Neutral Citation Number: [2007] IEHC 54

THE HIGH COURT

JUDICIAL REVIEW

[2005 457 J.R.]

BETWEEN

NAFISA ABDI ADAN

APPLICANT

AND

THE REFUGEE APPLICATIONS COMMISSIONER AND THE REFUGEE APPEALS TRIBUNAL

RESPONDENTS

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

NOTICE PARTY

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 23rd day of February, 2007.

The applicant is a Somali who states she arrived in Ireland and applied for asylum in August, 2004. She completed an ASY 1 application form and asylum questionnaire in August, 2004. She gave her date of birth as the 21st October, 1987 and was treated as a minor and put in the care of the Health Service Executive, East Coast Area.

She attended for interview at the office of the Refugee Applications Commissioner ("ORAC"), as requested on the 2nd February, 2005, accompanied by Ms. Gemma Doyle a project worker with the HSE, East Coast Area to whom she had been assigned and a case worker from the Refugee Legal Service ("RLS").

The applicant did not disclose, as she was obliged to do, that prior to arriving in Ireland she had been in the United Kingdom and there applied for asylum and had been refused. In considering the application, ORAC had identified this fact from the finger print taken from the applicant and the URODAC facilities. The United Kingdom Home Office confirmed on the 7th October, 2004, to ORAC that a person with the applicant's fingerprints had made an application for asylum in the United Kingdom on the 30th August, 2002, under the name Hannan Mohamed Osman with a stated date of birth of 26th April, 1984, and from Somalia. On the 8th December, 2004, the United Kingdom confirmed that they would accept the transfer of the applicant for further consideration of her asylum application under the terms of article 16(1)(e) of Council Regulation (EC) No. 343 of 2003.

Notwithstanding this, it appears that a determination must have been made by or on behalf of the first named respondent ("the Commissioner") and that the applicant's pending asylum application would be considered and determined in this jurisdiction.

The applicant's advisors were unaware of any of the above when they accompanied her to interview on the 2nd February, 2005. The applicant was unaware that the Irish authorities were now aware of her earlier application in the United Kingdom under the different name and date of birth.

The interviewer commenced the interview without disclosing the facts known to him in relation to the United Kingdom application. It appears from the affidavit of Ms. Doyle, the HSE project worker that the interview commenced by the applicant being asked what are described as standard questions relating to her name and date of birth and then more specific questions regarding her mode of travel to Ireland and why she sought asylum. The applicant repeated the facts set out in her ASY 1 form and questionnaire, many of which are now acknowledged to be untrue. The interviewer then called for a break in the interview. During this break he asked Ms. Doyle and the case worker from the RLS to speak to him in the absence of the applicant. He then disclosed to them that he had received notification from the Untied Kingdom Home Office that the applicant had made a previous claim for asylum. Ms. Doyle states that she then asked that the interview be adjourned and rescheduled to another day or at the very least that she be afforded an opportunity of speaking to the applicant in private before the interview recommenced. Both of these requests were refused by the interviewer and the interview then resumed.

Ms. Doyle in her affidavit avers that when the interview resumed "the interviewer adopted a more aggressive and confrontational style of interview. As a result of the foregoing, the applicant became extremely distressed and at one point began to cry uncontrollably". It then appears that Ms. Doyle sought and obtained a second break in the interview during which she spoke to the applicant's lawyer in the RLS who was not present.

A further request was then made by Ms. Doyle for the interview to be adjourned. This was refused by the interviewer. It appears the point was taken that the applicant was not a minor and could make her own decision. It appears from Ms. Doyle's affidavit that the interviewer then asked the applicant if she was happy to continue and that she replied "yes". The applicant at paragraph 15 of her affidavit explains her understanding of the options then available in the following way. "The interviewer declined to suspend the interview and stated that if we walked away from the interview now, there would be no way that we could come back on another day".

The final stage of the interview is described by Ms. Doyle at paragraph 10 of her affidavit in the following terms:

> "Towards the end of the interview the applicant began to set out the true facts regarding her case of asylum. Whereas the interviewer made a note of what she was saying and asked a number of questions, he did not seem to be particularly interested in pursuing the matter. At the end of the interview, I asked the interviewer why he had not asked more questions about why the applicant had left the United Arab Emirates to which he replied that it was not relevant since the applicant had already lied."

The report and recommendation of the Commissioner pursuant to s. 13(1) of the Refugee Act 1996 (as amended) was prepared by the authorised officer who had conducted the interview on the following day the 3rd February, 2005 and the recommendation included by him therein stated "I have considered the information in relation to Nafisa Abdi Adan. I am satisfied that she has failed to establish a well founded fear of persecution as defined under s. 2 of the Refugee Act 1996 (as amended). On the same day a second official of ORAC completed the report by stating:

> "I have considered this application and pursuant to the provisions of s. 13(1) of the Refugee Act 1996 (as amended) I recommend that Nafisa

> Abdi Adan, should not be declared a refugee. I am also satisfied that s. 13(6) ss. (a) and (b) apply to this case."

The s. 13(1) reported recommendation of the Commissioner was sent to the applicant with a letter dated the 16th February, 2005. In that letter the applicant's attention was drawn to the fact that the s. 13 report includes amongst its findings one of the findings set out in s. 13(6) of the Act and that any appeal against the recommendation therein must be made within 10 working days from the date of that letter and that the appeal would be dealt with without an oral hearing.

The applicant was being advised and assisted by the RLS. Ms. Gráinne Brophy, a solicitor with the RLS has sworn two affidavits on behalf of the applicant from which the following appear to be the relevant subsequent facts to the issues arising on the application for leave. A notice of appeal was lodged to the second named respondent, the Refugee Appeals Tribunal ("the Tribunal") dated the 2nd March, 2005. This appears to have been accepted as within the necessary 10 day period. The appeal was lodged on the form ASY 1. Ground 6 stated "further submissions will be forwarded shortly". The notice of appeal was forwarded to the Tribunal with a covering letter from Mr. Albert Llussa, an Advocate with the Refugee Legal Service which stated "please note that we submit this notice of appeal without prejudice to our client's right to judicially review the Commissioner's recommendation".

By a letter of the 1st March, 2005, Mr. Llussa had written on behalf of the applicant to the office of the Commissioner requesting that the Commissioner quash the recommendation dated the 3rd February, 2005 on the basis that the interview and investigation pursuant to s. 11 of the Act of 1996 that took place on the 2nd February, 2005, was conducted in breach of the applicant's constitutional right to fair procedures. He also requested the Commissioner to order the conduct of a fresh interview and investigation with a new interviewer. He then stated "please note that our client has been advised of her right to judicially review your recommendation in the event of you refusing to agree to our request". He set out in 5 pages detailed submissions as to why it was alleged the interview and investigation were conducted in breach of the applicant's rights to fair procedures and made a number of references to the UNHCR Handbook on procedures and criteria for determining refugee status.

No responses are disclosed as being received to either of the above. By a letter of the 11th March, 2005, Mr. Llussa forwarded very detailed submissions to the Tribunal on behalf of the applicant including submissions relating to the alleged breach of the applicant's right to fair procedures in the manner in which the interview and investigation was conducted. These appear intended as the further submissions referred to in the notice of appeal. In the covering letter Mr. Llussa stated:

> "Please note that our client has requested the Commissioner to quash her recommendation and invite Ms Abdi Adan for a new interview. Please note that in the event of this request being refused, our client intends to apply for a legal aid certificate for the purpose of challenging the Commissioner's recommendation by way of judicial review proceedings. We would be obliged if the Tribunal could withhold its decision until then."

No response appears to have been received to the above request.

Ms. Brophy in her affidavit states that a further letter was sent by Mr. Llussa to the Commissioner on the 15th March. This is not exhibited. The Court assumes that this was in the nature of a reminder or a further copy of the letter of the 1st March, by reason of the response received ultimately from the Commissioner on the 5th April and referred to below.

On the 21st March, Mr. Llussa sent further documentation obtained from the

Refugee Documentation Centre to the Tribunal for the attention of Ms. Michelle O'Gorman, a member of the Tribunal to whom, he must have learnt, the appeal had been assigned.

By a letter dated the 5th April, Mr. Llussa received the following response from Mr. Minihan, an Assistant Principal on behalf of the Commissioner:

> "I refer to your letter received on March 15th regarding Ms. Adan's application for asylum and her subsequent interview conducted by this Office in that regard.
>
> Having reviewed the file on the case and spoken with the authorised officers involved I am satisfied with the conduct of the interview in this instance. In my opinion, there is no reason why the case should be reopened and handed over to another caseworker at this stage.
>
> Accordingly, I do not propose to quash the recommendation dated February 3rd 2005."

Ms. Brophy is the managing solicitor in the judicial review section of the RLS. She states that on the 11th April, her colleague informed her of the Commissioner's refusal to withdraw the negative recommendation in respect of the applicant. She then applied for a legal aid certificate for counsel's opinion on the 12th April and received this on the 15th April. A brief was prepared and papers sent to counsel on the 19th April and an opinion received in her office on the 20th April, in which counsel advised that proceedings should be instituted. She then applied for the legal aid certificate for the proceedings which was granted on the 22nd April. She instructed counsel by telephone on the 28th April, to draft proceedings which were received in her office on the 29th and she states that she then arranged for the applicant to swear the grounding affidavit. This was done on the 4th May and the notice of motion seeking leave issued on the same day.

In the meantime by a letter dated the 22nd April, 2005, the applicant was informed of the decision of the Tribunal on her appeal. The decision was to affirm the recommendation of the Commissioner given under s. 13 of the Act of 1996 that she should not be declared to be a refugee. The letter further indicates the matters and documents which have been considered in reaching the decision. It also states that the Tribunal was satisfied that the applicant was not a refugee within the meaning of s. 2 of the Act of 1996 for the reasons set out in the appendix attached which is stated to form part of the decision and to be signed by the member of the Tribunal who considered the case. The appendix is a decision of Ms. Michelle O'Gorman who is a member of the Tribunal and is dated the 11th March, 2005.

Leave and Grounds

The application for leave is made by motion on notice to the Commissioner, the Tribunal and the Minister for Justice in accordance with s. 5 of the Illegal Immigrants (Trafficking) Act, 2000. The only replying affidavit is one sworn by a Higher Executive Officer on behalf of the Commissioner and the affidavit is stated to be made in response to the grounding affidavit of the applicant. The deponent exhibits the ASY 1 form completed by the applicant with the aid of a translator and interpreter and as she had claimed to be an unaccompanied minor, in the presence of a representative of the HSE, East Coast Area. He also exhibits the information leaflet for applicants for refugee status in Ireland of which the applicant acknowledged receipt. The deponent was not present at the interview and no affidavit has been filed disputing any of the matters pertaining to the interview averred to by Ms. Doyle or the applicant.

The applicant seeks leave to apply for judicial review seeking *inter alia* an order of *certiorari* quashing the decision of the Tribunal and an order of *certiorari* quashing the decision of the Commissioner recommending that the applicant should not be declared to be a refugee. Related declarations are also sought including a declaration that the applicant is entitled to or have her application for asylum remitted to the Commissioner to be considered *de novo* pursuant to the substantive procedures set out in ss. 11 and 13 of the Refugee Act, 1996 (as amended).

The applicant also seeks an order extending the time in which to seek such reliefs.

Claim Against Tribunal
The only ground in the statement of grounds which supports the application for *certiorari* of the decision of the Tribunal is that at paragraph 5(xi) which states:

> "The decision of the second respondent is invalid and ought to be quashed on the basis that it had regard to and affirms the defective recommendation of the first respondent."

Whilst Ms. Brophy in her second affidavit sworn on the 27th April, 2006, long after the statement of grounds was filed herein, appears to make criticism of the failure of the Tribunal to consider the submissions made on behalf of the applicant dated the 11th March, 2005, and 23rd March, 2005, no application was made to amend the statement of grounds to include a separate challenge to the validity of the Tribunal decision on such a ground.

The challenge to the decision of the Tribunal must be considered as dependent upon and consequential to the applicant's entitlement to challenge the validity of the decision of the Commissioner. This is important to the submissions made on behalf of the respondents and notice party in respect of the application for leave to challenge the decision of the Commissioner.

Claim against Commissioner
The reliefs for which the applicant seeks leave to apply in respect of the decision of the Commissioner are:

> "(a) An order of *certiorari* by way of application for judicial review quashing the decision of the first respondent dated the 3rd February, 2005, notified to the applicant by letter dated the 16th February, 2005, recommending that the applicant should not be declared to be a refugee.
>
> (b) A declaration that the decision of the first respondent is *ultra vires*, void and of no force or effect having regard to the provisions of sections 2, 11 and 13 of the Refugee Act, 1996 (as amended).
>
> (c) A declaration that the applicant is entitled to have her application for asylum herein remitted to the first respondent to be considered *de novo* pursuant to the substantive procedures set out under sections 11 and 13 of the Refugee Act, 1996 (as amended).
>
> (d) An order of *Mandamus* compelling the first respondent to reconsider the applicant's claim for asylum *de novo* pursuant to the substantive procedures set out under sections 11 and 13 of the Refugee Act, 1996 (as amended)."

The primary relief is the order of *certiorari*. The declarations sought make clear that the applicant is seeking to achieve a situation whereby the procedures envisaged by ss. 11

and 13 of the Act of 1996 will recommence *de novo*. Section 11(1) and (2) of the Act of 1996 (as amended) provides:

> ""11. (1) Where an application is received by the Commissioner under section 8 and the application is not withdrawn or deemed to be withdrawn pursuant to this section 9 or 22, it shall be the function of the Commissioner to investigate the application for the purpose of ascertaining whether the applicant is a person in respect of whom a declaration should be given.
>
> (2) In a case to which subsection (1) applies, the Commissioner shall, for the purposes of that provision, direct an authorised officer or officers to interview the applicant concerned and the officer or officers shall comply with any such direction and furnish a report in writing in relation to the interview concerned to the Commissioner and an interview under this subsection shall, where necessary and possible, be conducted with the assistance of an interpreter."

The procedure envisaged by the above is an investigation conducted by the Commissioner with an interview as part of the investigation.

Section 13(1) of the Act of 1996, (as amended), provides for the report and recommendation of the Commissioner following the investigation under s. 11 in the following terms:

> "13.(1) Where the Commissioner carries out an investigation under section 11 he or she shall, as soon as may be, prepare a report in writing of the results of the investigation and such report shall refer to the matters raised by the applicant in the interview under section 11 and to such other matters as the Commissioner considers appropriate and shall set out the findings of the Commissioner together with his or her recommendation whether the applicant concerned should or, as the case may be, should not be declared to be a refugee."

As appears from the above following an investigation the Commissioner must prepare a report under s. 13(1) which must contain a recommendation together with the other results of the investigation including the matters raised by the applicant at interview and the findings of the Commissioner.

The decision communicated to the applicant by letter of the 16th February, 2005, was:

> "The Refugee Applications Commissioner is recommending that you should not be declared to be a refugee. This recommendation also applied to dependants, if any, named in the Section 13 report in respect of your application. I enclose a copy of this report together with all information relating to the investigation of your application which has been submitted to the Commissioner or otherwise came to her notice in the course of investigating your claim.
>
> Your attention is drawn to the fact that the Section 13 report in your case includes amongst its findings one of the findings set out in Section 13(6) of the Refugee Act. For this reason, if you appeal against this recommendation you must do so within 10 working days from the sending of this letter and, any such appeal will be dealt with without an oral hearing."

The grounds relied upon by the applicant in the statement of grounds to challenge the decision of the Commissioner in summary are:

1. The investigation conducted by or on behalf of the Commissioner including the interview was in fundamental breach of the applicant's right to fair procedures and contrary to the procedures and criteria for determining refugee status as set out in the UNHCR Handbook in:

(i) Failing to furnish to the applicant the confirmation obtained from the UK Home Office in October, 2004, at any time prior to the interview of the applicant on the 2nd February, 2005;

(ii) Failing to adjourn the interview on the 11th February, 2005;

(iii) The manner in which the interview was conducted and in particular in failing to give to the applicant an opportunity to present her information/evidence in a clear accurate and comprehensive way and to render a truthful account of facts relevant to her claim;

(iv) Failing to elicit from the applicant or give her an opportunity of explaining why she had sought to rely on false or misleading evidence in pursuing her application for asylum; and

(v) Failing to put to the applicant certain adverse material relied upon in assessing the applicant's claim. In particular country of origin information suggesting that nationals of other countries had been posing as Somalian nationals in the hope of a more favourable outcome of their asylum claim.

2. The Commissioner erred in law by placing undue weight on the fact that the United Kingdom Home Office had recommended that the applicant should not be granted a declaration of refugee status in circumstances where the Commissioner determined not to transfer the applicant to the United Kingdom pursuant to Council Regulation (EC) No. 343 of 2003 but rather determined pursuant to article 3.2 thereof to examine the application for asylum in this jurisdiction.

As appears from the above the principal focus of the grounds relied upon are the alleged breaches of fair procedures in the manner in which the investigation and in particular the interview was conducted.

This application is subject to s. 5 of the Illegal Immigrants (Trafficking) Act, 2000. Having regard to this and the submissions made by counsel for the respective parties, the issues which have to be determined by the Court on the application for leave to challenge the decision of the Commissioner and related declarations are:

1. Is there a subsisting decision of the Commissioner amenable to judicial review by the High Court subsequent to the appeal decision of the Tribunal; and if so

2. Does the existence of the Tribunal decision preclude the court granting relief by way of judicial review against the decision of the Commissioner;

3. Has the applicant established substantial grounds for contending that the decision of the Commissioner is invalid or ought to be quashed; and

4. Should the court exercise its discretion to extend the time under s. 5 of the Act of 2000 to bring the application for leave to challenge the decision of the Commissioner.

Extant Decision of Commissioner

The primary submission made on behalf of the respondents and notice party was that leave may not be granted in this application as at the date of commencement of the application there was no subsisting decision of the Commission amenable to judicial review by the High Court. It is submitted that the decision or recommendation of the Commissioner has "merged" in the decision of the Tribunal. Counsel also submits that if there is an extant decision of the Commissioner it is not now amenable to judicial review. Counsel for the respondent makes this submission in reliance upon the judgment of the Supreme Court in *G.K. v. The Minister for Justice and Others* [2002] 2 I.R. 418 and the judgments of the High Court in *Savin v. The Minister for Justice* (Unreported, High Court, Smyth J., 7th May, 2002) and *Okungbowa v. Minister for Justice and Others* (Unreported, High Court, MacMenamin J., 8th June, 2005) *Croitroriu v. The Refugee Appeals Tribunal and Others* (Unreported, High Court, MacMenamin J., 21st June, 2005) and *Rusu v. The Refugee Applications Commissioner and Others* (Unreported, High Court, Hanna J., 26th May, 2006).

Counsel for the applicant submits that if this Court takes the view that it is legally precluded from granting leave to apply by way of judicial review to challenge the decision of the Commissioner by reason of the Tribunal decision that this would be inconsistent with the decision of the Supreme Court in *Stefan v. The Minister for Justice* [2001] 4 I.R. 203.

There is no Supreme Court decision determining the question as to whether or not a decision of the Tribunal under s. 16(2) of the Act of 1996 determining an appeal from a recommendation of the Commissioner made under s. 13(1) of the Act has the effect in law of meaning that the recommendation of the Commissioner is "merged" in the decision of the Tribunal such that it no longer remains a separate and distinct decision amenable to judicial review by the High Court. The term "merger" in relation to a first instance and appeal decision in the asylum or refugee context appears to have been used by Hardiman J. in *G.K. v. The Minister for Justice*, [2002] 2 I.R. 418. That judgment concerned an appeal from an order of the High Court extending the time to apply for judicial review under s. 5(2)(a) of the Illegal Immigrants (Trafficking) Act, 2000. The decisions sought to be challenged were a decision of February, 2000, at first instance determining that an application for refugee status be refused and orders of deportation made in January, 2001. It appears clear from the judgment that the decision at first instance refusing asylum was not a decision of the Commissioner under s. 13 of the Act of 1996 nor was the subsequent decision on appeal given in July, 2000, a decision of the Refugee Appeals Tribunal. As appears from the title of the proceedings the relevant appeal body was the Refugee Appeals Authority. Further, Hardiman J. at p. 421 refers to s. 5(1)(f) of the Act of 2000 as being the relevant section applicable to the decision to refuse refugee status at first instance. This refers to "a decision by or on behalf of the Minister to refuse an application for refugee status or …". It appears clear therefore that the decisions at issue in that judgment were decisions made under an earlier different procedure and not the decisions at issue in these proceedings made under ss. 13 and 16 of the Act of 1996.

Further the statement of Hardiman J. at p. 425 when considering the decision at first instance that "this decision may well have merged in the decision on appeal" must, it appears to me be considered as obiter. Whether or not it did so merge does not appear to have been an issue on the appeal.

The question as to whether a decision of first instance may be considered to have merged in the relevant decision taken on appeal must, it appears to me be considered in the context of any relevant statutory scheme; the nature of each decision, the form of the appeal and any continuing effects of the first decision following the decision on appeal. In attempting to resolve the issue as to whether or not a recommendation of the Commissioner made under s. 13(1) of the Act of 1996 merges in a decision of the Tribunal made under s. 16(2) it appears to me that regard must be had to the statutory scheme established by that Act.

The next authority relied upon is the decision of Smyth J. in *Savin v. The Minister for Justice, Equality and Law Reform and Others* (Unreported, High Court, 7th May, 2002). That decision concerns a decision of the Commission and one of the Tribunal but not decisions taken under the Act of 1996. It concerns decisions taken under the Dublin Convention (Implementation) Order 2000. The decision of the Commissioner at issue appears to have been a determination made under article 3 of the 2000 Order that the applicant or her application be transferred to Germany as the convention country responsible. The appeal to the Tribunal was one under article 7(1) of the 2000 Order which provides:

> "7. (1) An applicant may appeal to the Tribunal against a determination of the Commissioner that he or she should be transferred to a convention country and, if he or she does so, the Tribunal shall, unless the appeal is withdrawn, make a decision in writing in relation to the appeal affirming or setting aside the determination and shall cause notice in writing of the decision to be given to the applicant, the Commissioner and the Minister."

The decision of the Tribunal was to affirm the determination of the Commissioner. The consequences of such an affirmation are set out in article 7(9), (10) and (11) of the 2000 Order as:

> "(9) Where the Tribunal affirms the determination of the Commissioner, the Tribunal shall notify the Minister of its decision and the reasons therefor.
>
> (10) Where no appeal is made within the period specified in paragraph (2) or where the applicant concerned withdraws his or her appeal, the Commissioner shall notify the Minister of his or her determination and the reasons therefor.
>
> (11) On receipt of a notification under paragraph (9) or (10), the Minister shall inform the applicant, where necessary and possible in a language that the applicant understands, of the determination or decision and the reasons therefor and the Minister shall arrange for the removal of the applicant to the convention country concerned."

From the above it would appear, following the decision of the Tribunal affirming the decision of the Commissioner, no further reliance is placed upon the decision of the Commissioner. Under article 7(9) only the Tribunal decision is sent to the Minister.

In *Savin v. The Minister for Justice, Equality and Law Reform and Others*, it appears from the judgment of Smyth J. at p. 9 that the applicant lodged a notice of appeal within the specified 5 days in September, 2001. No qualification was placed on the character of the appeal and the challenge to the decision of the Commissioner was made over 3 months after its date and after the decision on appeal was known. Smyth J. stated at p. 9:

> "The decision of the Commissioner is extinguished in its effect if and when followed by a valid decision of Appeals Authority (otherwise now the Refugee Appeals Tribunal) and any rights arising from the decision of the

> Commissioner are extinguished and absorbed in a valid decision of the Tribunal. In such circumstances the decision of the Commissioner loses its effectiveness by such valid decision of the Tribunal. A valid decision of the Tribunal is not super added but rather supplants that of the Commissioner. A valid decision of the Tribunal ousts, replaces or supersedes that of the Commissioner. Once being properly displaced, the Commissioner's decision may be said to merge in that of the Tribunal if they are both to the same effect."

The sense in which Smyth J. was using the term "merge" in relation to the two decisions appears to be that a valid decision of the Tribunal is not superadded but rather supplants that of the Commissioner and that it ousts, replaces or supersedes that of the Commissioner. I would respectfully agree with the view which he has formed as to the relative status of the two decisions in the context of the scheme provided for by the Dublin Convention (Implementation) Order, 2000. The scheme envisaged by article 7(9) and (11) is that in a situation where the Tribunal affirms the determination of the Commissioner, the Minister was to inform the applicant of the decision of the Tribunal and arrange for the removal of the applicant to the Convention country concerned. In those circumstances the Minister is not sent the determination of the Commissioner nor does he act upon it. The decision of the Tribunal replaces the decision of the Commissioner as the operative decision.

In *Okungbowa v. The Refugee Appeals Tribunal and Others*, MacMenamin J. was determining as a preliminary issue the question as to whether the remedy of judicial review was now available to the applicant to challenge a recommendation of the Commissioner. In that application the Commissioner had made a recommendation on the 2nd February, 2004 received by the applicant on the 12th February, 2004 recommending that the applicant not be declared a refugee. The applicant appealed to the Tribunal and on appeal the Tribunal affirmed the recommendation of the Commissioner. The applicant was notified of that decision by letter dated 10th March, 2004. By notice of motion dated 24th March, 2004, the applicant sought leave to commence judicial review proceedings seeking to quash the decisions both of the Tribunal and the Commissioner.

Dunne J. extended time to seek leave to apply for judicial review up to the 24th March, 2004 and granted leave to seek judicial review of the decision of the Commissioner alone and not that of the Tribunal.

MacMenamin J. considered the decisions in *G.K. v. Minister for Justice*, *Savin v. The Minister for Justice and Others* referred to above and also the decisions of the Supreme Court in the *State Roche and Delap* [1980] I.R. 170, *Buckley v. Kirby* [2000] 3 I.R. 431 and *Stefan v. The Minister for Justice* [2001] 4 I.R. 203 and the decision of Barron J. in *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497. He identified the issue before him at p. 10 of the judgment as:

> "What is at issue here is whether the remedy of Judicial Review is appropriate as against any Respondent in circumstances where the Applicant chose to proceed by way of Judicial Review only after the Tribunal decision and not at the time or immediately after the time of the recommendation by the Commissioner."

On that issue he reached the following conclusion at p. 12:

> "On the facts of this case, I must conclude that the decision of the Commissioner ceased to have legal effect once the Refugee Appeals Tribunal made the decision on appeal; that is that the decision of the Commissioner merged into the Tribunal [to the] decision at that time.
>
> The Applicant opted to appeal against the recommendation of the Commissioner. He did not seek to apply for Judicial Review and/or restrain

> the Tribunal from considering the appeal within the time permitted under Section 5(2) [of the Illegal Immigrants (Trafficking) Act 2000] or at any time prior to receipt of the Tribunal's decision.
>
> In the circumstances therefore, an Applicant such as the present is not in my view entitled to avail of the remedy of Judicial Review having, as he did in this circumstance, not only proceeded with the appeal but completed the process. A fortiori, this principle applies in circumstances where no relief was granted against the First-Named Respondent, that is the Refugee Appeals Tribunal."

As with Smyth J. it appears the sense in which "merger" is used is that the decision of the Commissioner ceased to have legal effect once the decision of the Tribunal on appeal was made. I would respectfully understand the subsequent paragraph in the above judgment of MacMenamin J. as his determining that on the facts of that case the court should not exercise its discretion to grant judicial review of the decision of the Commissioner rather than a determination that there was as a matter of law no decision which could now be the subject matter of judicial review. It is this latter proposition which is urged on me by counsel for the respondents and notice party.

I am reinforced in my understanding of the judgment of MacMenamin J. by his own characterisation of it in the subsequent decision of *Croitroriu v. The Refugee Appeals Tribunal and Others* (Unreported, High Court , MacMenamin J., 21st June, 2005), where at p. 13 he stated:

> "In *Okungbowa* the issue was whether the remedy of judicial review was appropriate as against the Tribunal in circumstances where the applicant chose to proceed by way of judicial review only after the Tribunal decision and not at the time of or immediately after the time of recommendation of the Commissioner."

These issues were revisited by Hanna J. in *Rusu v. The Refugee Applications Commissioner and Others* (Unreported, High Court, Hanna J., 26th May, 2006).

That decision concerned an application for leave to challenge a decision of the Commissioner made under s. 13(1) of the Act of 1996 recommending that the applicant should not be declared a refugee. The decision was communicated by a letter dated 31st December, 2004 and is stated to have been received about the 5th January, 2005. What is described as "a protected (sic) notice of appeal" was sent to the Tribunal on the 17th January, 2005.

A notice of motion seeking leave to challenge the decision of the Commissioner was issued on the 18th February, 2005, in the meantime it was held that a decision on the appeal had been made by the designated member of the Tribunal on the 14th February, 2005. This was notified to the applicant by a letter of the 21st February, 2005.

Hanna J. refused the application for leave for 2 distinct reasons. Firstly, he did so on the basis of the decisions of the Supreme Court in *Buckley v. Kirby* [2003] 3 I.R. 31 and *The State (Roche) v. Delap* [1980] I.R. 170 and following those he considered it would not be competent for the High Court to intervene in the circumstances of that case by *certiorari*. I will return to a consideration of those decisions below.

He also addressed the issue under consideration. He put the question succinctly; "is there a decision to be quashed involving the named parties". Whilst adverting to the distinction of the facts in *Rusu* from those in *Savin* and *Okungbowa* in that Mr. Rusu was not aware of the decision of the Tribunal when the application for leave was made against the decision of the Commissioner, Hanna J. took the view that once the Tribunal

had handed down its decision, the position was as set out by Smyth J. in his judgment in *Savin* as referred to above. Hanna J. then concluded:

> "Therefore in my view, the first respondent's decision became subsumed in the decision of the Refugee Appeals Tribunal given on the 14th February, 2005, and thereby ceased to exist. As a result no quashable order of the first respondent exists and *certiorari* could not issue."

In considering the above decision it is important to note that it does not appear to have been brought to the attention of Hanna J. that the decision of the Commission at issue in *Savin* was quite a different decision to that at issue before him. Further, there does not appear to have been any submissions made in relation to the statutory scheme of the Act of 1996 in relation to the decisions of the Commission, Tribunal and the Minister on an application for a declaration of refugee status.

Having carefully considered each of the above High Court decisions I have concluded on the facts of this application that notwithstanding the decision of the Tribunal there remains an extant decision of the Commissioner which as a matter of law could be the subject of an order of *certiorari*. My reasons for so concluding are as follows.

Section 13(1) of the Act of 1996 envisages that where the Commissioner carries out an investigation under s. 11, she will then prepare a report in writing and prescribes that the report shall refer to certain matters and also "shall set out the findings of the Commissioner together with his or her recommendation whether the applicant concerned should or, as the case may be, should not be declared to be a refugee". The recommendation of the Commissioner is based upon the findings set out in the report. The recommendation is an integral and necessary part of the report of the Commissioner under section 13(1). It is not a decision which in the statutory scheme exists independently of the report of the Commissioner.

Further, as a matter of commonsense, on the facts of this application it cannot be suggested that the decision of the Commissioner which is sought to be challenged is confined to the recommendation, included in the report and that the applicant is not seeking to challenge the balance of the report issued by the Commissioner under section 13.

The position becomes even clearer when one considers the declaratory relief sought at paragraphs 2(b) and in (c) and the order of mandamus sought at paragraph 2(d) of the statement and the grounds relied upon to challenge the validity of the decision of the Commissioner. What the applicant is seeking to achieve in this judicial review application is a new investigation of her application for asylum under s. 11. This can not be achieved unless the report of the Commissioner made under s. 13(1) recommending that the applicant should not be declared to be a refugee is quashed. Further, the grounds relied upon to challenge the validity of the decision of the Commissioner are primarily grounds which go to the fairness and validity of the investigation conducted by or on behalf of the Commission, the results of which are set out in the report as distinct from an incorrect or invalid legal assessment of results of an investigation which is not challenged.

Section 16(1) of the Act of 1996 provides for an appeal by the applicant "against a recommendation of the Commissioner under … s. 13...". The recommendation is the operative part of a s. 13(1) report in the sense that the nature of the recommendation triggers the next step in the asylum process established by the Act of 1996. Section 16(2) sets out the decisions which may be made by the Tribunal on such an appeal:

> "(2) The Tribunal may-
>
> (a) affirm a recommendation of the Commissioner, or

(b) set aside a recommendation of the Commissioner and recommend that the applicant should be declared to be a refugee."

Section 16(17) sets out what must be done by the Tribunal following the taking of a decision under s. 16(2). It provides:

"(17) (a) A decision of the Tribunal under subsection (2) and the reasons therefor shall be communicated by the Tribunal to the applicant concerned and his or her solicitor (if known).

(b) A decision of the Tribunal under subsection (2) and the reasons therefor shall be communicated by the Tribunal to the Minister together with a copy of the report of the Commissioner under section 13.

(c) A decision of the Tribunal under subsection (2) shall be communicated to the High Commissioner."

The obligation imposed on the Tribunal under s. 16(17)(b) to furnish to the Minister with its decision a copy of the report of the Commissioner under s. 13 was introduced by the amendments made to the Act of 1996 by the Immigration Act 1999. Section 16(17) as originally enacted only required the decision of the then Appeals Board to be sent to the Minister. Section 16(17)(b) (as amended) indicates a clear intention of the Oireachtas that subsequent to a decision of the Tribunal (including a decision which affirms a recommendation of the Commissioner) that the report of the Commissioner under s. 13(1) (which includes her recommendation) continue to subsist independently of the decision of the Minister and be furnished to the Minister.

In the statutory scheme of the Act of 1996 it is of course the Minister who takes the decision as to whether or not a person should be granted or refused a declaration of refugee status. The decisions of the Commissioner and Tribunal are recommendations to the Minster. Section 17 of the Act of 1996 sets out both the circumstances in which decisions may be taken by the Minister and the nature of such. Section 17(1) provides:-

"17. – (1) Subject to the subsequent provisions of this section, where a report under section 13 is furnished to the Minister or where the Tribunal sets aside a recommendation of the Commissioner under section 16, the Minister-

(a) shall, in case the report or, as the case may be, the decision of the Tribunal includes a recommendation that the applicant concerned should be declared to be a refugee, give to the applicant a statement in writing (in this Act referred to as "a declaration") declaring that the applicant is a refugee, and

(b) may, in any other case, refuse to give the applicant a declaration, and he or she shall notify the High Commissioner of the giving of or, as the case may be, the refusal to give the applicant a declaration."

It appears from the opening words of s. 17(1) that where the decision of the Tribunal is to affirm the recommendation of the Commissioner then it is the furnishing of the Commissioner's report under s. 13 to the Minister which triggers the decisions which may be made under subss. 17(1)(a) or (b).

Accordingly, it appears to me that a recommendation of the Commissioner that the applicant not be declared to be a refugee made under s. 13(1) and including in the report made under that section is envisaged in the statutory scheme created by s. 16

and 17 of the Act of 1996 to continue to subsist after a decision of the Tribunal on appeal affirming the recommendation and continues to have certain effects for the applicant. In particular it is the report of the Commissioner under s. 13 including her recommendation which triggers the decision to be taken by the Minister under s. 17 as to whether the application for a declaration of refugee status is to be granted or refused.

Notwithstanding that there may continue to exist a decision which is capable of being the subject matter of an order of certiorari it is quite a distinct issue as to whether the court should grant leave (assuming substantial grounds to exist) to challenge by way of judicial review a decision of the Commissioner where prior to the issue of the motion seeking leave the Tribunal has determined the appeal of the applicant against such decision of the Commissioner.

Counsel for the applicant submits that the court should follow the approach of the Supreme Court in *Stefan v. Minister for Justice* [2001] 4 I.R. 205, and grant leave to challenge the decision of the Commissioner notwithstanding the determination of the appeal. Factually that case is quite different to the present application in that the appeal was only pending and not determined.

In *Stefan* the process under consideration was the old asylum process under the Hope Hanlon letter. That process involved a decision at first instance and an appeal to the appeals authority. In *Stefan* there was an issue as to whether this was a single undivided process or bifurcated such that the decision at first instance was amenable to *certiorari.* The second issue on the appeal was whether *certiorari* should lie in view of the alternative remedy of appeal. The process was determined to be bifurcated and in considering the second issue Denham J. at p. 216 stated.

> "In a criminal law case the High Court (Lynch J.) has upheld the right to judicial review when there is the alternative of an appeal. In *Gill v. Connellan* [1987] I.R. 541, the applicant had not received a satisfactory hearing before the District Court and the question was whether an appeal to the Circuit Court was an adequate alternative remedy. Lynch J. held at p. 548 that it was not, stating:-
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> > 'In the present case however, both facts and law are in issue. Neither facts nor the law have been adequately heard in the District Court. On an appeal to the Circuit Court, therefore, the appeal could hardly be said to be by way of rehearing – the case would more truly be heard for the first time. The applicant and his solicitor would be deprived of the possible advantage of having gone over the whole facts and law and of having heard the submissions and cross-examination by the prosecuting superintendent in the District Court.'
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> 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. The stage of the alternative remedy may be relevant, though it may not be determinative of the issue. This is a case where an appeal had been lodged but had not been opened. It is therefore a situation to be distinguished from that in *The State (Roche) v. Delap* [1980] I.R. 170.
>
> 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 consideration

the requirements of justice. This has been expressed clearly in *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497 at p. 509 by Barron J:-

> 'The real question to be determined where an appeal lies is the relative merits of an appeal as against granting relief by way of judicial review. It is not just a question whether an alternative remedy exists or whether the applicant has taken steps to pursue such remedy. The true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and the principles of fairness; provided, of course, that the applicant has not gone too far down one road to be estopped from changing his or her mind. Analysis of the authorities referred to shows that this in effect the real consideration.'

In *Buckley v. Kirby* [2000] 3 I.R. 431, Geoghegan J. adopted the view of Barron J."

As appears Denham J. distinguished the situation in *Stefan* from that considered by the Supreme Court in *The State (Roche) v. Delap* [1980] I.R. 170,, as the appeal had not yet opened. She did not consider the posirion where an appeal had been determined.

The State (Roche) v. Delap concerned an application for *certiorari* of a conviction in the District Court and an appeal to the Circuit Court. The decision was reconsidered by the Supreme Court in *Buckley v. Kirby* [2000] 3 I.R. 431. That decision also concerned an application for leave to seek *certiorari* of a conviction in the District Court and an appeal to the Circuit Court. In *Buckley v. Kirby* Geoghegan J. identified four separate situations which can arise in relation to appeal and judicial review. The first of these were:

> "(1) the applicant both appeals to the Circuit Court and brings judicial review proceedings and at the stage of the judicial review the appeal has been fully or partly heard."

Geoghegan J. considered such first situation at p. 433:

> "The first of these situations is clearly covered by the decision of this court in *The State (Roche) v. Delap* [1980] I.R. 170. In that case the appeal had already been opened before the Circuit Court Judge but he adjourned it for the purposes of a *certiorari* application. Henchy J. who delivered the judgment of the Supreme Court held that undoubtedly in the ordinary way the remedy of *certiorari* would have been available because the order was bad on its face. But he went on to observe the following at p. 173:-
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> > 'However, it does not follow from this conclusion that *certiorari* should have issued. The prosecutor elected to appeal to the Circuit Court. There he allowed the appeal to be opened and did not contend that his conviction (as distinct from the sentence) was other than correct. While that appeal was pending, it was not open to him to apply for certiorari: see *R. (Miller) v. Justices of Monaghan* (1906) 40 I.L.T.R. 51 which shows that he should have elected either for appeal or for certiorari. It was not within the competence of the High Court to intervene by *certiorari* to quash a conviction and sentence when an appeal had not alone been taken to the Circuit Court but that appeal was actually in the process of being heard in that court.'
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> It is clear tht the basis of Henchy J.'s reasoning was that the defect in the order could have been corrected by the Circuit Court judge on the appeal

> and that as the appeal has already opened, *certiorari* ought not to be granted."

Considering the three Supreme Court judgments *The State (Roche) v. Delap, Buckley v. Kirby* and *Stefan v. The Minister for Justice*, it does not appear to me that where there is both an application for *certiorari* and an appeal that the determination of the appeal automatically precludes the Court from considering or granting an application for *certiorari*. Whilst Henchy J. in *The State (Roche) v. Delap* uses the phrase "it was not within the competence of the High Court…" as Geoghegan J. points out the basis of Henchy J.'s reasoning was that the defect in the District Court order could have been corrected by the Circuit Court judge on appeal. In *Stefan* Denham J. stated "the stage of the alternative remedy may be relevant though it may not be determinative of the issue". Rather, I have concluded in accordance with those three decisions of the Supreme Court and the principles expressed by Barron J. in *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497, approved of in two of those decisions that the High Court retains a jurisdiction to consider and determine an application for judicial review notwithstanding the determination of the related appeal.

However in accordance with those decisions the normal position must be that where an appeal is determined an applicant has gone too far and the High Court will not subsequently interfere with the first instance decision by way of judicial review. Whilst the court retains a discretion to do so it should only exercise its discretion to grant *certiorari* of a decision which has been the subject of a decided appeal where there exist special circumstances which make such late interference necessary to do justice for the parties. Such an approach by way of exception appears required by the principles set out above when considered in the context of the purpose of judicial review and distinction from an appeal process. It also appears consistent with the policy of the courts in relation to the non-duplication of procedures and proceedings.

It is not appropriate to try and set out exhaustively what might constitute special circumstances which would warrant late interference by the High Court. It will depend on the facts of each application. Relevant considerations may include the nature of the grounds asserted in support of *certiorari*; whether they could be considered on appeal; when the applicant became aware of such grounds; whether the applicant was prevented from bringing the application for leave to apply for judicial review prior to determination of the appeal; whether the applicant acquiesced in or permitted the determination of the appeal; any relevant statutory scheme; the time which elapsed prior to determination of appeal and fairness of appeal procedure.

The issue which must therefore be decided in this application is whether the applicant has established substantial grounds for contending that such special circumstances exist such that the Court should grant leave. If not in accordance with *Buckley v. Kirby* leave must be refused.

The applicant is a young person and on her project worker's affidavit appears to be vulnerable and not well educated. She was however legally represented at all material times. Considering the grounds relied upon to challenge the decision of the Commissioner, independently of the determination of the appeal by the Tribunal, I am satisfied that she has established substantial grounds for contending that the process of investigation including the interview upon which the decision was based was in breach of her rights to fair procedures when considered in the context of the scheme established by the Act of 1996, Regulation (EC) No. 343 of 2003, the UNHCR Handbook and the general principles in relation to fair procedures. I am also satisfied that she has established substantial grounds for contending that the Commissioner may have erred in law in the weight attached to the decision of the United Kingdom Home Office having regard to the scheme of Regulation No. 343 of 2003. I am further satisfied that in relation to the challenge to the investigation and interview that this is a matter which is

appropriate to judicial review and may not be amenable to the appeal available to the applicant under s. 16 of the Act of 1996 .

If the application for leave had been brought within the time provided by s. 5 of the Act of 2000 or within such further period in respect of which the court was prepared to extend time then were it not for the determination of the appeal by the Tribunal the applicant may have been entitled to leave on the facts of this application.

However, by reason of the Tribunal decision on appeal for the reasons set out above what I might call "normal substantial grounds" are not sufficient. There must exist special circumstances which would warrant later interference by the High Court in the interests of justice.

I have concluded that the applicant has not established any such circumstance on the facts of this application which would permit this Court to grant leave on a motion issued after the determination of the appeal lodged with the Tribunal. The facts upon which the applicant is relying to challenge the validity of the decision of the Commissioner were known immediately after the interview on the 2nd February, 2005, and all potential grounds made clear on receipt of the letter of the 16th February, The applicant was subject to a 14 day period for judicial review under s.5 of the Act of 2000. She was also subject to a short time limit for appeal, namely 10 days. The cause of this must be considered to be her own failure to make only truthful statements in her original application for asylum in this jurisdiction. Having lodged a notice of appeal, the applicant, with the benefit of legal advice must be considered to have been aware that this was an appeal which would be determined without an oral hearing and one which could be determined speedily (see s. 16(18) of the Act of 1996). On the 11th March, the applicant's solicitors informed the Tribunal of the request to the Commissioner to quash her recommendation and stated "we would be obliged if the Tribunal could withhold its decision until then".

There is no evidence that any response was received by the Tribunal to that request. Notwithstanding, it does not appear to have been followed up. Even when the Commissioner responded on the 5th April and the applicant through her solicitor subsequently took steps towards an application for judicial review there does not appear to have been any further communication with the Tribunal.

The applicant does not contend in these proceedings that the Tribunal acted unfairly or in breach of fair procedures in determining the appeal. The decision of the Tribunal is contained in a letter of the 22nd April, 2005. The reasons for the decision set out in the appendix which is the decision of the member of the Tribunal is dated the 11th March, 2005. This suggests that the Tribunal acceded to the request made by the solicitors for the applicant on the 11th March, to withhold its decision until after the decision of the Commissioner on the request to quash her recommendation.

Whilst not strictly relevant to the issues, it appears to me to have been a sensible approach of the Tribunal, having regard to the very tight time limits and the costs involved in bringing judicial review applications to have acceded to the request of the solicitors for the applicant and to have permitted some time at least for the Commissioner to consider the application to quash the recommendation and failing that to permit the applicant to commence judicial review proceedings. It might have been better practice to have responded specifying a reasonable time limit. This would create certainty. However, a reasonable period of time had expired by the 22nd April and correctly, in my view no point has been taken on behalf of the applicant in these proceedings that the Tribunal acted in any way unfairly or in breach of fair procedures in issuing the appeal decision on the 22nd April, 2005.

On these facts the applicant must also be considered to have acquiesced in or permitted the Tribunal determining the appeal. No steps were taken on the applicant's behalf to prevent the Tribunal from deciding the appeal even after the Commissioner refused to quash her recommendation and reopen the investigation. All relevant facts and grounds were known to the applicant and by reason of her legal representation was not precluded from applying for leave at an earlier date.

The Court has also considered, the submission supported by the affidavit of Ms Brophy that the steps taken on the applicant's behalf prior to commencing the judicial review application were with a view to saving costs and necessitated by the legal aid system. It appears desirable that attempts should be made to avoid unnecessary costs in relation to judicial review applications such as was done in this instance by the request to the Commissioner to reconsider the matter. However such steps can only be taken with due regard to the statutory framework of the Refugee Act, 1996 and the short time limits specified therein for appeals and the time limit for the bringing of judicial review applications under s. 5 of the Act of 2000. Where such steps are taken it would appear to require the agreement of the Tribunal to defer its decision on the appeal for a short period of time or in the alternative that steps are taken if necessary by way of application to the court to prevent the Tribunal from determining the appeal. The Court has also considered the delays allegedly caused by legal aid applications. However the periods are not material on the facts herein.

As the applicant has not established the type of special circumstances which would warrant late interference by the Court by *certiorari* and the declaratory reliefs claimed are in essence to the same effect or supplementary to the order of *certiorari* sought the application for leave against the Commissioner must be refused.

For the reasons set out earlier in this judgment the application for *certiorari* of the decision of the Tribunal is confined to one ground only which must be considered as consequential on the claims sought to be made against the Commissioner. As leave against the Commissioner is refused such consequential ground can not be considered to be an independent substantial ground to challenge the validity of the decision of the Tribunal. Accordingly the application for leave against the Tribunal is also refused.