

THE HIGH COURT

[2011 No. 1037 J.R.]

BETWEEN

A.V.P. (SIERRA LEONE)

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL,
THE MINISTER FOR JUSTICE AND EQUALITY,
IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Robert Eagar delivered on the 21st day of May, 2015

1. This is a challenge to the decision of the Refugee Appeals Tribunal to affirm the negative recommendation of the Refugee Applications Commissioner on the applicant's asylum application.
2. The decision of the Refugee Appeals Tribunal was dated the 4th October, 2011 and these proceedings were commenced by way of notice of motion dated the 26th October, 2011.
3. The only ground in the statement grounding the application for judicial review that is argued by the applicant is that of ground 5(3):-

"The effective remedy required by the provisions of Article 39 of Council Directive 2005/85/EC of the 1st December 2005 read in conjunction with Recital 27 and Article 267 TFEU (and with reference to Article 47 of the Charter of Fundamental Rights of the European Union) is not provided by the first named Respondent as one or more of the following may apply:-

3. The fact that the decision-making members of the first named Respondent body are appointed by the second named Respondent and further serve on a part-time basis and further are remunerated on a case by case basis."

4. Both the applicant and the respondent provided written submissions and also this Court has listened to the oral submissions of counsel for both sides. The case is made by the applicant on a question raised by way of preliminary reference by Cooke J. to the Court of Justice in the proceedings *H.I.D. & B & A v. Refugee Applications Commissioner & Ors*, Judicial Reviews 2008 1261 JR.
5. The applicant has limited his ground to ground (3) of the statement grounding application for judicial review and argues that the effective remedy required by the provisions of Article 39 of the Council Directive 2005/85/EC of December 2009 read in conjunction with Recital 27 and Article 267 TFEU (and with reference to Article 47 of the Charters of the Fundamental Rights of the European Union) is provided by the first named respondent as the fact the decision-making members of the first named body are appointed by the second named respondent and further served on a part-time basis and further are remunerated on a case by case basis.
6. The applicant argues that the fact that the decision making members of the Tribunal are appointed by the Minister for Justice and Equality (hereinafter referred to as "the Minister") and serve on a part time basis for a period of three years and are remunerated on a case by case basis in circumstances where the Court of Justice determined that the Refugee Appeals Tribunal was either a Court or a Tribunal is a breach of the principles reflected in the United Nations Basic Principles for the Independence of the Judiciary.
7. Counsel for the applicant argues that this was a matter which was not dealt with by the European Court of Justice in its decision in *H.I.D & B.A. v. Refugee Applications Commissioner & Ors*. Counsel on behalf of the respondent argues that the European Court of Justice in its decision comprehensively dealt with the issues raised in these cases and points to the decisions of Cooke J. both prior to and after the European Court judgment which was given by the European Court on the 31st January 2013.
8. The European Court of Justice gave its judgment on the request for a preliminary ruling concerning the interpretation of Articles 23 and 39 of the Council Directive 2005/85/EC of the 1st December 2005 on minimum standards in procedures in Member States for granting and withdrawing refugee status.
9. In its judgment the European Court of Justice examined the asylum procedure in Ireland. Paragraphs 22 and 23 deal with the role of the Refugee Applications Commissioner and paragraph 25 deals with the appeals before the Refugee Appeals Tribunal and provides for an applicant for asylum to challenge the validity of a recommendation of the Refugee Applications Commissioner or a decision of the Refugee Appeals Tribunal before the High Court. It also underlines in accordance with s. 5 of the Illegal Immigrants (Trafficking) Act 2000 that an appeal against the decision of the High Court lies to the Supreme Court (now the Court of Appeal) only where the High Court issues a certificate of leave to appeal.
10. Paragraph 31 examines the Refugee Appeals Tribunal and cites that the second schedule to the Refugee Act 1996 (as amended) (hereinafter "the Act of 1996"), states that the Refugee Appeals Tribunal is to consist of a Chairperson and such other number of ordinary members, with the consent of the Minister for Finance, considers necessary the expeditions despatch of the business of the Tribunal, each of whom must have had not less than five years experience as a practicing barrister or solicitor before his or her appointment. The members of the Refugee Appeals Tribunal are appointed by the Minister and each ordinary member is appointed for a term of three years on such terms and conditions as the Minister may determine when appointing him or her.
11. The European Court of Justice then recited the two cases which had been referred to them by Cooke J. for a preliminary ruling. The second question for the Court for preliminary ruling was as follows:-

"Is Article 39 of [Directive 2005/85] when read in conjunction with its recital 27 and Article 267 TFEU to be interpreted to the effect that the effective remedy thereby required is provided for in national law when the function of review or appeal in respect of the first instance determination of applications is assigned by law to an appeal to the Tribunal established under Act of Parliament with competence to give binding decisions in favour of the asylum applicant on all

matters of law and fact relevant to the application notwithstanding the existence of administrative or organisational arrangements which involve some or all of the following:

- The retention by a government Minister of residual discretion to override a negative decision on an application;*
- The existence of organisational or administrative links between the bodies responsible for first instance determination and the determination of appeals;*
- The fact that the decision making members of the Tribunal are appointed by the Minister and serve on a part-time basis for a period of three years and are remunerated on a case by case basis;*
- The retention by the Minister of powers to give directions of the kind specified in ss. 12, 16(2B)(b) and 16(11) of the [Refugee Act]?”*

12. In dealing with the second question which I believe encompasses the submissions made by the applicant in this case the Court recited Article 39 (1) (a) of the Directive 2005/85 that Member States must ensure that applicants for asylum have the right to an effective remedy before a court or Tribunal (this Court’s emphasis) against the decision taken on their application for asylum. The applicants had submitted that the Refugee Appeals Tribunal was not “a court or tribunal” within the meaning of that Article.

13. The Court continued that it must be borne in mind that according to settled case law of the court, in order to determine whether a body making a reference is a “a court or tribunal” for the purpose of Article 267 TFEU which is a question governed by the European Law alone, the court takes account of a number of factors such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.

14. The Court noted that the applicants in those proceedings contested the assertions that the Tribunal has compulsory jurisdiction and the procedure before it is *inter partes* and that it is independent.

15. The Court noted that in accordance with ss. 15 and 16 of the Act of 1996 ,the Refugee Appeals Tribunal is a competent Tribunal to examine and rule on appeals brought against the recommendations of the Refugee Applications Commissioner which are the decisions on first instance on asylum applications in accordance with Annex 1 (second intent) to Directive 2005/85. In addition the Court continued that in the event that the appeal before the Refugee Appeals Tribunal is upheld, the Minister is obliged in accordance with s. 17 (1) of the Act of 1996 to grant refugee status. It is only in cases where the Refugee Appeals Tribunal does not uphold the appeal brought by the applicant for asylum that the refugee status may nevertheless be granted to the applicant by the Minister. The Minister therefore has no discretion where the Refugee Appeals Tribunal has taken the decision favourable to the applicant for asylum. Further the Court continued that the Office of the Refugee Applications Commissioner’s (ORAC) participation as a party to the appeal proceedings before the Refugee Appeals Tribunal, the decision taken at first instance, is not an absolute requirement.

16. Finally the Court in paragraph. 98 states that:-

“In the present case, section 58 (2) of the Refugee Act provides that the Refugee Appeals Tribunal is independent in the performance of its functions”

17. Paragraph 99 states:-

“As for the rules governing the appointment of members of the Refugee Appeals Tribunal these are not capable of calling into question the independence of that Tribunal. The members of the Tribunal are appointed for a specific term from among persons with at least five years experience as a practicing barrister or a practicing solicitor and the circumstances of their appointment by the Minister does not differ substantially from the practice in many other Member States.”

18. Paragraph 101 states:-

“As noted by the Advocate General at point 88 of his opinion, the cases in which the members of the Refugee Appeals Tribunal may be removed from office are not defined precisely by the Refugee Act. Nor does the Refugee Act specify whether the decision to remove a member of Refugee Appeals Tribunal was amenable to judicial review.”

It is this Court’s view that a decision to remove a member of the Refugee Appeals Tribunal clearly is amenable to judicial review.

19. Further the Court said in paragraph. 103:-

“In the present case under section 5 of the Illegal Immigrants (Trafficking) Act 2000 Applicants for asylum may also question the validity of the recommendations of the Refugee Applications Commissioner and decisions of the Refugee Appeals Tribunal before the High Court. The decisions of which may be appealed to the Supreme Court” (now the Court of Appeal).

20. In paragraph 104 the Court held:-

“In those circumstances it must be concluded that the criterion of independence is satisfied that the Irish system for granting or withdrawing refugee status and that that system must therefore be regarded as respecting the right to an effective remedy.”

21. In paragraph 105 the Court said:-

“Consequently, the answer to the second question (posed by Cooke. J) is that Article 39 of Directive 2005/85 does not preclude national legislation such as that at issue in the main proceedings, which allows an Applicant for asylum either to lodge an appeal against the decision of the determining authority before a court or a tribunal such as the Refugee Appeals Tribunal and to bring an appeal against the decision of that Tribunal before a higher court such as the High Court or to contest the validity of that determining authorities decision before the High Court, judgments of which may be the subject of appeal to the Supreme Court.”

22. The existence of these means of obtaining redress appear, in themselves, to be capable of protecting the Refugee Appeals Tribunal against potential temptations to give in to external intervention or pressure liable to jeopardise the independence of its members.

Decision

23. I believe that the ground argued by the applicant is not tenable in the light of the ruling by the Court of Justice in *H.I.D & B.A.* and the subsequent decision of Cooke J. applying same. This decision is reported at [2011] IEHC 33.

24. In those circumstances I refuse the application for *certiorari* on behalf of the applicant.