

**THE HIGH COURT**

**RECORD NO. 2012 679 JR**

**BETWEEN**

**C.C**

**AND**

**N.R.U. (A MINOR SUING BY HER MOTHER AND NEXT FRIEND C.C.)**

**(NIGERIA)**

**APPLICANTS**

**AND**

**THE REFUGEE APPLICATIONS COMMISSIONER**

**AND THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENTS**

**AND**

**THE HUMAN RIGHTS COMMISSION**

**AND**

**THE ATTORNEY GENERAL**

**NOTICE PARTIES**

**JUDGMENT of Mr. Justice Eagar delivered on the 26th day of November, 2015**

1. This is a telescoped hearing in which the applicants seek leave to quash the decision of the Refugee Applications Commissioner that the applicants be refused a declaration of refugee status.

2. The reliefs originally sought were:

1. An order of *certiorari* quashing the recommendation that the applicants be refused a declaration of refugee status.
2. A declaration further to the provisions of s. 5 of the European Convention on Human Rights Act, 2003 (hereinafter referred to as "the Act of 2003") that the provisions of the Criminal Justice (Human Trafficking) Act 2008 (hereinafter referred to as "the Act of 2008") are incompatible with the provisions of Article 4 of the Act of 2003.

At the outset of the hearing, counsel on behalf of the applicant indicated that the second relief was not being sought in relation to the relief sought under the first relief.

3. The grounds upon which relief were sought:

a. The first named Applicant is a victim of human trafficking. Trafficking is identified by the United Nations and the European Union as a serious crime. It is also considered a gross violation of fundamental rights. The respondents have failed and omitted to have regard to this fact with reference to her application for asylum or otherwise. In particular they have failed to investigate the trafficking or to proceed to apprehend, prosecute and penalise the perpetrators.

b. The respondents have also failed to ensure the physical safety of the first named applicant in the state or otherwise. They have also exposed her to a danger of re-victimisation, including by failing to provide her with secure and appropriate accommodation.

c. The respondents have failed and omitted to provide the first named applicant with medical care, counselling and a psychiatric report.

d. The respondents should not have proceeded to decide the application for a declaration of refugee status until such time as the first named Applicant's account of being trafficked had been fully investigated and any criminal proceedings had taken place. The first named applicant should also have been provided with a place of safety. She was also required to have the benefit of all proper medical assistance and facilities required in her situation.

e. The first named respondent's decision was contrary to the uncontroverted weight of evidence and no rebuttal evidence was obtained from An Garda Síochána, the Police Service of Northern Ireland or otherwise. Accordingly the decision was irrational and unfair.

f. The respondents are organs of State. Their failure to refer the first named applicant's evidence of trafficking to police authorities and to await the outcome of an investigation is contrary to the rule of law and further constitutes a failure of due process. It was also a failure to protect and vindicate the applicant's fundamental human rights. The other grounds related to the second relief in relation to the Act of 2008.

4. The affidavit of John Gerard Cullen, solicitor, referred to the statement grounding the application for judicial review and requested

the Court to grant the relief sought.

5. The first named applicant is a 22 year old female. She is a native of Nigeria. She left that country in January, 2011. Her travel was organised by a third party on the basis that she would repay the cost of the journey from work which he would arrange. She was brought to Belfast. On arrival in that city she was detained in a house by his associates. These men tried to rape her. She escaped and went to Dublin where she met a Nigerian woman who accommodated her in Cork for a number of months in exchange for childminding.

6. In October 2011, on the advice of the woman who had accommodated her in Cork, the first named applicant sought asylum. On the 11th January, 2012 the applicant gave birth to a baby girl, the second named applicant. Mr. Cullen states that to the applicant's knowledge neither the Refugee Applications Commissioner nor the Minister for Justice and Equality had investigated the circumstances of her trafficking and they had not initiated any criminal enquiry into the matter, and she has not been interviewed by the Gardaí in relation to the matter. He also states that the applicant has not been provided with medical care, counselling or psychological support, and no appropriate accommodation which would constitute a place of safety has been provided to her. He says that some of those people responsible for the first named applicant's trafficking and who she instructs tried to rape her reside in Belfast, Northern Ireland. He further states that the applicants have been, and are, in an extremely vulnerable position. There is a test to their physical safety and there is a risk of re-victimisation of the first named applicant.

7. The report into the first named applicant's asylum application prepared by the first named respondent contains no reference to any enquiry or investigation carried out into the trafficking of the first named applicant. From the contents it can be inferred that the writers of the report had no training in respect of human trafficking and he begs to refer to the report pursuant to s. 13 (1) of the Refugee Act, 1996, the recommendation of the Refugee Applications Commissioner.

8. Mr. Cullen states that there has been an increasing occurrence of human trafficking in Ireland in recent years. Much of this concerns the sexual exploitation of women. A number of cases have concerned trafficking from Nigeria. Many of the victims, such as the applicant, are victims of forms of debt bondage. There is also a cross border dimension to this crime, and he begs to refer to copies of newspaper reports from the Irish Examiner and the Irish Independent in May and June 2012. Mr. Cullen further avers that he was providing a copy of these proceedings to An Garda Síochána.

### **Background facts**

9. The first named applicant made an application for asylum at the Office of the Refugee Applications Commissioner on the 24th October, 2011 and attended for a s. 11 interview on the 24th February, 2012. She had given birth to the second named applicant on the 11th January, 2012. At the s. 11 interview she confirmed that she left to travel to the United Kingdom on the 28th and 29th of January, 2011, and flew from Port Harcourt, via Germany, to London. She spent two days in London, and then took a flight to Belfast at the start of February. She said a friend of the man who had arranged to bring her to England met her in London and came with her to Belfast. She said she stayed there for three to four weeks in a house in Belfast and that afterwards she knew she had to escape from there as he was trying to take advantage of her. She said, "They were trying to rape me." She then confirmed that she had travelled to Dublin by taxi and met a Nigerian woman, and she went to Cork with her to help her mind her children. She confirmed that she had a visa to enter the UK because the man, known as Mr. Mike, had arranged it. He said that he had arranged for the other guy to meet her in London, and that when she started work she would repay 1.2 million Naira, about €5,600.00 (5 thousand, six hundred Euro) at today's currency conversion. She was asked what her reason for leaving Nigeria was and she replied, "To get a job, Mike told me his friend would collect me and get me work when I got to Belfast." She confirmed that there were two men living in the house in Belfast and she ran away when they were not there.

10. The Officer of the Refugee Applications Commissioner asked her in the s. 11 interview had she experienced any problems in Nigeria before she left.

11. The exchange was as follows:

Q. 38 "What was your reason for leaving Nigeria?"

A. "To get a job. Mike told me his friend would collect me and get me work. When I got to Belfast I asked him where was the job they were going to give me but they didn't help me and were trying to take advantage of me."

...

Q. 41 "Had you experienced any problems in Nigeria before you left there?"

A. "I couldn't get a job in Nigeria. I was sick of looking for a job there. I wanted a job to help my mother and younger sibling since my father died in 1993."

Q.42 "Were you in danger from anyone or in fear of anyone in Nigeria before you left?"

A. "No. I was leaving to get a better life."

Q.43 "Do you think you would have problems if you returned to Nigeria?"

A. "I wouldn't be safe. Mr. Mike would make trouble from me and my family because he would want the 1.2 m Naira from me."

Q.44 "Does he know where you are at the moment?"

A. "No."

Q. 45 "Does he know where your family in Nigeria live?"

A. "No. He knows where my senior brother lives but not the rest of my family."

Q. 46 "Has he caused any problems for your senior brother?"

A. "Yes. He has told my brother he should pay him. He told him there is no money to pay him."

Q. 47 "Has your brother reported him to the police?"

A. "No."

Q. 48 "Could the police help you if you returned to Nigeria and you told them this man was harassing you?"

A. "No. They won't help since you don't have money."

Q. 49 "What do you fear would happen to you if you returned to Nigeria?"

A. "I fear that Mike might go so far as killing me or someone, God forbid, if I didn't pay him his money."

Q. 50 "Has your brother ever been beaten or assaulted by Mike?"

A. "He has been disturbing my brother on the phone."

Q. 51 "Could you move to another part of Nigeria away from Port Harcourt, such as Lagos or Abuja, and live safely?"

A. "No. Because he has his gang. He would find me."

Q. 52 "Are you in fear of anyone else apart from Mike?"

A. "No. It's Mike I'm afraid of."

12. In this s. 11 interview in relation to her daughter she confirmed that that was the fear she had for her daughter.

**Report pursuant to s. 13 (1) of the Refugee Act, 1996 (as amended)**

13. The decision the Refugee Applications Commissioner stated that:

"Considering the Applicant's statements at interview, it would appear that the Applicant is an economic migrant and has not presented a case that satisfies the persecution element of the refugee definition."

14. The Refugee Applications Commissioner considered the issue of whether or not the applicant had a well-founded fear of persecution and, having considered the facts, the officer stated:

"It is difficult to substantiate in any real or meaningful way if the events the Applicant describes have actually occurred in Nigeria, given the inherently subjective nature of much of her claim."

15. The decision then went into the details (which have been outlined previously in this judgment) and then the officer of the Commissioner said "It is difficult to substantiate in any real or meaningful way if the events the applicant describes have actually occurred in Nigeria given the inherently subjective nature of much of her claim." The officer then said the applicant's statements must be coherent and plausible and must not run counter to generally known facts, and it was necessary to examine the Applicant's account, the relevant country of origin information, and assess the overall credibility of her testimony."

16. He said the following points were relevant:

a. The applicant claims to have left Nigeria in January 2011 and arrived in this State in March. The applicant states that she had no idea she could apply for asylum until this woman told her. The view of the Commissioner was that this was not accepted as a valid reason for failure to seek the assistance of this State in the six month period following her arrival here in March, and the delay in doing so serves to question the well-foundedness of the applicant's fear of persecution should she return to Nigeria.

b. The applicant states she was not in danger from anyone in Nigeria prior to her departure from Nigeria and she was leaving "to get a better life". She also stated that her reason for leaving Nigeria was "to get a job". It is considered that the applicant was an economic migrant and not a refugee.

c. The applicant states she experienced problems when she arrived in Belfast and enquired about the job she thought she would get upon her arrival. She states that the men she was staying with tried to take advantage of her. She stayed there for three or four weeks and after that she knew she had to escape because they were trying to rape her. The applicant states that she ran away from the house when the men were not there. The applicant stated she was being held in the house against her will. The Commissioner's view was that it was considered unlikely therefore that the men would leave the applicant alone in the house and it was also not plausible that if the applicant was left alone in the house, that these men would not have securely locked the house to avoid her escaping.

d. The applicant states she travelled to Ireland via Germany and the UK, and did not apply for asylum in any of these countries en route to Ireland. The applicant states that Mike's gang would find her even if she returned to another part of Nigeria such as Lagos. The Commissioner took the view that the applicant's account of how she escaped from the contact of Mike's in Belfast was not considered credible and that it was considered that she could return to Nigeria and live in relative safety.

e. The Commissioner then took the view that, given the issues outlined, it was considered reasonable to conclude that the applicant had not demonstrated a well-founded fear of persecution in Nigeria. He then dealt with state protection and confirmed that the applicant had not experienced any problems in Nigeria prior to her departure so she did not require the assistance of state authorities there. In relation to internal relocation, it was considered that the applicant could be able to locate in an area away from Port Harcourt such as Lagos. In relation to the nexus to s. 2 grounds, the Commissioner said that if her testimony was considered credible, it could be considered that a nexus might exist under the category of co-membership of a particular social group i.e. women in danger from a criminal gang. However the applicant had not demonstrated a well-founded fear of persecution in Nigeria.

17. The officer (of the Commissioner) held that the applicant had not established a well-founded fear of persecution as required by s. 2 of the Refugees Act, 1996 and the superior officer of the Refugee Applications Commissioner also recommended that s. 13 (6) (a)

be appropriate to the application. Section 13 (6) (a) refers to an application which showed either no basis or a minimum basis for the contention that the applicant is a refugee and thus any appeal to the Refugee Appeals Tribunal would be determined without an oral hearing.

18. In the course of these proceedings the respondent obtained leave from this Court to serve the affidavits of Detective Sergeant Francis McGrath dated the 30th October 2015 and Ronan Cotter dated the 2nd November 2015. Detective Sergeant Francis McGrath states that he is a Detective Sergeant with the Human Trafficking Investigation and Co-ordination Unit, and stated that the Anti-Trafficking Unit of the Department of Justice and Equality, having been served with the judicial review papers in this case, contacted the Office of the Refugee Applications Commissioner advising that one of the grounds in the papers referred to a claim of human trafficking and the matter was referred to Detective Sergeant McGrath to investigate. He detailed numerous attempts to contact the first named applicant, personally or through her solicitor. And finally the first named applicant stated she would like to speak to her solicitor before she would speak to the Gardaí. He left his contact details with the first named applicant. He received a call from John Cullen, solicitor, on the 29th October 2015. Mr. Cullen had telephoned his mobile number. He identified himself as a member of An Garda Síochána and informed Mr. Cullen that he wished to interview his client in respect of her claims that she was a victim of human trafficking. Mr. Cullen informed him that he would get back to him by text message but he has not yet received a text message or further telephone call from Mr. Cullen up to the time of swearing the affidavit. The applicant has made no attempt to make a complaint in relation to human trafficking.

19. Ronan Cotter is a solicitor in the Office of the Chief State Solicitor and he refers to the notice of appeal which was lodged on behalf of the Applicant, dated the 25th July, 2012 and by letter dated 25th July, 2012 Messrs. John Gerard Cullen, solicitors, forwarded a copy of the notice of appeal to the Refugee Appeals Tribunal. This also enclosed a letter to the Refugee Appeals Tribunal indicating that they were lodging it on a strictly without prejudice basis in circumstances where they were instructed by her client to bring an application by way of judicial review challenging the ORAC recommendation. Mr. Cullen, by letter dated 29th October 2015 referred to certain aspects of the case and then confirmed that the applicant states that she will make a statement to An Garda Síochána.

### **Submissions by counsel for the Applicant**

20. In submissions by counsel for the applicant, Mr. Desmond Murphy S.C. (with Patrick Killian McMorrough B.L.) had set out the basis of judicial review as outlined in *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 93. Finlay CJ in that case states as follows:

*"The question arising on this issue falls to be decided in accordance with the principles laid down by this Court in The State (Keegan) v. Stardust Compensation Tribunal [1986] I.R. 642 which are set out in the judgment of Henchy J. in that case, with which in respect of the legal principles applicable, all the other members of the Court specifically agreed."*

21. In dealing with the circumstances under which the Court could intervene to quash the decision of an administrative officer or tribunal on the grounds of unreasonableness or irrationality, Henchy J., in his judgment sets out a number of such circumstances in different terms. They are:

*"1. It is fundamentally at variance with reason and common sense.*

*2. It is indefensible for being in the teeth of plain reason and common sense.*

*3. Because the court is satisfied that the decision-maker has breached his obligation whereby he 'must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision'."*

22. Finlay CJ. continued:

*"I am satisfied that these three different methods of expressing the circumstances under which a court can intervene are not in any way inconsistent one with the other, but rather complement each other and constitute not only a correct but a comprehensive description of the circumstances under which a court may, according to our law, intervene in such a decision on the basis of unreasonableness or irrationality."*

23. In setting out these principles, Henchy J., in the course of that judgment quoted with approval the statement of Lord Greene M.R. in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 K.B. 223:

*"It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere . . . ; but to prove a case of that kind would require something overwhelming."*

24. Finlay CJ. later stated:

*"It is clear from these quotations that the circumstances under which the court can intervene on the basis of irrationality with the decision-maker involved in an administrative function are limited and rare..."*

*...The court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it."*

25. Mr. Murphy argued that the decision-maker erred in this case that he did not take into account the fact that the applicant was the victim of a set of circumstances and that he did not seek to have the matter further investigated before making a decision in the case.

26. In his written submissions he submitted that the first named respondent should have availed of the provisions of s. 11 (4) (a) of the Refugee Act, 1996 as amended.

27. He suggested that it was a manifest failure on behalf of the Refugee Applications Commissioner not to investigate the matter and that in those circumstances the appropriate decision of the Court would be to grant an order of certiorari.

### **Submissions by Counsel for the Respondent**

28. Ms. Catherine Duggan B.L. said that counsel for the applicant had not dealt with the principles laid down in *P.D. v. the Minister for Justice and Law Reform & Ors* [2015] IEHC 111, a decision of MacEochaidh J. dated 20th February, 2015. She also stated that there was no error in the decision of the Commissioner and the concession by counsel for the applicant that she was an economic migrant

whilst held against her will in Belfast did not deal with the issues raised by the Refugee Act 1996 (as amended). There was no question of an error on the part of the Commissioner.

29. She quoted from the judgment of this court in the case of *C.R.D.L. and anor (Bolivia) v. Refugee Applications Commissioner & Ors.* [2015] IEHC 182 in which this Court considered the judgment of MacEochaidh J. in *P.D.* and analysed the reasoning of MacEochaidh J.

### Discussion

30. The first step that this Court must take is whether or not there is any basis for this Court to entitle the applicant to judicially review the decision of the Refugee Applications Commissioner in circumstances where there is available to the applicant an appeal to the Refugee Appeals Tribunal, pursuant to the law provided by the Refugee Act, 1996 (as amended). In fact, in this case an application for an appeal has been lodged with a request to the Refugee Appeals Tribunal indicating that it was being lodged on a strictly without prejudice basis in circumstances where they are instructed by the applicant to bring an application by way of judicial review challenging the ORAC recommendation.

31. In *P.D.* MacEochaidh J. raised a question as to whether an applicant may be permitted to seek judicial review of the decision of the Refugee Applications Commissioner prior to an appeal to the Refugee Appeals Tribunal.

*"The consistent jurisprudence of the Superior Courts is that intervention by way of judicial review in respect of decisions of the Refugee Applications Commissioner is rarely permitted and only in cases which at least involve errors as to jurisdiction but even then, the court retains discretion to refuse."*

32. It appears to this Court that the only basis on which an application can be made to the Refugee Applications Commissioner is in relation to a recommendation under s. 13 (5) (a) relating to a finding under s. 13 (6) as these are not matters which the Refugee Appeals Tribunal can overturn.

33. MacEochaidh J. reviewed the authorities in relation to the jurisprudence which he identifies in *Stefan v. The Minister for Justice Equality and Law Reform* [2001] 4 IR 203. This case addressed a former non-statutory regime for asylum applications but which provided an administrative appeal, Denham J. concluded that:

*"It is clear that whilst the presence of an alternative remedy, an appeal process, is a factor, the court retains jurisdiction to exercise its discretion to achieve a just solution..."*

*In this case the appeal is pending. It is for the court to determine in the circumstances whether judicial review is an appropriate remedy. The presence of the pending appeal is not a bar to the court exercising its discretion. It is a factor to be considered. It is a matter of considering the requirements of justice."*

34. In *B.N.N. v. Minister for Justice Equality & Law Reform* [2009] 1 IR 719 Hedigan J. stated:

*"It is clear in the light of this series of recent decisions that it is only in very rare and limited circumstances indeed that judicial review is available in respect of an Office of the Refugee Applications Commissioner decision. The investigative procedure with which the Office of the Refugee Applications Commissioner is tasked must be properly conducted but the flaw in that procedure that entitles an applicant to judicial review of an Office of the Refugee Applications Commissioner's decision must be so fundamental as to deprive the Office of the Refugee Applications Commissioner of jurisdiction. The Courts, the applicants themselves, and the general public have a right to expect that no such fundamental flaw should ever occur in such an application. An applicant must demonstrate a clear and compelling case that an injustice has been done that is incapable of being remedied on appeal to the Refugee Appeals Tribunal. If such a clear and compelling case is not demonstrated, the applicant must avail of the now well established procedure that has been set up by the Oireachtas, which provides for an appeal to the Refugee Appeals Tribunal."*

35. Cooke J. in *M.A.R.A. (Nigeria) (infant) v. the Minister for Justice & Ors.* [2014] IESC 71 stated:

*"It is now well settled in law that where the statutory appeal is available and has been invoked in good time, it is only in exceptional cases that the High Court will entertain an application for judicial review of the s. 13 Report and only then when the report is shown to have some potentially independent consequences for an applicant which is incapable or inapt to be dealt with by the statutory appeal."*

36. It is therefore for this Court to determine whether or not the Commissioner's decision in this case as to whether or not an injustice has been done in relation to the investigation as to whether the applicant is a refugee under the Refugees Act, 1996 (as amended), and it is incapable of being remedied on appeal to the Refugee Appeals Tribunal.

37. Section 6 of the Refugee Act, 1996 (as amended) establishes the role of the Refugee Applications Commissioner, and s. 13 deals with the investigation of an application for refugee status by the Commissioner.

38. The complaint made by the applicant in this case is that the Refugee Applications Commissioner:

- i. failed to investigate the trafficking;
- ii. failed to ensure the physical safety of the applicants;
- iii. failed to provide the first named applicant with medical care, counselling and a psychiatric report;
- iv. should not have proceeded to decide the application for a declaration of refugee status until the applicant's account of being trafficked had been investigated;
- v. the Refugee Applications Commissioner's decision was contrary to the uncontroverted weight of evidence, and no rebuttal evidence was obtained from An Garda Síochána, the Police Service of Northern Ireland or otherwise;
- vi. The Respondents are organs of State; their failure to refer the first named applicant's evidence of trafficking to the police authorities and to await the outcome of an investigation is contrary to the Rule of Law and further constitutes a failure of due process and a failure to vindicate the applicant's fundamental human rights.

39. However it is the role of the Refugee Applications Commissioner to consider whether or not the applicants are refugees. It is not the role of the Refugee Applications Commissioner to, for instance provide her with secure and appropriate accommodation. It is not the role of the Refugee Applications Commissioner to provide the applicants with medical care, counselling, and psychiatric reports. It is not the role of the Refugee Applications Commissioner to await the investigation of the applicant's account of being trafficked.

40. In this case, it seems clear that the applicant has not made any report to either An Garda Síochána or the PSNI. It is also not the role of the Refugee Applications Commissioner to refer the applicant's complaint of trafficking to the relevant police authorities.

41. It is the role of the Refugee Applications Commissioner to consider the question as to whether the applicant complies with the definition of refugee in the Refugee Act, 1996 (as amended), and to comment if necessary on the plausibility or otherwise of the applicant's statements, and in this case the Refugee Applications Commissioner has held that the applicant's statements are not coherent and plausible and run counter to generally known facts.

42. It appears to this Court that any complaint in relation to the analysis by the Refugee Applications Commissioner can fall to be determined by the Refugee Appeals Tribunal. In this Court's view, the applicant has not demonstrated a clear compelling case of an injustice that has been done that is incapable of being remedied on appeal to the Refugee Appeals Tribunal.

43. While a finding was made by the Commissioner under s. 13 (6) (a) no reliance was placed on this nor did it form part of the statement of grounds for relief.

44. In this case, in this Court's view, the applicant has not demonstrated a clear and compelling case of an injustice which has been done and that it was incapable of being remedied on appeal to the Refugee Appeals Tribunal.

#### **Decision**

45. As this is a telescoped hearing this Court refuses leave to apply for judicial review and dismisses the application for certiorari.

**Counsel for the Minor Applicant: Desmond Murphy S.C. with Killian McMorrow B.L., instructed by John Gerard Cullen Solicitors**

**Counsel for the Respondent: Catherine Duggan B.L., instructed by the Chief State Solicitor**