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THE HIGH COURT
JUDICIAL REVIEW

[2004 No. 374JR]

BETWEEN

ANDY MOKE

APPLICANT

AND

THE REFUGEE APPLICATIONS COMMISSIONER

RESPONDENT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered 6th day of October 2005

The applicant is a citizen of the Democratic Republic of Congo. He arrived in Ireland on the 27th February, 2003. He was unaccompanied. He claims to have been born on the 1st November, 1986, and therefore at the time of his arrival to be less than eighteen years of age. He went to the office of the respondent. A doubt was formed as to whether he was under 18 as claimed. He was interviewed by two officials on behalf of the respondent for the purpose of assessing his age. He was assessed not to be under eighteen years of age.

The applicant was assigned to adult accommodation in Cork. He made an application for asylum which was processed in the usual way. He was interviewed for that purpose on behalf of the respondent on the 20th January, 2004, and informed by a letter dated the 12th March, 2004, that the respondent recommended that he not be granted a declaration of refugee status.

On 4th May, 2004, the applicant issued a motion seeking leave to challenge the validity of each of the above decisions made on behalf of the respondent. On consent an order was made granting leave on 11th April, 2005, referred to in more detail below. The respondent opposes the claims and alleges delay, particularly in relation to the challenge to the age assessment decision taken on the 27th February, 2003.

Delay

The respondent objects to the applicant being granted the relief sought by reason of the delay in making this application. The respondent also relies upon the failure to comply with Order 84, rule 21 of the Rules of the Superior Courts.

The application for leave to issue judicial review herein was brought on a notice of motion issued on the 4th May, 2004. It was brought on notice to the respondent herein, the Refugee Appeals Tribunal, the Southern Health Board, the Minister for Justice, Equality and Law Reform, Ireland and the Attorney General. The order of *certiorari* sought in respect of the

respondent's recommendation pursuant to s. 13 of the Act of 1996 (as amended) is subject to s. 5 of the Illegal Immigrants (Trafficking) Act, 2000 and accordingly the application for leave to seek that relief had to be brought on notice to the respondent and the Minister for Justice Equality and Law Reform.

At the time of issue of the notice of motion, the applicant in accordance with his claimed date of birth was still a minor. He had in March, 2004 sought the assistance of the Refugee Legal Service to lodge an appeal to the Refugee Appeals Tribunal against the recommendation of the respondent. They had refused assistance upon the basis that they were not permitted to submit appeals on behalf of minors unless the minor had a guardian. The applicant's present solicitors Ronan Daly Jermyn both lodged an appeal to the Refugee Appeals Tribunal without prejudice to the intended judicial review proceedings and also sought to have the Southern Health Board appoint a person to act as a next friend for the applicant in these proceedings. It refused. Ultimately the solicitor taking instructions from the applicant determined that the applicant was competent to give instructions and issued the proceedings notwithstanding the applicant's claim to be a minor at the relevant date.

The applicant came of full age on 1st November, 2004, in accordance with his claimed date of birth. Thereafter the issues between the applicant, the Refugee Legal Service and the Southern Health Board were no longer relevant. In addition the Refugee Appeals Tribunal agreed not to proceed with the appeal until the determination of these proceedings.

Subsequently an amended statement of grounds was prepared on behalf of the applicant seeking only relief against the respondent herein. At the request of the applicant and the respondent I made an order on consent on 11th April, 2005, granting the applicant leave to apply by way of judicial review for the reliefs set forth in the amended statement of grounds. The order as perfected does not record any order in relation to an extension of time or reservation in relation to a time point. No application has been made to amend that order.

In *PO'C v. The Director of Public Prosecutions* (The High Court, Unreported, 11th March, 2005) I considered the approach of the High Court to a claim that an applicant had failed to comply with Order 84, rule 21 at a full hearing and stated at
p. 3 of that judgment:

> "On an application for leave the onus is on the applicant to show that he is applying "promptly" and within the time limit specified in Order 84, rule 21. If he is not so applying, then the onus is on him to establish that there are good reasons for which the court should extend the period within which the application for leave may be made.

> However, once leave is granted (without any reservation of the time point), then delay only becomes an issue if an application is made to set aside the leave or there is an appeal against same or (as has been done in this case), the respondents object to the application being pursued or the relief granted by reason of the delay by the applicant in bringing the application. Where this latter objection is made, the onus would appear to be on the respondent to establish that the delay in bringing the application is such as to disentitle the applicant to pursue the application or to obtain relief to which he might otherwise be entitled. This approach does not mean that the court ignores O. 84, r. 21 in considering the issue of delay. The court will have to have regard to the obligation under the Rules of the Superior Courts on an applicant to move promptly and within the time limits as specified. However, the court is not considering simply whether there exist reasons for which the time for making the application for leave should be extended. It is exercising a much wider discretion."

In that decision I considered the proper approach for the High Court in exercising such wider discretion as mandated by the judgments of the Supreme Court in *De Róiste v. The Minister for Defence and Others* [2001] 1 I.R. 190. For the reasons set out therein I considered that this court should follow the approach set out by Denham J. at p. 208 where she stated:

> "In analysing the facts of a case to determine if there is a good reason to extend time or to allow judicial review, the court may take into account factors such as; (i) the nature of the order or actions the subject of the application; (ii) the conduct of the applicant; (iii) the conduct of the respondents; (iv) the effect of the order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order to be reviewed; (v) any effect which may have taken place on third parties by the order to be reviewed; (vi) public policy that proceedings relating to the public law domain take place promptly except when good reason is furnished. Such list is not exclusive."

It appears to me for the reasons which I have set out in detail in *PO'C v. Director of Public Prosecutions* that I should now, in considering the respondents objection to relief being granted by reason of the delay of the applicant, exercise the wider discretion identified in that judgment.
The applicant received notice of the recommendation of the respondent under s. 13 of the Act of 1996 by letter dated 12th March, 2004. He does not say the precise date upon which he received it but as a matter of probability it was within a few days. The respondent correctly in my view did not press any objection by reason of any delay between the receipt of the letter of 12th March, 2004, and the issue of the notice of motion on 4th May, 2004, notwithstanding the fourteen day time limit in s.5 of the Act of 2000. It appears from both the affidavit of the applicant and of his current solicitor Mr. James O'Sullivan of Ronan Daly Jermyn solicitors that subsequent to receipt of the letter of 12th March the applicant initially promptly sought advice from the Refugee Legal Service and having failed to obtain their assistance attended at Ronan Daly Jermyn on 27th March and that thereafter steps were taken to obtain advice of counsel and have counsel draft proceedings. Attempts were also made to have the Southern Health Board appoint a next friend.
The objection pursued is that the applicant took no steps to challenge the decision of 27th February, 2003, until after receipt of the letter of 12th March and that he had available to him in that period legal advice and that he is well outside the six month time limit in Order 84, rule 21 of the Rules of the Superior Courts.
I have reached the following factual conclusions in relation to steps taken by the applicant between February, 2003 and March, 2004. In so doing I have taken into account all the evidence including the oral evidence of the applicant in response to the cross examination by Ms. Moorehead S.C., counsel for the respondent; the letter from the Refugee Legal Service to the respondent which appears to have been received on 28th March, 2003, (enclosing the request dated 27th March, 2003, from the applicant to the respondent to release all relevant documents to the Refugee Legal Service) and the handwritten notes on same handed into court by consent and explanations given by counsel for the respondent as to the normal practice between the Refugee Legal Service and the respondent.
1. The applicant, with the assistance of a friend who he met in the Cork hostel completed an application to the Refugee Legal Service on 27th March, 2003, to represent him. This consisted of a number of pages one of which was a standard form request to the respondent to release documents to the Refugee Legal Service.
2. That document was sent by the Refugee Legal Service to the respondent and received by her on 28th March, 2003.
3. In accordance with standard practice, the documents requested were not sent to the Refugee Legal Service until after the applicant had been

scheduled for a s. 11 interview by the respondent. The interview was fixed for 20th January, 2004. The handwritten note on the letter handed into Court indicates that the documents were sent to the Refugee Legal Service on 17th December, 2003.

4. The first contact made by the Refugee Legal Service with the applicant subsequent to his written application to them of 27th March, 2003, was after 19th December 2003 and prior to 20th January, 2004. He was invited to attend at the Refugee Legal Service in anticipation of the interview fixed with the respondent for 20th January, 2004.

5. The applicant attended with the Irish mother of a friend at the Refugee Legal Service. The Refugee Legal Service were aware at the time that the applicant was claiming to be under eighteen years of age. The Refugee Legal Service informed the applicant that they would not attend with him at the interview on 20th January, 2004. The reason for this was not made clear to the applicant. The primary focus of the discussion at the Refugee Legal Service was an explanation of the asylum process including what he might expect at interview on 20th January and the subsequent decision which he would obtain. At the meeting with the Refugee Legal Service the applicant did not seek and he was not given advice in relation to the possibility of challenging the age assessment decision taken on 27th February, 2003.

6. The first occasion upon which the applicant received advice in relation to the possibility of challenging the age assessment decision of the respondent was subsequent to receipt of the letter of 12th March, 2004.

7. Whilst paragraph 9 of the first affidavit of the applicant does not set out the full picture in relation to legal advice obtained, insofar as it does not disclose the meeting with the Refugee Legal Service prior to the interview of 20th January, 2004, I have concluded that there was no lack of *bona fides* of the applicant in the explanation given in the affidavit. I have concluded from his oral evidence that he did not consider that meeting relevant to advice in relation to the age assessment decision. Further it appears that the failure to refer to the earlier meeting may have been contributed to by an incorrect assumption made by his current legal advisors that the date of 27th March, 2003, on the request to the respondent to release documents to the Refugee Legal Service was a typographical error. That document is exhibited and fully disclosed to the court in the first affidavit as exhibit “K”. It is however incorrectly referred to at paragraph 6 of the affidavit as being a letter dated “27th day of March, 2004”.

I have concluded that on the facts herein this Court should not refuse to entertain the application in respect of which leave was granted or if successful to grant the applicant relief in relation to the decision of 27th February, 2003, by reason of the delay in the commencement of proceedings. The relevant period is between the 27th February, 2003, and 4th May, 2004. The applicant during this period claims to have been a person under the age of eighteen years. It forms no part of the function of

this Court to determine whether that claim is correct. However, it is accepted on behalf of the respondent that whether he was under eighteen or was over eighteen he was a young and vulnerable person. It is undisputed that he was alone in this country without the support of family or friends from his own country. He does appear to have been befriended by a person from Angola in the hostel and subsequently by the Irish mother of a friend of his own age. With the assistance of his Angolan friend he applied on 27th March, 2003, to be represented by the Refugee Legal Service. He did not hear from them until after the 19th December, 2003. This delay appears to have been contributed to by the standard practice of the respondent not to send out the requested documents relating to the applicant until after the interview with the applicant had been scheduled. The practice of the Refugee Legal Service is to interview an applicant when the date for interview is fixed and the documents obtained. The focus of such interview was preparation for the scheduled interview.
Counsel for the respondent has submitted that there is prejudice to the respondent in the delay in the commencement of these proceedings. In particular she refers to the fact that Ms. Cassidy, one of the interviewers cannot recall the detail of the particular interview with the applicant. Nothing turns on such understandable failure to recollect the specific interview. The issues pursued by counsel for the applicant at the hearing in relation to the age assessment decision relate to the alleged lack of fair procedures in the standard practice of the respondent in carrying out age assessments as explained by Ms. Ryan and Ms. Cassidy.

Age Assessment Decision

A significant number of persons arrive in Ireland each year, intending to claim refugee status who appear to be unaccompanied and claim to be minors i.e. under eighteen years of age. In the first affidavit of Sheila Ryan sworn on behalf of the respondent it is stated that in 2002, 2003 and 2004 respectively, 858, 841 and 685 such persons arrived in Ireland. It appears that a limited number of unaccompanied persons who are not minors arrive and claim to be minors. This situation is not unique to Ireland. The evidence given by Ms. Ryan is consistent with the factual description of the U.K. situation given by Burnton J. in *(R) B. v. The London Borough of Murton* [2003] 4 All E.R. 280. The current practice of the respondent in dealing with persons who claim to be unaccompanied minors and wish to claim asylum as explained in the affidavits sworn on her behalf may be summarised as follows. The person will be treated as a minor unless an official has a doubt that she or he is such. Where a doubt exists the applicant will be interviewed, normally by two officials with both training and experience in age assessment. Unless both interviewers form the view that the applicant is over eighteen she or he will be treated as a minor and referred under s. 8(5) of the Refugee Act, 1996. Where an applicant is assessed to be over eighteen he will be informed that he is being sent to adult accommodation

and is permitted to make and pursue his application for asylum in the normal way.

Section 8 of the Refugee Act, 1996 provides for applications to be made by all persons seeking a declaration of refugee status in the State. It does not distinguish between adults and minors. In practice the initial application is made to an officer of the respondent. Such person is referred to in the legislation as "an authorised officer". Section 8(5) of the Act of 1996 (as amended) makes limited special provision for certain minors and provides:

> "(5)(a)Where it appears to an immigration officer of an authorised officer that a child under the age of 18 years, who has either arrived at the frontiers of the State or has entered the State, is not in the custody of any person, the officer shall, as soon as practicable, so inform the health board in whose functional area the child is and thereupon the provisions of the Child Care Act, 1991, shall apply in relation to the child.
> (b) Where it appears to the health board concerned, on the basis of information available to it, that an application for a declaration should be made by or on behalf of a child referred to in paragraph (a), the health board shall arrange for the appointment of an officer of the health board or such other person as it may determine to make an application on behalf of the child.

…"

On behalf of the respondent it was submitted that where an unaccompanied person arrives and claims to be under the age of eighteen years but it appears to an officer of the respondent that this may not be a correct claim that the respondent has an implicit power under s. 8 (5)(a) of the Act of 1996 (as amended) through its authorised officers to determine whether the person is a child under the age of eighteen years and only if the officer forms such a view is s/he under a duty to inform the relevant health board or now the Health Services Executive (HSE).

Whilst, in the statement of grounds, the power of the respondent to take such a decision, (commonly referred to as an age assessment decision) was challenged this ground was not (correctly in my view) pursued at the hearing. Having regard to the explicit power and duty to inform the HSE of the arrival of an unaccompanied child under the age of eighteen years it appears that the respondent, her servants or agents must have as a necessary or incidental power the power to determine whether a person who claims to be a child under the age of eighteen years and not in the custody of any person is such. The general principle of construction in favour of necessary incidental powers to express statutory powers or duties is well established by decisions such as *Howard v. the Commissioners of Public Works* [1994] 1 I.R. 101.

It is agreed that such decision making power must be exercised by or on

behalf of the respondent in accordance with the principles of constitutional justice and fair procedures. Mr. Durkan S.C. on behalf of the applicant submits that whilst in relation to an age assessment such as carried out on the applicant such principles do not require great formality, they do require certain minimum safeguards and procedures which he contends were not met on the uncontested facts of this application. What constitutes fair procedures depends of course upon the nature of the decision being taken and the legal and factual circumstances in which it is being taken. In addition to the above legal and factual context, there are further important factual aspects which must be taken into account.

Firstly, where an unaccompanied person arrives and claims to be a child under eighteen, and there are doubts about the veracity of this claim it is important that an immediate decision is taken. The accommodation to which the person will be referred is dependant on that decision. The protection of other unaccompanied minors requires that persons who are over eighteen should not be housed with such younger children. It is likewise important for an unaccompanied applicant if he or she is genuinely a child under eighteen years not to be housed with adults.

Secondly, age assessment is an inexact science. It is recognised on behalf of the respondent that there is a significant margin of error, particularly in relation to persons in their late teens and therefore it is stated that the practice is to accept a claim to be under eighteen from persons even where this is unsubstantiated unless the authorised officer forms a view that the person appears to be over eighteen when an age assessment interview and determination is carried out. It appears to be a matter of common sense that where age assessment is being carried out simply by means of an interview and observation as is done on behalf of the respondent of a person who is from a different cultural, racial and ethnic background and may have suffered traumatic events in his or her life that it becomes even more difficult.

Thirdly, the affidavits of Ms. Ryan lay emphasis upon the possibility of reassessment and indeed a number of methods by which an applicant might, notwithstanding an initial assessment to be over eighteen, subsequently persuade the respondent that he or she is a child. Whilst there appear to be factual disputes as to certain of these matters, such disputes are not relevant to the issue to which I have to decide. The affidavits of Ms. Ryan set out steps which have been taken on behalf of the respondent to put in place a medically backed scheme for age assessment. A pilot survey was conducted. Difficulties have been encountered with medical practitioners but it is believed that the respondent may have available medical practitioners willing to carry out medical age testing upon referral. The possibility of reassessment appears an important balance to the informal nature of the initial assessment and the admitted inexact science and wide margin of errors of age assessments by interview. However the possibility of such

reassessment is of no benefit to an applicant unless its existence is effectively communicated.

Having regard to the above legal and factual context, the submissions of the parties, the helpful decision of Burnton J. in *(R) B. v. The London Borough of Murton* [2003] 4 All E.R. 280 and the principles of constitutional justice and fair procedures I have formed the view that the following are minimum procedural requirements in relation to an initial age assessment decision to be taken on behalf of the respondent pursuant to s. 8(5) of the Act of 1996 in relation to a person, such as the applicant, claiming to be an unaccompanied child under the age of eighteen years.

i. The applicant must be told the purpose of the interview in simple terms. This may be as straight forward as informing the applicant that the interviewers need to decide whether the applicant is or is not under the age of eighteen years.

ii. Where an applicant claims to be under eighteen years of age and the interviewers form a view that this claim may be false, the applicant is entitled to be told in simple terms the reasons for or grounds upon which the interviewers consider the claim may be false and to be given an opportunity of dealing with those reasons or grounds.

iii. Where, as in this instance the applicant produces a document which purports to be an original official document which includes a record of his alleged date of birth and the interviewers are not prepared to rely upon such document the applicant is entitled to be told of their reservations and given an opportunity to deal with same.

iv. If the decision is adverse to the applicant then he must be clearly informed of the decision and the reasons for same. The reasons need not be long or elaborate but should make clear why the applicant's claim to be under eighteen is not considered credible. The initial information and communication may of necessity be given orally but should be promptly confirmed in writing.

v. Where the decision is adverse to the applicant and as stated there exists the possibility of reassessment then such information should be communicated clearly to the applicant again initially, orally and also in writing. Such communication should include how such reassessment may be accessed by the applicant.

I further concluded on the facts of this application such minimum procedural requirements were not met. In reaching this conclusion I have accepted the evidence given on behalf of the respondent both by Ms. Ryan as to the general procedures and by Ms. Cassidy as to her standard practice. I have concluded that as a matter of probability the interview with the applicant was conducted in accordance with her standard practice as described. I have also taken into account the contemporaneous note of the interview and Ms. Cassidy's note of the conclusion reached at the end of the interview. That states:

> "This applicant was interviewed by Frances Cassidy and Margaret White in order to determine whether or not he should be referred to the ECHB as a minor. Having spoken with him and observed his demeanour, physical appearance and level of maturity we both formed the view that he is an adult and should be treated as such. He has an I.D. card in his possession which is actually a card to state that his original I.D. has been lost. There is no way of knowing whether this is a genuine card or not and I have not placed any emphasis on this when arriving at my decision as it could belong to anyone or have anybodies photo attached.
> Sheriff (interpreter) present during interview."

I am satisfied from the affidavit that Ms. Cassidy that in accordance with her normal practice the applicant was made aware of the purpose of the interview with herself and Ms. White namely to decide whether or not the applicant was over eighteen. It is clear from the conclusion reached that Ms. Cassidy and Ms. White both considered the applicant's claim, to be under eighteen years of age, to be false. I do not consider from Ms. Cassidy's description of their normal practice, nor from the notes of the interview produced that the applicant was made aware in the course of the interview of the reasons for which they considered his claim to be under eighteen to be false nor was he given an opportunity of dealing with these matters. Further, it does not appear from the notes of the interview that the identity document produced referring to his alleged date of birth was explored or that Ms. Cassidy's and Ms. White's reservation about placing any reliance on same put to the applicant. The applicant was informed of their decision but not given the reasons. It appears to have been made clear that he was being treated as an adult and sent to an adult hostel. He was not given the decision and reasons in writing. He was not informed of the possibility of any reassessment. Ms. Cassidy states that it was not the practice to advice applicants of that time of any reassessment.

As is clearly recognised by both Ms. Ryan and Ms. Cassidy in their affidavits applicants, regardless of whether they are under eighteen or one or two years over eighteen young persons who arrive in the State unaccompanied and claim asylum are vulnerable persons. Fair procedures requires that important information such as a decision that they are not under eighteen as claimed, the reasons for the decision, the existence of the possibility of reassessment and the method by which such reassessment may be accessed must be given to them in writing and in a language they are capable of understanding.

For the above reasons I have concluded that the decision taken on behalf of the respondent in relation to the assessment of the applicant's age on the 27th February, 2003, was in breach of the respondent's constitutional obligation to do so by a procedure which accords with constitutional justice

and fair procedures. The applicant is entitled to an order of *certiorari* of the decision of 27th February, 2003.

Section 13 Report and Recommendation

The applicant also seeks an order of *certiorari* of what is described as "the decision of the respondent to refuse the applicant's application for recognition of refugee status". Such decision is the report of the respondent issued pursuant to s. 13(1) of the Act of 1996 which includes a recommendation that the applicant should not be declared a refugee. The only grounds in the statement of grounds which potentially relate to the s. 13 report and recommendation are those set out at para. e(i) and (ii). In essence, in reliance upon those grounds counsel for the applicant submitted that if the age assessment decision was determined to be invalid that then as a consequence the respondent acted in jurisdictional error or *ultra vires* in processing his application for a declaration of refugee status, including the interview conducted with him under s. 11 of the Act of 1996 without the applicant having the benefit of assistance from a person nominated by the health board under s. 8(5)(b) of the Act of 1996.

The applicant makes no factual complaint as to how he was treated by or on behalf of the respondent in relation to the making and processing of his application for refugee status. He does not allege that he was in any way treated unfairly at the interview conducted on 20th January, 2004, on behalf of the respondent.

Ms. Moorhead S.C., on behalf of the respondent, submits correctly that the onus is on the applicant to establish the invalidity of the s. 13 report and recommendation as a consequence of the invalidity of the age assessment decision. She also correctly submits that the applicant in his affidavits does not set out any factual adverse consequences of the determination that he should be treated as an adult in relation to the making and processing of his asylum application prior to the issue of the report and recommendation under s. 13.

The scheme established by s. 8 of the Act of 1996 entitles any person to apply for a declaration of refugee status. 'Person' is not specially defined and includes both adults and minors. The only special provision in relation to minors is contained in sub-s. 8(5) of the Act of 1996, set out earlier in this judgment. Section 8(5)(a) obliges the respondent to refer an unaccompanied minor to the relevant health board. Section 8(5)(b) envisages that the health board would appoint a person to make an application on behalf of the minor where it considers an application should be made.

The purpose of s. 8(5) of the Act of 1996 appears twofold. Firstly, it has a child protection purpose. It is intended to ensure that persons who arrive in the State as unaccompanied minors are brought to the attention of the relevant health board for the purposes of their protection in their daily living.

Secondly, it also envisages that such persons would have an application for refugee status, if appropriate, made and pursued on their behalf by a person appointed by the health board. However, nothing in s. 8 precludes the respondent from accepting or processing an application for a declaration of refugee status made by a child. On the contrary s. 9(12)(a) and s. 9(a) of the Act of 1996 appear to envisage applicants under the age of eighteen years. In the statutory scheme established by the Act of 1996 for making and determining applications for asylum (as distinct from any child protection purposes) it appears, the most that can be said is that the invalid age assessment decision of the respondent may have deprived the applicant of the potential benefit of the assistance of a guardian appointed by the health board either to make the application on his behalf or to assist him in pursuing the application already made.

There may well be cases in which it would be in breach of an applicant's right to fair procedures for the respondent to proceed with a s. 11 interview and to issue a s. 13 report and recommendation without carrying out a valid determination as to whether or not a person who claims to be an unaccompanied minor is such. This would depend upon the relevant facts. In this application no such ground is advanced in the statement of grounds. Further, on the affidavits sworn by the applicant after he had had the full benefit of advice from his present solicitors and counsel, including advice as to his position as a minor, no complaint is made by the applicant in relation to his treatment by the respondent in the holding of the s. 11 interview or the processing of his asylum application.

Accordingly, I have concluded the respondent did not act either without jurisdiction or *ultra vires* in issuing the s. 13 report and recommendation and will refuse the application for *certiorari* of the s. 13 report and recommendation.