THE HIGH COURT

No. 2000 No. 533JR

BETWEEN

VALERI ZGNAT'EV

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Finnegan J. delivered the 29th day of March, 2001

This is an application for leave to apply for a judicial review. The application is regulated by the Illegal Immigrants (Trafficking) Act, 2000, Section 5 and leave shall not be granted unless the Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed.

As to the meaning of *"substantial grounds"* I have regard to the judgment of the Supreme Court on the reference of the Illegal Immigrants (Trafficking) Bill, 1999, delivered on 28th August, 2000, at page 24:-

> *"As regard to the requirement that an applicant for leave to issue judicial review proceedings establish "substantial grounds" that an administrative decision is invalid or ought to be quashed, this is not an unduly onerous requirement since the High Court must decline leave only where it is satisfied that the application could not succeed or where the grounds relied on are not reasonable or are "trivial or tenuous". This follows from a number of authorities where a similar requirement, as regard to the Planning Acts, has been judicially considered. Counsel for the Attorney General referred in particular to the judgment of* Egan J in ***Scott -v- An Bord Pleanala***

***[1995] 1 ILRM 424, 428**, Carroll J in **McNamara -v- An Bord Pleanala [1995] 2 ILRM 125**, and Morris P in **Lancefort Ltd -v- An Bord Pleanala [1997] 2 ILRM 508, 516**."*

The relevant passages in **McNamara -v- An Bord Pleanala** are at page 130:-

*"Another case in which the application for leave to apply for judicial review fell to be decided was **Byrne -v- Wicklow County Council, High Court** 1994 Number 351JR (Keane J) 3 November 1994. He approached the matter on the basis that the Applicants must show not merely an arguable case but substantial grounds for contending that the planning decision was invalid and he said he had not the slightest hesitation in holding that there were no substantial grounds. The decision impugned was a decision of the County Manager and he said it was plainly and almost inarguably a decision in respect of which there was material before him entitling him to arrive at the conclusion.*

What I have to consider is whether any of the grounds advanced by the appellant are substantial grounds for contending that the board's decision was invalid. In order for a ground to be substantial it must be reasonable, it must arguable, it must be weighty. It must not be trivial or tenuous."

In ***Jackson Way Properties Ltd -v- The Minster for the Environment and Local Government & Ors,*** the High Court, Geoghegan J, 2nd July 1999, the passage which is quoted above from ***McNamara -v- An Bord Pleanala*** was considered in the following terms -

"As has been pointed out in the written submissions there are some difficulties arising out of Carroll J's own definition but I am certain that she would never have intended that her words would be interpreted as though they were in a statute. I am satisfied that

it was clearly intended by the Oireachtas that stricter criteria be applied to the granting of leave than would be applied on an ex parte application in an ordinary judicial review. Once a court has decided that the points at issue in the proposed judicial review are not trivial or tenuous, the court must assess whether there is real substance in the argument and not merely that which is just about open to argument."

The applicant seeks to challenge the manner in which his application for refugee status was determined the determination having been made upon the basis that his application was manifestly unfounded and in accordance with the procedures for such applications.

The State is a contracting party to the Convention Relating to the Status of Refugees, 1951 (The Geneva Convention) as amended by the Protocol Relating to the Status of Refugees, 1967 (The New York Protocol) which together are hereinafter called "the *Convention".* The Convention defines *"refugee"* in Article 1 as follows:

"Any person who .... owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside of the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."

Having regard to the status of the United Nations High Commissioner for Refugees under the Convention and the desirability of a uniform construction of the Convention in countries which are parties to the same in considering the terms of the Convention it is appropriate to have regard to the views expressed by the High Commissioner and in this regard I considered it appropriate to have regard to the Handbook on Procedures and Criteria for

Determining Refugee Status published by the office of the United Nations High Commissioner for Refugees. The Handbook deals with the phrase *"well founded fear of being persecuted"* at page 11 et seq. *"Fear"* is subjective so that determination of refugee status will primarily require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin. The fear must be well founded and this implies that the applicant's frame of mind must be supported by an objective situation. The phrase therefore contains a subjective and an objective element. If such a well founded fear exists and if offered by an applicant as a reason for being outside the country of his nationality it will in general be irrelevant that he also offers other reasons which would not entitle him to refugee status. The objective element requires an evaluation of conditions in the country of the applicant's nationality. Such consideration need not be confined to the applicant's own personal experience but regard may be had to what has happened to his friends or relatives or other members of the same racial or social group and which may show his fear to be well founded.

"Persecution" also presents difficulties of definition. A threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group or the serious violation of human rights for any such reason will always constitute persecution. Persecution may emanate from the authorities of a country but also from the acts of individuals or groups within that country if such acts are tolerated by the authorities. Where an Applicant relies upon non state persecution the position is correctly stated in ***Horvath -v- Secretary of State for the Home Department [2000] WLR 379*** at 387 by Lord Hope as follows:-

> *"I consider that the obligation to afford refugee status arises only if the person's own state is unable or unwilling to discharge its own duty to protect its own nationals. I think that it follows that in order to satisfy the fear test in a non state agent case, the applicant for refugee status must show that the persecution which he fears consists of acts of violence or ill treatment against which the state is unable or unwilling to pro-*

vide protection. The applicant may have a well founded fear of threats to his life due to famine or civil war or of isolated acts of violence or ill treatment for a Convention reason, which may be perpetrated against him. But the risk, however severe, and the fear, however well founded, do not entitle him to the status of a refugee. The Convention has a more limited objective, the limits of which are identified by the list of Convention reasons and by the principle or surrogacy."

Therefore there are three possibilities:-

1 The persecution is by the state.

2 The persecution is by a non state agency and the state is unable or unwilling to provide protection.

3 The persecution is by a non state agency and the state provides protection to its nationals by respecting the rule of law and it enforces its authority through the provision of a police force.

In the first of these two possibilities there is persecution. In the third there is not. Thus, in the Horvath Case the applicant was a Slovakian Roma. The Immigration Tribunal was satisfied that racial violence against the Roma perpetrated by skinheads existed and that the police did not conduct proper investigations in all cases. There had however been cases where investigations had been carried out and there was evidence that the police had intervened to provide protection when asked to do so and that stiff sentences had been imposed at times for racially motivated crimes. The Immigration Tribunal concluded that violent attacks on the Roma were isolated and random attacks by thugs. The House of Lords held on the finding of

the Tribunal that there was a sufficiency of state protection for the Roma in Slovakia and that the applicant had failed to show that he had a well founded fear
of being persecuted within the meaning of the Convention.

Pending the making of the Convention part of the domestic law of the State the Minister for Justice on the 13th December, 1985, wrote to the representative of the United Nations High Commissioner for Refugees setting out the procedure which would be adopted for the determination of refugee status in Ireland *("the von Arnim Letter").* It was held in ***Gutrani -v- The Minister for Justice*** ***[1993] 2 IR 427*** that the Minister having established the procedure however informally he was bound to apply it in appropriate cases and his decision would be subject to judicial review. Further, a letter dated 13th March, 1998, from the Respondent to the representative of the United Nations High Commissioner for Refugees dated 13th December, 1995 (the Hope Hanlan Letter) the procedures were modified by the introduction of a procedure for dealing with manifestly unfounded applications. I accept, and it was not disputed before me, that the Hope Hanlan letter enjoys the same status as its predecessor the von Arnim Letter.

The procedure for manifestly unfounded applications had its origin in a resolution adopted by EU Ministers at London on 30th November and 1st December, 1992. In short manifestly unfounded applications may be dealt with by a fast track procedure. The resolution arose out of an awareness that a rising number of applicants for asylum in Member States of the EU are not in genuine need of protection within the Member States within the terms of the Convention and the concern that manifestly unfounded applications overload asylum determination procedures resulting in delay in the recognition of refugees in genuine

Need of protection. The London Resolution gives guidance as to the basis on which an application can be deemed to be manifestly unfounded and this corresponds with paragraph 14 of the Hope Hanlan Letter:-

"14 The grounds on which it may be determined that an application is manifestly unfounded is as follows:

(a) it does not show on its face any grounds for the contention that the Applicant is a refugee.

(b) the Applicant gave clearly insufficient details or evidence to substantiate the application.

(c) the Applicant's reason for leaving or not returning to his or her country of nationality does not relate to a fear of persecution.

(d) the Applicant did not reveal, following the making of the application, that he or she was travelling under a false identity or was in possession of false or forged identity documents and did not have reasonable cause for not so revealing.

(e) the Applicant, without reasonable cause, made deliberately false and misleading representations of a material or substantial nature in relation to the application.

(f) the Applicant without reasonable cause and in bad faith, destroyed identity documents, withheld relevant information or otherwise deliberately obstructed the investigation of the application.

(g) the Applicant deliberately failed to reveal that he or she had lodged a prior application for asylum in another country.

(h) the Applicant submitted the application for the sole purpose of avoiding removal from the state.

(i) the Applicant has already made an application for a declaration or an application for recognition as a refugee in a state party to the Geneva Convention, and the application was properly considered and rejected and the Applicant has failed to show a material change of circumstances.

(j) the applicant is a national of or has a right of residence in a state party to the Geneva Convention in respect of which the Applicant has failed to adduce evidence of persecution.

(k) The Applicant has, after making the application, without reasonable cause, left the State without leave or permission or has not replied to communications, or

(l) the Applicant has already been recognised as a refugee under the Geneva Convention by a state other than the State, has been granted asylum in that state and his or her reason for leaving and not returning to that state does not relate to a fear of persecution in that state."

The Executive Committee of that High Commissioners Programme has variously described manifestly unfounded applications as applications by persons who clearly have no valid claim to be considered refugees under the relevant criteria and applications which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure. Such applications have been termed *"clearly abusive"* or "*manifestly unfounded"*. Again, manifestly unfounded applications are those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the Convention: see Excom Conclusions on International Protection Number 30 (XXXIV) 1983.

Finally, in relation to the meaning of manifestly unfounded I have been referred to a letter from Michael Lindenbauer, Senior Liaison Officer, United Nations High Commission for Refugees, Dublin, to the Respondent in which having referred to Excom Conclusion Number 30 he goes on to say:-

"Before deeming a case manifestly unfounded the decision making authority should examine the set of circumstances giving rise to the claim for refugee status as presented by the Applicant against the criteria defined in the above Excom Conclusion. If a claim is not clearly fraudulent or if it bears relation to the criteria for granting refugee status under the 1951 Convention or any other criteria justifying the granting of asylum then such a case should not be dealt with in an accelerated procedure."

I have set out in the schedule to this judgment in full the Hope Hanlan Letter. The substantive procedure provided for in the Hope Hanlan Letter may be summarised as follows:-

1 The Applicant for refugee status makes application and is informed of the Hope Hanlan procedure.

2 The Applicant is interviewed.

3 A person appointed by the Minister will assess the application having regard to the interview, a report of the interview, any written representations received from or on behalf of the Applicant and information obtained from the UNHCR or other internationally reliable source and will make a recommendation as to whether refugee status should be granted or refused by the Minister.

4 A different person authorised by the Minister will make a decision on the application on behalf of the Minister based on the information made available during the process described above and the Applicant will be notified of the decision and the reasons for it.

Manifestly unfounded applications are dealt with by an accelerated procedure provided for in the Hope Hanlan Letter at paragraphs 12 and 13. Paragraph 12 provides that at any time following receipt of an application a person duly authorised by the Minister may decide to terminate further examination of the case on the grounds that it is manifestly unfounded and to refuse the application for refugee status accordingly. Having regard to the use of the phrase *"a person duly authorised"* it seems to me that this must be the person duly authorised under paragraph 11 of the Letter and mentioned at step 4 above as opposed to persons appointed by the Minister for the purpose of conducting the interview at step 2 or the assessment at step 3 above, unless in addition to being appointed they were authorised to make a decision under paragraph 12. The applicant whose application has been deemed manifestly unfounded will be notified of the decision and the reasons for it and of his right to appeal the decision within seven days of the notification being sent setting out the grounds on which the appeal is based. The appeal will be decided by a person of more senior rank and will be made on the basis of the papers available in the case and of any submission made by or on behalf of the applicant.

Where the application is deemed manifestly unfounded further examination is terminated: there is no consideration of the case on its merits. The person duly authorised by the Minister makes the decision on the basis of the application, the note of the interview, the report of the interview and any written representations made by or on behalf of the Applicant. Of necessity he must have regard to the objective element in the concept *"well founded fear of persecution"* and must have regard to relevant background material on the applicant's country of nationality. On the basis of all the foregoing he must determine whether the Applicant has disclosed an arguable case that he is entitled to refugee status under the Convention. In so doing he is not obliged to accept mere assertion by the Applicant of facts and circumstances which if true would entitle him to refugee status. He is entitled to consider credibility and to take into ac-

count that the Applicant's story is inconsistent, contradictory or fundamentally improbable: see London Declaration paragraph 6(c).

The Applicant was interviewed by a person appointed by the Respondent, Ms Majella Donoghue. She prepared a report and assessment which she addressed to Mr Enda Hughes and in which she considered that the accelerated procedures should apply. Mr Hughes considered the application on the 22nd of June, 2000, and was satisfied that the application was manifestly unfounded and referred to subsections paragraph 14 (a), (b) and (c) of the Hope Hanlan Letter. By letter dated 29th June, 2000, the Applicant was informed that his application had been determined as manifestly unfounded and notified of the reasons for the decision. By letter dated 17th July, 2000, the Applicant appealed the decision and submissions were made in support of that appeal. The Refugee Appeals Authority made its recommendation to the Minister on the 31st July, 2000, and recommended that the appeal be dismissed. By letter dated the 5th September, 2000, the Applicant was informed that Linda Greely, the Officer authorised by the Minister had considered the recommendation of the Refugee Appeals Authority and had decided to uphold the original decision and refused the appeal.

The Applicant then initiated these proceedings. The statement required to ground an application for judicial review challenges the decision at first instance that the application was manifestly unfounded, the recommendation of the Refugee Appeals Authority and the decision on the appeal. I propose dealing with the grounds in respect of each of these in turn in the sequence in which the same are set out in the statement required to ground an application for judicial review at paragraph E thereof.

(a) It was not indicated to the Applicant prior to the decision at first instance that the application could be deemed to be manifestly unfounded and accordingly the Applicant was not afforded an opportunity to present evidence to the contrary.

The Applicant was given every opportunity to make out his case for refugee status in full by completing the application, attending for interview and if he wished by making submissions after the interview. At this point there are three possibilities - refugee status will be granted or refugee status will be refused on the merits or refugee status will be refused on the basis that the application is manifestly unfounded. At all stages the Applicant must be aware of the onus that rests upon him to satisfy the terms of the Convention and his application, interview and representations if any will be directed to that purpose. It does not make sense to say that if he was aware that his application would be determined as manifestly unfounded he would have adduced more cogent evidence than that which he adduced on the basis that his application would be determined on the merits. I am not satisfied that this is a substantial ground.

(b) The first named Respondent failed to give adequate reasons for the decision at first instance and/or the decision to refuse the Applicant's appeal against the decision at first instance.

The decision at first instance was communicated by letter dated the 29th June and this sets out the grounds of the determination being those corresponding to paragraph 14(a), (b) and (c) in the Hope Hanlan Letter. With the letter of 29th June, 2000, the Applicant was sent all papers on which the decision was based and insofar as the grounds require any amplification they can be read in conjunction with the interview and the assessment carried out by Ms Majella Donoghue. The grounds relied upon are justified by the analysis contained in the assessment: see ***Ni Eili -v- The Environmental Protection Agency & Anor*** the Supreme Court 30 July 1999 Murphy J. at P.29. There are reasons and the reasons are adequate. I am not satisfied that this is a substantial ground.

(c) The second named Respondent failed to give any adequate reasons for the recommendation that the Applicant's appeal against the decision at first instance should be refused.

The recommendation of the second named Respondent made after consideration of all the documents on the Applicant's file and submissions in writing made by the Refugee Legal Service dated 17th July, 2000, upheld the decision that the claim was manifestly unfounded again on the basis of paragraph 14(a), (b) and (c) of the Hope Hanlan Letter. In the circumstances of this case I am satisfied that this is a sufficient setting out of reasons and in any event the reasons can be clarified by reference back to the assessment and the decision at first instance. I am not satisfied that this is a substantial ground.

(d) The first named Respondent, his servants and/or agents, in reaching the decision at first instance and/or the decision to refuse the Applicant's appeal against the said decision at first instance failed, refused and neglected to observe and/or otherwise act in accordance with the guidelines prepared and/or established and/or laid down by the first named Respondent his servants and/or agents for use in the determination of whether applications for recognition of refugee status are manifestly unfounded within the meaning of the aforesaid Hope Hanlan Letter.

This ground is expanded upon in the grounding affidavit sworn on behalf of the Applicant by Gráinne Brophy on the 3rd October, 2000, at paragraphs 22 and 23 thereof as follows:-

> *"I say and believe that on the basis of the nature of the claim made by the Applicant to the first named respondent in the said questionnaire and at the said interview with Ms Donoghue the applicant had established a prima facie case for recognition of his ref-*

ugee status and/or has identified issues which prima facie brought him within the relevant provisions of the Geneva Convention."

The functions of this Court are limited. It cannot interfere with the decision of an administrative decision making authority merely on the ground that on the facts it would have reached a different conclusion: ***O'Keefe -v- An Bord Plenala & Ors* [1993] I IR 39**. For this Court to interfere the Applicant is required to show that the decision making authority had before it no relevant material which would support its decision. An examination of the papers shows that there was ample relevant material before the decision maker to support the decision. In short the circumstances relied upon do not amount to persecution.

(e) The first and second named Respondent or either of them, their servants and/or agents, erred in law in failing to observe and/or otherwise act in accordance with the guidelines and/or directions of the UNHCR in respect of the determination of whether applications for recognition of refugee status are manifestly unfounded.

This ground is expanded upon in Paragraph 26 of the grounding affidavit. Reliance in particular is placed upon a letter dated September, 1999, from Michael Lindenbauer, Senior Liaison Officer, UNHCR, Dublin, to the first named Respondent in relation to a case other than that of the Applicant. The letter must be read in conjunction with Excom Conclusion Number 30 (XXXIV) of 1983. The relevant portion of the letter, I am satisfied, is the following:-

"If a claim is not clearly fraudulent or if it bears relation to the criteria for the granting of refugee status under the 1951 Convention, or any other criteria justifying the granting of asylum, then such a case should not be dealt with in an accelerated procedure."

Again, it seems to me that ***O'Keefe -v- An Bord Pleanala & Ors*** is relevant. There was ample evidence available to the decision maker to justify a finding that the claim did not bear relation to the criteria for the granting of refugee status. On the application the Applicant has not disclosed persecution. In these circumstances the Court cannot interfere. (f)

The first named Respondent, his servants and/or agents reached a decision at first instance and reached an appeal decision which said decisions, or either of them are manifestly unreasonable having regard inter alia to the guidelines prepared and/or established and/or laid down by the first named Respondent his servants or agents and/or having regard to the guidelines and/or directions of the UNHCR and/or having regard to the requirements of natural and/or constitutional justice and/or having regard to the provisions of the Constitution of Ireland, 1937, and having regard to international law.

(g) The second named Respondent reached a decision and/or made a recommendation in respect of the Applicant's appeal which is manifestly unreasonable having regard to the directions of the UNHCR and/or having regard to the requirements of natural and/or constitutional justice and/or having regard to the provisions of the Constitution of Ireland, 1937, and/or having regard to international law.

In order to succeed on these grounds the Applicant would have to satisfy the very stringent test laid down in ***The State (Keegan) -v- Stardust Victims Compensation Tribunal [1986] IR 642***:-

"The decision sought to be impugned must be so unreasonable that no reasonable decision maker could ever have come to it."

The affidavit in support of the application falls far short of discharging this burden. The decision on the application was clearly open to the decision maker on the information before him. I am not satisfied that this is a substantial ground.

(h) In his initial application the Applicant had established a prima facie case for recognition of his refugee status and/or identified the issues which prima facie brought him within the relevant provisions of the United Nations Convention relating to the Status of Refugees, 1951, and the Protocol relating to the Status of Refugees, 1967, (hereinafter referred to together as "*the Geneva Convention"*). In the premises the decision of the first named Respondent, his servants and/or agents at first instance and/or in respect of the Applicant's appeal and/or the recommendation of the second named Respondent is or are manifestly unreasonable and/or irrational.

The onus on the Applicant here is again that in the ***State (Keegan) -v- Stardust Victims*** Compensation Tribunal. Again the approach which the Court must adopt is that in ***O'Keefe -v- An Bord Pleanala***. Judicial review is concerned not with the decision but with the decision making process. Judicial review is not an appeal from a decision but a review of the manner in which the decision was arrived at. The Court cannot interfere with the decision merely on the grounds that it is satisfied that on the facts as found it would have raised different inferences or conclusions or it is satisfied that the case against the decision made was much stronger than the case for it. Again, as Finlay CJ said in ***O'Keefe -v- An Bord Pleanala*** (at page 72):-

> *"I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the*

applicant should establish to the satisfaction of the court that the decision making authority had before it no relevant material which would support its decision."

As there was ample relevant material before the decision maker in the application and the interview to enable the decision in fact made to be arrived at, I am not satisfied that this ground is substantial.

(i) The first named Respondent, his servants and/or agents erred in law and/or acted unreasonably and/ irrationally in failing to admit the Applicant to the *"full"* asylum applications procedure when the Applicant had submitted a claim for recognition of his refugee status which prima facie brought him within the relevant provisions of the Geneva Convention.

For the same reasons as at paragraph (h) above I am not satisfied that a substantial ground is shown here on the basis of irrationality. Insofar as an error in law is concerned I have set out the relevant law as to the meaning of refugee persecution and manifestly unfounded. There is no error of law apparent in the decisions sought to be impugned and indeed as I understand the Applicant's case on affidavit the error relied upon is the findings of facts to which the law was applied. I am not satisfied that this is a substantial ground.

(j) The procedure established pursuant to paragraphs 12-14 (inclusive) of the Hope Hanlan Letter failed to satisfy the requirements of natural and constitutional justice and/or are bad in law and/or violate Article 6 (1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms in that the said procedures do not provide an appellant with an opportunity for an oral hearing of his or her appeal and in particular the Applicant herein was not afforded an oral hearing of his appeal against the decision at first instance.

In short the Applicant's complaint is that there was no facility for an oral hearing on his appeal.

Article 14.3 of the Constitution implies a guarantee of basic fairness of procedures. The requirements of natural and constitutional justice will vary with the circumstances of the case: ***Gunn -v- Bord an Cholaiste Naisiunta Ealaine is Deartha [1992] IR 168.*** ***In Kiely -v- Minister for Social Welfare [1977] IR 267 at 281*** Henchey J said that:-

> *"Tribunals exercising quasi judicial functions are frequently allowed to act informally - to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedure, and the like - but they may not act in such a way as to imperil a fair hearing or a fair result. I do not attempt an exposition of what they may not do. To quote the frequently cited dictum of Tucker LJ in Russell -v- Duke of Norfolk:-*
>
> *"There are, in my view, no words which are of universal application for every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth"."*

Clearly there is no universal requirement or general entitlement to an oral hearing of an appeal. ***Galvin -v- Chief Appeals Officer*** **[1997] 3 IR 240** was a case in which the respondent had a discretion as to whether or not an oral hearing would be held. Costello J held that as it would be extremely difficult if not impossible to arrive at a true judgment on the issues which arose without an oral hearing and so quashed the decision arrived at without an oral hearing. However, it is not necessarily a denial of natural justice for a tribunal to receive and rely upon written representations: ***R -v- Amphlett*** **[1915] 2 KB 223,** ***Local Government Board -v- Arlidge*** **[1915] AC 120,** ***Selvarajan -v- Race Relations Board*** **[1976] 1 All ER 12**.

Many statutes eg. Local Government (Planning and Development) Acts, 1963-1999, specifically permit tribunals to proceed on written evidence alone. In an Australian case, ***Re Babler -v- Director General of Social Services*** (unreported 17th March, 1982 Administrative Appeals Tribunal) where there was a discretion as to whether there should be an oral or written appeal it was held that it would be appropriate to rely upon written evidence in the form of a statutory declaration where the social security recipient spoke very poor English and was concerned about appearing in person to give evidence. Again, it may be of advantage to an applicant for refugee status not to have an oral appeal at which he could be cross-examined as to evidence which he had given. I make these remarks as it may not always be to the benefit of an appellant to have an oral hearing. Other than to assert that natural justice required that the applicant be given an oral hearing no authority was cited to me in support. No specific disadvantage to the Applicant resulting from written procedures was cited to me. However the consequences for a genuine applicant for refugee status of his appeal failing as so serious it seems to me that I should grant leave on this basis. In doing so I bear in mind the dicta in ***Goldberg -v- Kelly*** 397.U.S. 254 at 268-269

> *"The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard... Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mould his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision."*

(k) The second named Respondent erred in law and fact in failing to recommend that the Applicant be admitted to the *"full"* asylum procedure when the

applicant had submitted a claim to the first named Respondent and/or the second named Respondent or either of them their servants and/or agents which prima facie brought him within the relevant provisions of the Geneva Convention and/or erred in mistaking the grounds for and/or the reasons for the Applicant's claim for recognition of his refugee status and accordingly the second named Respondent was not entitled to reach the said decision and/or to recommend that the Applicant's appeal should be refused and therefore the said recommendation is unreasonable and irrational.

(l) In the aforesaid premises, the recommendation of the second named Respondent contains an error on the face of the record.

(m) To the extent that the first named Respondent his servants and/or agents relied upon the said decision and/or recommendation of the second named Respondent reaching the appeal decision the said appeal decision was vitiated by the second named Respondent said error and/or misstatement.

It seems to me that these three grounds can be taken together and fall to be dealt with on the same basis as the grounds mentioned at (h) and (i) above. Insofar as it is said that the reasons for the Applicant's claim for recognition of his refugee status are misstated I am satisfied that there was evidence available to this Respondent to support the statement of the same. In these circumstances it cannot be said the Applicant's grounds were misstated. I am not satisfied that these grounds are substantial.

Accordingly I propose to grant leave to the Applicant to apply for the relief in the statement required to ground an application for judicial review at D 1(c) upon the grounds at E 1(j).

With regard to the grounds relied upon at E 2 - the violation of Article 6(1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms as

the Convention is not part of domestic Irish law at present I am not satisfied that this ground is substantial.

Schedule to Judgment

Ms Hope Hanlan
Representative
UNHCR
21st Floor Millbank Tower
21-24 Millbank
I .London SW1P 4QP

10 December, 1997

Dear Ms Hanlan

I am directed by the Minister for Justice, Equality and Law Reform to refer to this Department's letter of 13 December, 1985 to your predecessor, Mr R. von Arnim, regarding the procedures which Ireland follows in dealing with persons who seek asylum within the State. I also refer to recent correspondence and meetings between us on the subject.

Circumstances have changed considerably since 1985 as regards asylum matters in the State. The statutory background against which asylum applications fall to be considered has developed with the commencement of provisions of the Refugee Act, 1996, including the statutory definition of a refugee and the coming into effect of the Dublin Convention. In addition, the volume of applications being made in the State has increased about a hundred-fold since 1985. Both the Department and UNHCR have acknowledge the inadequacy of the procedures obtaining to date to deal with the volume of applications on hands and being received and recognise the need to replace them with procedures capable of dealing fairly and in a timely fashion with those applications.

In the light of these changed circumstances, it is now necessary for Ireland to put in place new administrative procedures pending the introduction of statutory procedures to deal with applicants for asylum in the State. These procedures are in substitution for those put in place in the letter of 13 December, 1985 to Mr von Arnim.

With effect from 10 December, 1997 the following administrative procedures will be in effect and will apply to all applications on hands on that date or made on or after that date. The Department believes these to be in line with Ireland's international obligations and humanitarian traditions.

General

1 An application for refugee status (hereinafter referred to as 'asylum') may be made by an applicant to an immigration officer on arrival in the State, or, if the person is already within the State to the Department of Justice, Equality and Law Reform or, if outside Dublin, to any Garda Station.

2 Immigration officers have been provided with written guidelines which draw attention to the statutory definition of a refugee contained in section 2 of the Refugee Act 1996 and to the prohibition on refoulement contained in section 5 of that Act.

3 Whenever it appears to an immigration officer as a result of a claim or information given by an individual that he or she might be an asylum-seeker, the following initial procedure will apply. The immigration officer will interview the person with the purpose of eliciting sufficient information for the officer of the Department appointed under section 22(4)(a) of the Refugee Act 1996 to decide if the application should be dealt with in the State or otherwise (currently the Dublin Convention (Implementation) Order 1997 (S.I. No. 360 of 1997) applies in this regard).

4 Immigration officers have been instructed that it is not necessary for an individual to use the term "refugee" or "asylum" in order to be an asylum-seeker. Whether or not a person is an asylum-seeker is a matter of fact to be determined in the light of all the circumstances of the particular case as well as guidelines which may be issued from time to time by the Department. Where necessary and possible, an interpreter shall be provided so that the individual may make his or her wishes known. In case of doubt, the immigration officer shall consult the Department.

Admissibility

5 An asylum seeker may be granted or refused leave to land in accordance with normal immigration criteria as the individual circumstances warrant. However, any refusal of leave to land in such circumstances will have suspensive effect, and such a person will not be removed from the State, until either -

- it is determined that the individual is not in fact seeking asylum in the State, or
- a final decision has been made under the Dublin Convention (implementation) Order that the application should be dealt with in another Convention country, or
- it is decided that the application is manifestly unfounded, or
- the application has been deemed to be abandoned, or
- the application has been examined substantively in the State and a final decision reached on it.

Substantive consideration

6 An asylum application for which the State has responsibility will be examined by reference to the definition of "refugee" contained in section 2 of the Refugee Act 1996. The following paragraphs set out the procedure by which that examination will take place.

7 The applicant will be given an opportunity to submit his or her case to the Department and to contact the UNHCR Representative and/or a local representative of his or

her choice. The applicant will be informed of the procedure to be followed and of these rights, where possible in a language which he or she understands.

8 The applicant will be interviewed by a person appointed by the Minister or by an immigration officer. Where necessary and possible the interview will be conducted with the aid of an interpreter. The applicant may be accompanied at the interview by a representative, who will, however, refrain from answering questions for the applicant or intervening in any way in the conduct of the interview. The representative will be given an opportunity at the end of the interview to make briefly any points which are considered necessary.

9 At any point before, or up to five working days after, the interview the applicant or his or her representative may make written representations relating to the case.

10 A person appointed by the Minister will assess the case having regard to the interview, the report of the interview, to any written representations duly submitted and to such information as may be obtained from UNHCR or other internationally reliable sources. Such person will make a recommendation as to whether refugee status should be granted or refused.

11 A person duly authorised by the Minister will make a decision based on the information made available during the process described above. The applicant will be notified by registered post of the decision and of the reasons for it, and (if the decision is negative) of the right to appeal the decision within 14 days of the notification being sent, setting out the grounds on which the appeal is based. The applicant in his or her notice of appeal shall specify if an oral hearing is required.

Manifestly unfounded cases: accelerated procedure

12 Where at any time following receipt of an application any of the circumstances set out at paragraph 14 below emerges, a person duly authorised by the Minister may decide to terminate further examination of the case on the grounds that it is manifestly unfounded and to refuse the application for refugee status accordingly. The applicant will be notified by registered post of the decision and of the reasons for it, and of the right to appeal the decision within 7 days of the notification being sent, setting out the grounds on which the appeal is based. UNHCR will also be notified of each such decision and provided with a copy of any appeal submissions made.

13 The appeal will be decided by a person of more senior rank, in consultation with the UNHCR where possible. Where UNHCR has made no observations on the case within 7 days of the decision under appeal, it will be assumed that no observations are being offered. The decision will be made on the basis of the papers available in the case and of any submission made by or on behalf of the applicant. If the appeal is determined in favour of the applicant, the applicant will be notified of the decision and processing of the application will resume. Otherwise the applicant will be notified of the decision and the provisions of paragraph 21 below will have effect.

14 The grounds on which it may be determined that an application is manifestly unfounded are as follows:

(a) it does not show on its face any grounds for the contention that the applicant is a refugee,

(b) the applicant gave clearly insufficient details or evidence to substantiate the application,

(c) the applicant's reason for leaving or not returning to his or her country of nationality does not relate to a fear of persecution,

(d) the applicant did not reveal, following the making of the application, that he or she was travelling under a false identity or was in possession of false or forged identity documents and did not have reasonable cause for not so revealing,

(e) the applicant, without reasonable cause, made deliberately false or misleading representations of a material or substantial nature in relation to the application,

(f) the applicant, without reasonable cause and in bad faith, destroyed identity documents, withheld relevant information or otherwise deliberately obstructed the investigation of the application,

(g) the applicant deliberately failed to reveal that he or she had lodged a prior application for asylum in another country,

(h) the applicant submitted the application for the sole purpose of avoiding removal from the State,

(i) the applicant has already made an application for a declaration or an application for recognition as a refugee in a state party to the Geneva Convention, and the application was properly considered and rejected and the applicant has failed to show a material change of circumstances.

(j) the applicant is a national of or has a right of residence in a state party to the Geneva Convention in respect of which the applicant has failed to adduce evidence of persecution,

(k) the applicant has, after making the application without reasonable cause left the State without leave or permission or has not replied to communications, or

(l) the applicant has already been recognised as a refugee under the Geneva Convention by a state other than the State, has been granted asylum in that state and his or her reason for leaving or not returning to that state does not relate to a fear of persecution in that state.

Appeals

15 Where an appeal is made within the specified time against a decision (other than in manifestly unfounded cases or in cases deemed to be abandoned (see paragraph 20)) to refuse refugee status, the applicant will be supplied with all of the material (other than material which has been supplied to the Department on the basis that it will not be disclosed further) on which the decision was based. The appeal will be determined by an Appeals Authority, a person independent of the Minister and the Department with at least ten years' practice as a solicitor or barrister appointed by the Minister for this purpose (more than one such person may be appointed). The Appeals Authority will be provided with all of the information provided tot

he applicant and with such submissions as may be made by or on behalf of the applicant in connection with the appeal. The Appeals Authority will make a decision based on the papers only or, where the applicant has so requested, following an oral hearing.

16 Where an applicant fails to attend at an appeal hearing, having requested and being granted an oral hearing and having been duly informed of the date thereof, the appeal shall be considered on the basis of written documentation already available to the Appeals Authority.

17 The Appeals Authority will make a recommendation to the Minister as to whether refugee status should be granted.

18 A duly authorised officer of the Department will make a final decision on refugee status on behalf of the Minister based on the recommendation of the Appeals Authority, but subject to considerations of national security or public policy.

Grant of status

19 Where refugee status is granted, the applicant will be notified accordingly and will be provided with documentation confirming his or her status and the nature and extent of his or her rights under the 1951 Convention and associated Protocol.

Abandoned cases

20 Where an applicant fails to attend at an interview or is otherwise uncontactable without good and sufficient reason his or her case will be considered to be abandoned. A notice to this effect will be sent to the applicant at his or her last known address by registered post. If the applicant subsequently comes tot he attention of the authorities he or she will be considered to be an illegal immigrant and will be dealt with in accordance with immigration (non-asylum) rules.

Refusal

21 Where refugee status is either refused at first instance and not appealed within the time specified, or is refused following an appeal, the applicant will be invited to leave the State voluntarily and informed that failure to do so within 14 days may result in a recommendation being made to the Minister that a deportation order should be made in respect of him or her.

Temporary leave to remain

22 The above procedures offer to applicants who do not come within the definition of "refugee" contained in section 2 of the Refugee Act 1996 sufficient opportunities to make submissions to the Minister as to whether there are special reasons why leave should be granted to them to remain temporarily in the State. A decision in any such case remains at the absolute discretion of the Minister.

Co-operation with the UNHCR

23 The UNHCR Representative will be notified of the making of each application. The UNHCR Representative may attend any interview or hearing in connection with the above proceedings, and may have access to the papers relating to any particular case at any stage during the processing of an application. Where the UNHCR Representative considers it appropriate , he or she may make unsolicited representations relating to any case or group of cases; such representations will betaken into account in arriving at a decision.

24 The Department undertakes to operate these procedures in a spirit of co-operation with the UNHCR with a view to ensuring that no person deserving of protection in the State is refused it.

Yours sincerely

Diarmuid Cole
Assistant Secretary

Ms Hope Hanlan
Representative
UNHCR
21st Floor Millbank Tower
21-24 Millbank
London SW1P 4QP

13 March, 1998

Dear Ms Hanlan

I am directed by the Minister for Justice, Equality and Law Reform to refer to my letter of 10 December last and the meeting of 5 February between Department officials and representative of the UNHCR, Amnesty, Irish Commission for Justice & Peace, Irish Refugee Council and Trócaire.

I am now to inform you that following consideration of the report of the meeting, the Minister has decided to amend the procedures for dealing with manifestly unfounded cases by providing for an appeal to an independent authority and also by increasing the time allowed for lodging an appeal from 7 days to 7 working days.

Accordingly, paragraphs 12 and 13 of my letter to you of 10 December will be amended as follows -

Paragraph 12

in line 7 replace "7 days" with "7 working days".

Paragraph 13

replace the existing paragraph with

"13(a) The appeal will be determined by an appeals authority, a person independent of the Minister and the Department with not less than 7 years' practice as a solicitor or barrister appointed by the Minister for this purpose (more than one such person may be appointed). The Appeals Authority will be provided with all of the papers available in the case and with such submissions as may be made by or on behalf of the applicant in connection with the appeal. The Appeals Authority will make a determination based on the papers only. Where UNHCR has made no observations on the case within 7 working days of the decision under appeal, it will be assumed that no observations are being offered.

(b) The Appeals Authority will make a recommendation to the Minister as to whether the original determination should stand or whether the application should be considered substantively.

(c) A duly authorised officer of the Department will make a decision based on the recommendation of the Appeals Authority, but subject to considerations of national security or public policy (ordre publique).

(d) If the appeal is decided in favour of the applicant, the applicant will be notified of the decision and processing of the application will resume. Otherwise the applicant will be notified of the decision and the provisions of paragraph 21 below will have effect."

I would also like to take this opportunity to confirm that applicants for refugee status are, of course, entitled to consult a solicitor and that the reference to "public policy" at the end of paragraph 18 should be followed by "(ordre publique)"

Yours sincerely,

Diarmuid Cole
Assistant Secretary