported, High Court, Gilligan J., 29th April, 2005.In that case, Gilligan J.considered that a failure by ORAC in the adjudication process to disclose country of origin information which was relied upon in the subsequent recommendation and report made under s.13(1) of the Refugee Act, 1996, was a breach of fair procedures.

25. Many other authorities are cited in the applicant's written submissions to the same basic effect.

26. The respondents point out, however, that the situation is not as portrayed on behalf of the applicant.They state that the applicant was questioned as to whether she reported her problem to the police in Nigeria and she confirmed that she did.They state that she also confirmed that the police acted upon her complaint and went to her parents' house, where they took a statement and apparently indicated to her that they would watch her husband.She left Nigeria shortly after making her complaint.

27. What is of particular importance, however, is that in these proceedings the applicant never claimed that the police failed to respond to her complaint.In fact her own testimony was to the contrary effect.The country of origin information referred to by the Tribunal member, therefore, the respondents point out, confirmed that the police act upon complaints made to them.The respondents contend that this information was taken into account by the Tribunal member for the purpose of making the assessment, that the police seemed to take action when the applicant made her complaint.No evidence has been adduced that the reference to country of origin information from the Research Directorate of the Immigration and Refugee Board of Ottawa (the IRB) is in any way adverse to the applicant.Indeed, the contrary is true.The quotation taken is actually confirmatory of the applicant's own account in her evidence.

28. Were an adverse conclusion drawn from the information in question, there is no doubt that it would constitute good grounds at least for a grant of leave to pursue judicial review.It would clearly carry with it all the connotations of extraneous information being relied upon by a Tribunal member which was not put to the applicant.However, as a matter of fact, this is not the case here.No evidence has been demonstrated of any prejudice, detriment or even affect on the decision making process as a result of this quotation made by the Tribunal member.The complaint made, however, does clearly demonstrate the need for any quotations from text books to be fully and accurately set out in the course of decisions or determinations by the Tribunal.

29. In order to consider the remainder of this case in context, it is essential that one must have regard to the primary finding of the applicant.

30. The report of the Commissioner made at first instance pursuant to s.13 of the Act made a finding that the applicant had not shown any basis for the contention that she was a refugee.Accordingly, s.13(6)(a) of the Act of 1996, as amended, applied.Therefore the applicant was not entitled to an oral hearing.

31. Under s.13(5) of the Act as amended, it is provided that:

> "Where a report under sub-section (1) includes a recommendation that the applicant should not be declared to be a refugee and includes among the findings of the Commissioner any of the findings specified in sub-section (6) then the following shall … apply:
>
> > (a) the notice under paragraph (b) of sub-section (4) shall, notwithstanding that sub-section state that the applicant may appeal to the Tribunal under section 16 against the recommendation within ten working days from the sending of the notice and that any such appeal will be determined without an oral hearing."

32. The respondents submit that in assessing the substantiality of the applicant's claims in these proceedings, it is important that the

court bear in mind that the applicant's appeal was one to which this accelerated procedure applied and also to note that the applicant, who was legally advised at the time, did not take any action to challenge the finding under s.13(6) nor the application of this procedure to her appeal.

33. On behalf of the respondents it is also pointed out that the applicant, both before the Commissioner and in her notice of appeal dated 16th December, 2003, together with the more formal grounds set out under cover of letter dated 5th January, 2004, did not include any country of origin information upon which she wished to rely.Neither did the applicant seek to comment on the generally available country of origin information accessible from the internet and elsewhere.

34. No challenge is actually made to the finding on the part of the Tribunal member in any of the sixteen grounds set out in the Statement of Grounds furnished by the applicant.

35. In *Muresan v Minister for Justice* [2004] 2 I.L.R.M.364, Finlay Geoghegan J.held that the Minister, in considering whether the provisions of s.5 of the Refugee Act, 1996 are satisfied, does not have to produce to an applicant for leave to remain, the country of origin information which it is proposed to consult and/or to seek representations upon it:

> "As a general proposition, it appears to me that in the statutory scheme which has been established both for the asylum phase under the Act of 1996 and the subsequent immigration phase under the Act of 1999, that the Minister, for the purpose of satisfying himself that the making of the deportation order would not breach the prohibition against refoulement in s.5 of the Act of 1996 must be entitled to have regard to material which may be available to him through his officers relating to the human rights situation in the country to which it is proposed to deport the applicant without *putting that material to the applicant for his observations*.The applicant has already had an opportunity in the asylum process of putting before the authorities all of the relevant material relating to the country in question in support of the claim for a declaration of refugee status."

36. On behalf of the respondents it is submitted that there is a clear analogy between the situation where an applicant for leave to remain puts in written submissions in support of that application with the opportunity to put any generally available country of origin information to the Minister, and the situation where, after the decision at first instance which involves an interview and the subsequent possibility to make post-interview representations, together with the opportunity to submit with the notice of appeal any country of origin information which might be thought relevant.The respondents submit that there is no obligation on the Tribunal to put all publicly available country of origin information to an applicant where the applicant has chosen not to make representations in relation to any such information in the notice of appeal and not to submit any countervailing information.This is particularly so, they contend, when the material in question is not being relied upon to make any specific finding adverse to the applicant or to her credibility.

37. I accept these submissions on the particular facts of this case.No evidence has been adduced herein that the material in question was relied upon to make any specific finding adverse to the applicant or to her credibility.However, this finding must be seen in the context of the authorities referred to earlier which clearly demonstrate that if there is relevant or material documentation or material which may be detrimental to the applicant's credibility.Such material must as a matter of fair procedures be put to an applicant.

38. The court therefore concludes that there was no breach of fair procedures by the Tribunal member in this particular instance, in the context of an accelerated procedure, where the applicant's claim is found to have no basis for the contention that she is a refugee, by reliance on material which actually supports an element of the applicant's version of events which is to the effect that when a statement was made to the police they proceeded to undertake a form of investigation of that complaint.

The Country of Origin Information

39. The applicant seeks to rely on the fact that the Tribunal member excluded certain words from the country of origin information which it is alleged placed a different meaning on the document from which the Tribunal member was quoting.It is further contended that the contents of that document were irrelevant and extraneous to the applicant's claim and therefore should not have been relied upon.

40. In order to place this contention in context it will be apposite to quote precisely the reference taken from the Refugee Board of Ottawa under the rubric "Nigeria: State Protection and "taking a complaint to the police"".

41. The Tribunal member wrote as follows:

> "Mr.Walson-Jack wrote in correspondence with the research directorate": to the best of my knowledge, reports of threat to violence, threat to life, maim or harm, are promptly dealt with by the police.The Nigeria police force itself has several layers and branches that citizens dissatisfied with investigations and actions by one branch could request and get cases transferred to other branches.Indeed the first port of call for someone threatened with violence or *extortion by a member of a cult* is definitely the police; not just for protection but for the arrest and prosecution of the suspect.The usual practice is for the police to invite the suspect for a chat.It is after "the chat" (actually interrogation) the allegation has an element of truth, and the suspect is arrested, detained and full investigation commenced".

42. I do not accept the contentions made on behalf of the applicant in relation to this quotation.I have already adverted to the fact that quotations should where appropriate be made fully without exclusions.On the fact of this case however the first paragraph of the passage quoted treats generally of the reaction of the Nigerian police to reports of threats of violence or threats to life.It is not in anyway specific to threats of that nature made by members of a cult.

43. Furthermore on consideration of the evidence actually given by the applicant in the course of her interview there were good grounds for the Tribunal member to consider material referring to cults.The applicant's claim was based on her alleged forced marriage to the Chief Priest of her village.This forced marriage is stated to have endured from 1989 to 2003 the period of 14 years.The applicant states that her customary husband was Chief Priest and not merely a Chief.Moreover when asked what type of persecution she feared she stated that

> "My two children with me and the pregnancy will be killed in secrifion to appease to the Gods and cleanse these atrocities".

44. The emphasis in the applicant's claim on the power of the tradition of the community and the position of her alleged husband as Chief Priest is repeated in her interview.She stated that her marriage was a traditional one.Furthermore she stated that her alleged husband used "ju ju" to make her swear and take an oath as to whether the baby was his or not.She stated in the course of her

interview that "a spiritual weapon" was used to make her calm.

45. At no point during the interview does the applicant allege any physical or other mistreatment of herself or her children by her husband.Her only complaints against relate to religious rights allegedly performed upon her in an attempt to get her to tell the truth about the paternity of her child.

46. Having regard to those circumstances I consider that it was legitimate for the Tribunal member to refer to this information as being confirmatory of the applicant's own evidence again no evidence is adduced that such reference was in any way detrimental or prejudicial to her.

Failure to Invite Further Representations
47. The applicant complains that following the compromise of her earlier judicial review proceedings which led to the original decision of the Tribunal in her appeal being vacated there was an obligation at minimum on the Tribunal to engage in some form of communication with the applicant and her advisors so as to notify them that it was now intended to reassign the appeal afresh for adjudication.Had such communication taken place the applicant and her advisors it is contended would have the opportunity to make further representations and/or submissions and/or to submit any further documentation whether by way of country information or otherwise.The position of the applicant in her circumstances is contrasted with that of an applicant who had an oral appeal following which there were judicial review proceedings challenging the decision and which were compromised.In this situation it is contended an applicant would have as a matter of course be advised by the Tribunal that it was intended to assign and adjudicate the appeal following its remittal.

48. It was noteworthy that neither the court order nor the written terms of settlement relating to the first set of judicial review proceedings have been put before the court in these proceedings.At no stage however has it been asserted that it was a term of the settlement or of the court order that the applicant was to be entitled to submit fresh grounds of appeal.The time sequence involved between the original judicial review proceedings and the reconsideration have already being referred to.On the basis of the applicant's own affidavit however it appears that it was a term of the settlement and therefore of the order of this court that the applicant's appeal would be remitted for determination by a member of the Tribunal other than the member who had previously adjudicated on the appeal.

49. Clearly it was an explicit term that the appeal was to be remitted for determination by a different member.No where however has any evidence been adduced that it was further term of the settlement that the appeal could not be fairly determined without the lodgement of fresh grounds of appeal and/or further representations.It would appear therefore as of the date of the order striking out the first set of proceedings the appeal was fully constituted and available for fresh determination.

50. It is essential to avert to the fact that the first set of judicial review proceedings did not aside the entire appeal procedure.Instead such proceedings were directed only at the first decision.The appeal which had been lodged in December 2004 was fully constituted and available for determination under the accelerated procedure which had been applied to it.It has not been contended that there was specific additional information which would or could or ought to have been submitted which would have been relevant to the Tribunal's determination.

51. Even if such a finding were incorrect, as it transpired the letter of the 29th December, 2003 to the applicant's solicitor did advise that the accelerated appeal procedure would not envisage the filing of any additional documentation.Nonetheless the applicant's solicitor did file additional grounds of appeal which were accepted by the Tribunal and placed on file.As has been further pointed out the short elapse of time between the original decision, the judicial review proceedings challenging these and the determination or decision in suit was so short that the applicant has not been able to point to any change of circumstance such as would make it a necessity as a matter of fair procedures to lodge fresh grounds of appeal or submissions.

52. In addition I do not think it is open to the applicant's to make a complaint as to an alleged failure to invite additional submissions in circumstances where an accelerated procedure has been applied to the applicant.

53. In the course of this hearing the applicant did not identify any relevant country of origin information upon which she would have sought to rely, nor I think has she demonstrated that there was a failure to give her an opportunity to furnish such information.The applicant had the opportunity in completing her questionnaire, at interview, in post interview representations and in the notice of appeal to put forward any information which she thought might have been assistance to her.No such material was furnished.While either judicial review proceedings it might be pointed out moreover at no stage during the course of the various opportunities open to her did the applicant ever submit any information of any nature which would tend to verify or support any element of her account.She did not identify the husband to whom she had been allegedly married for 14 years.Nor did she have any information to confirm her own identity.

Assessment of Credibility: The issue of credibility and failure to consider all the circumstances of the applicant's case
54. The applicant contends that there has been a failure of the Tribunal member to understand the nature of the fear of persecution and the reasons for it.These are it is contended raised in her affidavit.

55. The gravamen of the evidence to which this reference is made is set out in the affidavit as follows

> "I say that the Tribunal member has proceeded on the basis that my fear of persecution arises because of my husband discovering my liaison and that he is not the father of the children and a threat of violence and to my life made against me to my husband.I say that whilst these particular circumstances were the immediate catalyst for my fleeing Nigeria it is clear from the grounds of appeal and submissions lodged with the Tribunal and the information I provided in the course of my application that my fear of persecution arises because I was forced in a traditional customary practice in 1989 to marry my husband who is the Chief Priest of the village and a polygamist and I have been remained locked in that forced marriage against my wishes throughout that period and circumstances where I have been unable to extricate myself from same and have been denied the fundamental right that any woman should enjoy to marry if and whom I choose rather than be forced to do so and to have and rear children with the partner of my choice.I have a genuine, legitimate and well founded fear that if refouled to Nigeria I will be forced under threat to my life and freedom to return to the forced marriage and suffer very serious consequences if I resist".

56. The applicant contends the Tribunal member failed to carry out an assessment of the nature and extent of the practice of forced customary marriage in Nigeria and/or state protection against it as been the basis of her fear of persecution.

57. Close examination of the determination of the Tribunal member however does not bear out this contention.Firstly (and as has

been set out earlier) the Tribunal member sets out the applicant's case as made by the applicant in her questionnaire and in her interview.There is no suggestion in the course of these proceedings that the applicant's evidence has been misconstrued, is inaccurate, or omits any material element.The Tribunal member made her finding that on the basis of the case as made by the applicant herself that the persecution of which she complained did not constitute persecution for a Convention reason.Moreover this finding is expressly made on the basis of the evidence advanced by the applicant and without making any adverse finding as to the applicant's credibility.Furthermore the Tribunal member made a finding, again on the basis of the applicant's evidence, and in circumstances where her complaint was one of alleged persecution at the hands of non state agents, that the protection of the authorities in her home country was available to her should she seek it and had in fact been offered to her on the one occasion when she made a complaint in relation to the matter the subject matter of her claim.Again this is upon the basis of the applicant's own evidence.

58. The Tribunal member specifically directs herself as to the definition of refugee under s.2 of the 1996 Act meaning

> "A person who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and been outside the country of his or her former habitual residence is unable or, owing to such fear, is unwilling to return to it … she further directs herself that s.1 of the Act of 1996 further provides that concept of membership of a particular social group includes membership of a group of persons whose defining characteristic is their belonging to the female or male sex".

59. The primary onus is upon the applicant to establish that her fear is well founded within the meaning of s.2.No objective evidence of any type was adduced in support of her claim.I do not consider the fact that the Tribunal member made a finding that the applicant was not a refugee and did not establish that she had a well founded fear of persecution for a Convention reasons necessitates that the Tribunal member herself had failed to have regard to the totality of the evidence.

60. The adverse finding as to the applicant's credibility was made only after the Tribunal member had already found that at the high point of her claim the applicant herself did not meet the definition of "refugee".Express reference was made to two matters (lack of identity documentation and travel arrangements) both of which are matters to which a decision maker is expressly entitled to have regard in assessing credibility under s.11(b) of the Act of 1996 as amended.One of the functions of the Tribunal member is to assess credibility in accordance with decided case law (see *Kamara v.Minister for Justice* Unreported, Kelly J.July 26th, 2000) where the issue was whether there was material upon which the adverse finding in question might be made.Here the applicant was informed in the course of the s.13 report of the Refugee Appeals Commissioner that various elements of her claim had been found to be highly unlikely, highly implausible and incredible.This report also emphasised her failure to provide any evidence to support her assertions regarding any part of her claim.This position did not materially change between the Refugee Appeals Commissioner decision and the appeal decision.

Decision on Internal Relocation
61. The applicant complains that the Tribunal member erred in making a finding that the applicant could relocate elsewhere in Nigeria and that it was illogical to consider the issue of internal relocation unless one first considered whether the applicant was a refugee as internal relocation would only arise where there is a well founded fear of persecution.

62. Again it is necessary to refer to the primary finding of the Tribunal member.This was that even taking the applicant's own testimony she was not a refugee within the meaning of s.2 of the 1996 Act.Additionally the Tribunal considered that her story was implausible and further applied the provisions of s.11(b) of the 1996 Act as amended.

63. Two points are relevant here.

64. The first is that on the basis of the applicant's own evidence she lived in Lagos Nigeria for 2 years and went there with her partner prior to coming to Ireland.These were matters which she raised herself in the course of the process.

65. More fundamentally however it is clear from the decision that the claim failed because the Tribunal member was satisfied that the applicant had not demonstrated a well founded fear of persecution for a Convention reason.Insofar as it was relevant to the applicant's claim the applicant had also given evidence to the effect that she had availed of police protection.It cannot be denied that there is a degree of inconsistency in making this finding in the light of the primary finding of non refugee status.However I do not think that it has been demonstrated in any way that such finding was detrimental or prejudicial to the applicant.

Intensity of Review in Asylum and Human Rights Case
66. In considering the matters set out above I would add that in the instant case the court has sought insofar as possible to apply the test set out in the Supreme Court in the State *(Keegan) v.Stardust Compensation Tribunal* [1986] I.R.642 and *O'Keeffe v.An Bord Pleanála* [1993] I.R.39.However the court had also sought to consider the matters in accordance with the principles which have been suggested in the case of *Osayande and Lobe v.Minister for Justice* [2003] I.R.1 by McGuinness J.and Fennelly J.I would respectfully adopt the approach of the latter judge where he stated in that case with regard to the Keegan test

> "It seems to me that where as in this case, constitutional rights were at stake, such a standard of judicial scrutiny must necessarily fall well short of what is likely to be required for their protection.This appears to have led to some modification of the test in other jurisdictions.In Mahmood the decision of the English Court of Appeal upon which the Minister has relied Laws L.J.and Lord Phillips both applied a significantly modified Wednesbury test, one based on "anxious scrutiny" to a case involving interference with fundamental rights in a case such as the present, the routine application of the unmodified Wednesbury test makes decisions of the Minister virtually immune from review".

67. It is to be noted that in this case the conclusion of the Tribunal member was based on an acceptance of the applicant's testimony at its height rather than upon any rejection thereof.She nonetheless reached the conclusion that the applicant had failed to prove her case pursuant to s.2 of the 1996 Act as amended.This is the primary basis of the Tribunal member's finding and on the basis of a detailed consideration of the evidence and the procedure adopted I do not consider, even applying the anxious scrutiny that the applicant has demonstrated that there are good grounds for granting leave to seek judicial review.The application for leave will therefore be declined.