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NEUTRAL CITATION NUMBER [2012] IEHC 338

THE HIGH COURT

JUDICIAL REVIEW

[2007 No. 1362 J.R.]

BETWEEN

S.U.N. [South Africa]

APPLICANT

AND

REFUGEE APPLICATIONS COMMISSIONER, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT (No.2) of Mr. Justice Cooke delivered the 30th day of March, 2012

1. This case is one of a number which were heard in succession by the Court as cases which raised or turned upon the same issue concerning the absence of an oral hearing upon an appeal to the Refugee Appeals Tribunal from the s.13 Report of the Refugee Applications Commissioner in circumstances where the former

determination contained a finding under s. 13 (5) and (6)(e) of the Refugee Act 1996 (as amended) that the applicant for asylum was a national of a country designated by the second named respondent as a "safe country" pursuant to s.12 (4) of that Act.

2. The applicant is a national of South Africa who arrived in the State in November 2006 and later claimed asylum. He was interviewed by an officer of the Commissioner under s. 11 of the Refugee Act 1996, on the 21st September, 2007. He claimed to fear persecution if returned to South Africa because he is a member of the Venda ethnic group and as such he and his family had been targeted by a criminal gang who are members of the Zulu ethnicity. He claimed that State protection was unavailable to him in South Africa.

3. A report upon the application by an authorised officer of the Commissioner dated the 26th September, 2007, found that the applicant had failed to establish a well founded fear of persecution and recommended that he should not be declared to be a refugee. Part 5 of the report under the heading "Section 13(6) Findings" stated: "As set out above, Section 13(6)(e) of the Refugee Act 1996 (as amended) applies to this applicant. As the applicant is from a country which is designated as a safe country of origin by the Minister, there is a presumption that the applicant is not a refugee unless he shows reasonable grounds for the contention that he is a refugee. Based on the evidence of the well founded section of this report, it is felt that the applicant has not rebutted the presumption that he is not a refugee." The concluding recommendation of the report added: "I also recommend that section 13(6)(e) of the Refugee Act (as amended) is appropriate to this application".

4. The "well founded fear section" in the report consists of an analysis of the evidence given by the applicant as to what he said had happened to him in South Africa as a result of having been targeted and attacked, along with other members of his family, as a member of the Venda ethnic group by a Zulu man called "Lucky" and his gang. Two sisters were claimed to have been raped and stabbed to death by "Lucky" in 2001 and in 2005 the same man attempted to kidnap the applicant and his family. In effect the account given by the applicant was not believed. A number of findings were made in that regard:

> (i) "It is not credible that this group of gangsters would continue to pursue and harass one individual in particular no matter where he would go in South Africa, especially as their activities would not bring them material gain."
>
> (ii) In respect of his account of meeting a white man who decided to help him by paying to have him smuggled to Europe: "It is not considered credible that a complete stranger would expend such resources [between 15,000 and 20,000 euros] on a man he had encountered crying on the street, nor is it that the applicant offered a reasonable explanation as to why this may have been the case."

5. The report also noted that state protection had been available to the applicant on one occasion when he claimed to have gone to the police but that otherwise the applicant had failed to explore all options for state protection which were open to him. It is clear therefore that the main reason for the negative recommendation was the disbelief of the basis of the claim and the rejection of the applicant's personal credibility.

6. By order of the Court (Cooke J.) of the 23rd March, 2010, the applicant was granted leave to apply for a series of reliefs by way of judicial review including an

order of*certiorari* quashing that report and recommendation. In addition, leave was granted to seek the following declaratory reliefs:

> B. A Declaration that the second named respondent has acted *ultra vires* ss. 12(4) and (5) of the Refugee Act 1996, and/or has unlawfully fettered his discretion in making and/or maintaining regulations (safe countries of origin) order designating South Africa as a safe country of origin;
>
> C. A Declaration that S.I. 714/2004 (Safe Countries of Origin Order) is *ultra vires* and void;
>
> D. A Declaration that the provisions of s. 12(4) of the Refugee Act 1996 and/or S.I. 714/2004 are repugnant to the provisions of the Constitution and/or without prejudice are inconsistent with the provisions of Article 3 of the 1951 Convention relating to the stages of refugee.

Leave to seek those reliefs was granted by reference to three grounds which were formulated as follows:

> F. The provisions of s. 12(4) of the Act of 1996, and the making of regulations designating countries as presumed safe are inherently inconsistent with the provisions, purpose and objectives of the Refugee Act and discriminate refugee applicants by reason of their race and/or country of origin;
>
> H. The respondent Minister has acted *ultra vires* s. 12(4) and (5) in designating South Africa as a safe country of origin and/or in maintaining such designation;
>
> I. The provisions of s. 12(4) and of S.I 714/2004 in combination with s. 11 (A) and s. 13(5) and (6) are repugnant to the provisions of Article 40 of the Constitution.

7. Thus, the central issue to be raised upon the substantive hearing of this application for judicial review as originally commenced was the legality of the provisions under which South Africa has been designated as a safe country of origin with the consequential effect which those provisions have on the onus of proof faced by the applicant in making the asylum claim and the validity of the relevant statutory instrument of designation.

8. As described in more detail in a judgment of the Court given on 9 June 2011, following the grant of leave and the filing of grounds of opposition with an affidavit which made mention of certain diplomatic reports relating to the conditions in South Africa relevant to its designation under s 12(4), the applicant sought an order for discovery of that documentation. In that judgment the Court considered that it was not immediately necessary to make an order for discovery because there was a preliminary issue which ought first to be decided as identified in paragraph 19 of the judgment. Accordingly, having heard the parties, the Court directed the trial of a preliminary issue as follows:

> "In a case where the negative recommendation of the first named respondent in a report under s.13 of the Refugee Act 1996 (as amended) is based exclusively or primarily upon a finding of lack of personal credibility on the part of the applicant for asylum, is the

exclusion by s.13 ss.(5) and (6)(e) of that Act of an oral hearing on an appeal under s.16 by reason only of the designation of the applicant's country of nationality as a safe country of origin pursuant to s.12(4) lawful as compatible with the obligation of the State to provide an appeal remedy which is:

(a) "effective" in the sense of Article 39 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status; and/or

(b) the applicant's entitlement to a fair procedure in accordance with Article 40.3 of the Constitution or otherwise?"

9. It is appropriate to start by setting out the statutory context in which these issues fall to be considered.

10. The original statutory scheme for the examination and determination of an application for a declaration of refugee status under the 1996 Act has been modified by the impact of the provisions of two directives: Council Directive 2004/83/EC of 29 April 2004, (the "Qualifications Directive") and Council Directive 2005/85/EC of 1 December 2005, (the "Procedures Directive"). Prior to 2006, an asylum seeker's application was examined by the Refugee Applications Commissioner based upon an interview under s. 11 and a report was then made by the Commissioner under s. 13 to the Minister with the recommendation as to whether the applicant should or should not be declared to be a refugee. If the recommendation was positive, the Minister was obliged to grant the declaration under s. 17(1) of the Act. If the recommendation was negative there was a right of appeal to the Refugee Appeals Tribunal which was by way of rehearing unless an oral hearing was excluded in the circumstances described later in this judgment. The Tribunal Member either affirmed the negative recommendation or reversed it and in the latter event, the Minister was again bound to grant the declaration. If the negative recommendation was affirmed, however, the Minister still retained a discretion under s. 17(1) to grant the declaration. Thus, the decisive outcome to the examination of an asylum application lay with the Minister under s. 17(1). The functions of the Commissioner and the Tribunal Member were advisory in character although, of course, in the case of positive recommendations, the outcome was automatic.

11. By reason of the provisions of the Procedures Directive and particularly the dispensation given to the State under its Annex 1, the s. 13 report of the Commissioner now falls to be considered as the "first instance decision" of the asylum application by the "determining authority" for the purposes of Chapter III of the Procedures Directive. Annex 1 of the Directive provided that Ireland might, so long ass. 17(1) of the Act of 1996 continued to apply, consider that the Office of the Refugee Applications Commissioner constituted the "determining authority" provided for in Article 2(e) of the Directive and its "decisions at first instance" provided for in that Article should include the recommendations made by the Commissioner. Chapter V "Appeals Procedures" provides in Article 39 that applicants for asylum have the right "to an effective remedy before a court or tribunal" against a decision taken on the application for asylum including the specific decisions listed in Article 39.1(a). As has been held previously by the Court, it follows that in the scheme of the 1996 Act, the appeal to the Tribunal falls to be considered as the effective remedy required by Article 39 and its appeal ruling to be the "final decision" identified in Article 2(d). (See the judgment of 9th February, 2011 in the joint cases *H.I.D. (a minor) and B.A. v. Refugee Applications Commissioner and*

Ors. (Unreported, High Court, Cooke J. 9 February 2011, [2011] IEHC 33).

12. The Procedures Directive was not, as such, transposed into Irish law by statutory instrument under the European Communities Act 1973 in the way that the Qualifications Directive has been implemented by the European Communities (Eligibility for Protection) Regulations 2006. Until it became necessary to implement certain provisions (not relevant to the present case) by the European Communities (Asylum Procedures) Regulations 2011 and Refugee Act 1996 (Asylum Procedures) Regulations 2011, (S.I. Nos. 51 and 52 of 2011,) it appears to have been accepted that, with the availability of the interpretative provision of Annex 1, the requirements of the Procedures Directive were already met by the existing provisions of the Act of 1996.

13. In the written legal submissions on behalf of the applicant it was acknowledged that the asylum application in this case had been lodged "prior to the coming into force" of the Procedures Directive. That application had been made on 30 January 2007 and the s. 13 report is dated 26th September 2007. The directive was adopted on 1 December 2005. It was published in the Official Journal on 13 December 2005 and entered into force 20 days later in accordance with Article 45.The Member States were required to implement the main provisions in national laws by 1 December 2007 and the provisions of Article 15 by 1 December 2008. Article 44 required the Member States to apply the transposed provisions to applications for asylum made after 1 December 2007.

14. In view of the conclusion the Court has come to in this judgment on the preliminary issues before it, the Court should explain that in the particular circumstances resulting from the State's stance on the absence of the need for transposition it is necessary and appropriate to construe and apply the relevant sections of the Act of 1996 as if the relevant provisions of the Directive had been in force when this application for asylum was made. In effect, the stance of the State has been that implementation was not needed because the procedural standards required by the Directive were already met by the provisions of the Refugee Act 1996 when read and applied in conjunction with the provisions of Annex 1. This was something the State was entitled to do as a matter of Community law at the time.

15. The Member States to whom a directive is addressed are required to adopt the necessary legislative or administrative measures required to procure the results to be achieved and to do so prior to the expiry of the period for transposition stipulated in the directive. The choice of form and method employed for that purpose is left to the decision of the individual member States. (Article 288 TFEU.) Legislative implementation is not always required however- particularly in areas of harmonisation of standards across the Member States - if existing legislation in a Member State already applies and enforces the required standards or measures. (See Case 248/84 *Commission v Germany* [1985] ECR 1459 at paras 18-19 & 30: and Case 29/84 *Commission v Germany* [1985] ECR 1661 para 23.) In the former judgment in an action brought against Germany for alleged failure to implement a directive on the principle of equal pay for men and women, the Court accepted the argument that the relevant guarantees were already given in the Basic Law of the Federal Republic and added: "[18] ...The same guarantees are reiterated in the legislation concerning the public service, which expressly lays down that appointment to posts in the public service must be based on objective criteria with out distinction on grounds of sex. [19] It follows that the objective of Directive No 76/207 had already been achieved in the Federal Republic of Germany as regards employment in the public service when the directive entered into force, with the result that no further legislative provisions were required for its implementation."

16. In the present instance the State elected not to adopt any domestic measure which might have expressly applied the provisions of the Directive with actual effect from 1 December 2007 upon the basis that the necessary procedures and procedural standards were already in force and were being applied in the scheme and arrangements of the Act of 1996. It is significant that the interpretative dispensation accorded to Ireland in Annex 1 did not as such require implementation. The State might conceivably have introduced by statutory instrument appropriate deeming provisions in the 1996 Act in relation to the Office of the Commissioner as "determining authority" and the s.13 recommendations as "decisions at first instance". In effect by considering it unnecessary to do so nor to amend the powers, procedures or jurisdictions of either the Office or the Tribunal, the State was adopting the position that the 1996 Act as it already stood contained all the binding measures necessary to give effect to the requirements of the Directive including the ability of the appeal under s.16 to provide the "effective remedy" required by Article 39. It is therefore necessary for the Court to read and apply the Act of 1996 on that basis and to do so with effect from the entry into force of the Procedures Directive on the twentieth day following its publication on 13 December 2005 in the Official Journal. To do so is not to attribute "direct effect" to the provisions of the Procedures Directive prior to 1 December 2007: it is a matter of domestic statutory interpretation brought about by the State's choice as to the form and method of implementation namely, to treat the Directive, including its Annex 1, as already complied with as from its entry into force as an instrument of Community law.

17. Section 12 of the Act of 1996 provides for the prioritisation of certain classes of applications which may be the subject of a direction given by the Minister to the Commissioner or the Tribunal. One of the classes which may be so designated is that consisting of "applicants [who] are nationals of or have a right of residence in a country of origin designated as safe". Under subs. (4) of that section the Minister may, after consultation with the Minister for Foreign Affairs, by order designate a country as a safe country of origin. (Article 30 and Annex 2 of the Procedures Directive lay down criteria for the designation of third countries as safe countries of origin in national legislation of the Member States.) By the Refugee Act 1996 (Safe Countries of Origin) Order 2004, (S.I. No. 714 of 2004) the Republic of South Africa was designated a safe country of origin.

18. Section 16(1) of the Act of 1996, provides that an applicant may appeal against a recommendation of the Commissioner under s. 13 to the Tribunal. Under s.l6 subs. (3), the appeal is brought by notice specifying the grounds of appeal and indicating whether the applicant wishes the Tribunal to hold an oral hearing for the purpose of the appeal. The entitlement to express a wish for an oral hearing is, however, excluded in a case to which s. 13(5) applies. That exclusion applies where the report under s. 13(1) includes a recommendation that the applicant should not be declared to be a refugee and includes among the findings of the Commissioner any one of the findings specified in subsection (6) and in that case s.13 (5) subparagraph (a) provides that the notification of the negative recommendation in the report given by the Commissioner to an applicant is required to state that "any such appeal will be determined without an oral hearing". Subsection (6) lists five findings each of which removes the entitlement to an oral hearing on appeal when included as a finding in the s. 13 report. These are:-

> (a) that the application showed either no basis or a minimal basis for the contention that the applicant is a refugee;
>
> (b) that the applicant made statements or provided information in support of the application of such a false, contradictory, misleading or incomplete nature as to lead to the conclusion that the application is

manifestly unfounded;

(c) that the applicant, without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the State;

(d) the applicant had lodged a prior application for asylum in another state party to the Geneva Convention (whether or not that application had been determined, granted or rejected); or

(e) the applicant is a national of, or has a right of residence in, a safe country of origin for the time being so designated by order under section 12(4).

19. It is clear, accordingly, that the elimination of an oral hearing in an appeal against a negative recommendation in a s. 13 report is brought about by the inclusion in that report of at least one of these findings. The first question which arises, therefore, is whether the inclusion of such a finding is mandatory in any case where it arises or might be appropriate or has the Commissioner a discretion to decide not to include such a finding?

20. In this regard it is important to note first the terms in which the function of the Commissioner under s. 13 is defined in subsection (1). He is required to carry out the investigation under s.11 and then to prepare a written report of the results of the investigation. The content of the report is then further described: it 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." This language clearly indicates an intention to leave to the judgment of the Commissioner the "matters appropriate" for the contents of the report other than the matters raised by the applicant and the recommendation.

21. The manner in which subs. (5) is phrased is also consistent with the choice of findings to be included being left to the author of the s. 13 report. "Where a report under subsection (1) includes a [negative] recommendation... and includes among the findings of the Commissioner any of the findings specified in subsection (6)...". When read in conjunction with the wording of sub section (1)- "such ... matters as the Commissioner considers appropriate..."- the use of the phrase "where a report includes" strongly suggests that a report may omit such a finding if the Commissioner does not consider it appropriate to include it. Furthermore, the use of the word "finding" connotes the making of a judgment or decision on the part of the Commissioner in respect of some issue raised which it is necessary to determine in order to make the recommendation to the Minister in the report. It is common place that in the course of an inquiry by a decision-maker who is required to reach a conclusion, issues may be presented upon which the decision-maker considers it either unnecessary or inappropriate to make a specific finding in order to reach the conclusion which the particular function demands. Furthermore, even a fact essential to the required conclusion may not be the subject of a "finding" if it has been admitted or agreed by the parties. The use of that word seems to envisage that something arises which must be looked into and decided.

22. It would seem to the Court that cases may frequently arise where it would be possible or appropriate for the Commissioner to reach a conclusion on the recommendation without having to come to a view as to whether, for example, there had been a failure to make the application as soon as reasonably practicable

or whether the basis for the claim to be a refugee reached the "minimal" threshold. On that basis, the Commissioner might well make a negative recommendation and, in the absence of any mention of either of those issues, the applicant's entitlement to request an oral hearing on appeal would be retained. In the cases of a delay in the making of the asylum application or of a dispute as to the existence of a minimal basis to the claim, some assessment on the part of the decision-maker is necessary and in that sense the decision-maker must make a "finding" on the issue. In the majority of cases on the other hand, there is no dispute or doubt as to the country of origin of the claimant and the point may not be referred to other than in the title of the report. Thus the use of the word "includes" also suggests that the finding might not be included notwithstanding the fact that the crucial issue for adjudication namely, whether the claimant is shown to be outside his or her country of nationality due to a well-founded fear of persecution, cannot be made unless a country of nationality or origin is identified. It is notable that in the s.13 report in this case the applicant's nationality is identified as "South Africa" in the title and the safe country presumption of s. 11 A (1) is referred to in section 2 under the heading "Legal Basis for Assessment" but the authorised officer still considered it appropriate or necessary to introduce the explicit finding of s.13(6)(e) within the recommendation as the final sentence of the report.

23. In the judgment of the Court therefore, section 13 (5) appears to contemplate the deliberate inclusion of a specific finding which explicitly invokes one or more of the findings of subsection (6). The language used in that provision can be contrasted with other provisions where the duty imposed on the commissioner in relation to the approach to the making of the report is clearly mandatory. S11 B for example, requires the Commissioner to have regard to a series of thirteen specific factors in assessing the credibility of an applicant. Significantly, the application of the presumptions based on safe country nationality and prior asylum application in another state is obligatory. Section 13(5) could equally have been cast in mandatory terms if it had been the intention of the Oireachtas that the ss.(6)(e) finding should always be included in a report where the fact of nationality of a safe country arose.

24. In the course of argument it was suggested that such an interpretation of ss.(5) would be inconsistent with the conclusion reached by Birmingham J. in his judgment in the *M O.O.S Case* discussed further in paragraph 39 below. It is true that at paragraph 47 Birmingham J rejected a contention that "the statute preserves or creates a discretion vested in the respondents to permit an oral appeal or any discretion to disapply the operation of the subsections." He said: "The language is clear and unequivocal and there is simply no scope for ambiguity." The Court does not however read this as referring to the language which governs the choice as to whether any particular ss(6) finding might be included in a report by the Commissioner but to the inability of the respondents to acquiesce in an oral hearing on appeal notwithstanding the inclusion of a paragraph (d) finding. The "disapplication" appears to refer to the mandatory obligation to refer to the absence of an oral hearing in the notice to be given under ss.(4)(b). The reasoning is based on the assumption that the finding has been included and not on whether there was discretion to omit it.

25. For these reasons the Court considers that that s. 13(5) falls to be interpreted as leaving to the judgment and discretion of the Commissioner, the decision as to whether in any case one or more of the findings in subs. (6) should be explicitly invoked. That being so, the issue then arises as to what criteria the Commissioner ought to take into account when making that judgment or exercising that discretion. More particularly, when a negative recommendation is to be made which will be based solely or primarily on a finding of lack of credibility in the claim made, is there an obligation to omit the ss.(6)(e) finding in order to ensure that any appeal under

s.16 is an effective remedy and is conducted according to a fair procedure?

26. As mentioned in paragraph 11 above, at least since 1st December, 2007 (the final date for transposition of the Procedures Directive), the s. 13 report and recommendation of the Commissioner falls to be treated as the "decision at first instance" on an asylum application by a "determining authority" in the sense in which those terms are defined in Article 2(e) of the Directive. Pursuant to Article 39, Member States are required to "ensure that applicants for asylum have the right to an effective remedy before a court or tribunal" against the decisions identified in paragraph 1(a) including such a decision at first instance on the application.

27. It is to be noted that the Procedures Directive in this regard distinguishes between the judicial remedy required to be provided under Chapter V on the one hand and "onward appeals or reviews" which may additionally arise in the judicial systems of Member States on the other. (See Article 15.3(a) of the Directive).

28. The issue which these provisions raise in the context of the present case, accordingly, concerns the effectiveness of the remedy by way of appeal to the Tribunal where an applicant has been automatically deprived of an oral re-hearing before the Tribunal by reason only of the fact that a finding has been included in the section 13 report to the effect that the applicant is a national of a designated "safe country". In particular, where, as in the present case, the primary ground upon which the negative recommendation has been based is a finding of a lack of personal credibility on the part of the applicant in the claim which has been advanced, can an appeal to the Tribunal conducted exclusively on paper be considered an "effective remedy" in the sense of Article 39 when the applicant does not have the opportunity of persuading the court or tribunal dealing with the appeal of his credibility by personal observation and persuasion?

29. Recital 27 of the Directive provides that the remedy by way of appeal against the refusal of the declaration at first instance must lie to a "court or tribunal within the meaning of Article 234" (now Article 267 TFEU) and explains that "[t]he effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole." Article 39 does not therefore assume or require a single common form of appeal process or remedy across all Member States. It defers to the autonomy of the diverse justice systems of the Member States. This corresponds to the approach adopted by the Strasbourg Court to the obligation to provide an effective remedy under Article 13 of the European Convention on Human Rights. The remedy may be "effective" because of the combined effects of the aggregate of procedures both administrative and judicial made available in a Contracting State. (See, for example, the judgment of the ECtHR of 25 March 1983 in *Silver v United Kingdom* at paragraph 113.)

30. It is also useful to note the terms of Article 15.3(a) already referred to above. This provision is concerned with the availability of free legal assistance or representation and acknowledges the entitlement of Member States by national legislation to limit their availability to the "procedures before a court or tribunal in accordance with Chapter V" so that they may be excluded in respect of "any onward appeals or reviews provided for under national law, including a rehearing of an appeal following an onward appeal or review". In other words, the provision appears to countenance the possibility that the "final decision" given on appeal under Article 39 against the decision at first instance may be the subject of a further second level appeal or judicial review which may result in the quashing of the final decision and the remitting of the asylum application for "a rehearing of the appeal", that is, a rehearing of the Article 39 appeal. On the face of it, this would appear to suggest

that the Article 39 remedy is one by way of an appeal which involves some form of hearing or at least the reopening of all aspects of the first instance decision capable of appeal.

31. Article 39.3 does however appear to be open to the interpretation that the "effective remedy" by way of appeal does not necessarily involve any oral hearing of the asylum applicant in person. The provision requires the Members States, where appropriate, to "provide for rules in accordance with their international obligations dealing with (a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome; (b) the possibility of legal remedy or protective measures where the remedy pursuant to paragraph 1 does not have the effect of allowing applicants to remain in the Member State concerned pending its outcome....". In other words, the invocation of the right to an effective remedy on the basis of Article 39.1 does not necessarily carry with it an entitlement of an applicant to remain in the Member State concerned pending the determination of the appeal. This obviously suggests that the remedy could be "effective" even though the appellant is not personally present for the purpose of the procedure.

32. The position remains however, that the character of the appeal offered as the "effective" remedy depends not upon what the Directive may be considered to permit but upon the actual competence accorded to the specific tribunal designated for the purpose of Article 39 in each Member State and on the scope, limitations and powers of redress governing the exercise of its appeal jurisdiction. Under the 1996 Act this is the Refugee Appeals Tribunal in this jurisdiction and that tribunal is given full competence to re-examine and determine de novo the asylum application and, save in a case where a s13 (6) finding has been invoked by the Commissioner, to rehear and reassess the personal credibility of the applicant for the purpose.

33. The question as to whether an oral hearing is a necessary ingredient of an appeal in that stage of the asylum process has been considered in this jurisdiction in a number of cases. In *V.Z. v. Minister for Justice & Ors*. [2002] 2 I.R. 135, the Supreme Court held that the absence of a provision for an oral hearing of an appeal from a decision that an application for refugee status was manifestly unfounded did not infringe the right of an applicant to natural and constitutional justice. (The asylum process in question was conducted under the "Hope Hanlon procedure," the precursor of the Act of 1996). It had been submitted on behalf of the appellant in that case that where important personal rights were at stake, an oral hearing was crucial so that witnesses could be examined and cross-examined under oath in order to test the reliability of opinions of the decision-makers and the accuracy of material which had been relied upon. It had been argued on behalf of the respondents, on the other hand, that there was no legal authority whatever for the proposition that an oral hearing was necessary in all appeal cases. This submission was effectively accepted by the Supreme Court. In giving the judgment of the Court, McGuinness J. said:

> "I would accept the submission on behalf of the respondents that there is no authority to establish that an oral hearing on appeal is necessary in all cases. The appellant is not in the position of an accused person facing prosecution. There are no witnesses against him. He is not in a position to cross-examine the assessors of his claim and it is difficult to see how in these circumstances a right to cross-examine is relevant. He may certainly wish to expand on either his own evidence or independent evidence concerning the conditions prevailing in his country of origin but it is open to him to provide this information in writing. His appeal was drafted on his own instructions

> by his solicitor and did not challenge the factual matters set out in the papers provided to him."

34. It does not appear, however, that the asylum procedure in question was one in which the personal credibility of the applicant had been a material issue. (The applicant's reasons for leaving South Africa were found credible but irrelevant: his evidence of persecution in Russia was not so much disbelieved as found inadequate in detail and his reasons for not returning there were unrelated to a fear of persecution.) The Court also notes that although reliance had been sought to be placed on the European Convention on Human Rights in the High Court, this did not form any part of the appeal to the Supreme Court as the Convention provisions were not at that stage a part of domestic law as it was prior to the enactment of the European Convention on Human Rights Act, 2003. The issue as to whether there could be an effective remedy for the purpose of Article 13 ECHR in a credibility case without personal testimony did not therefore arise for consideration.

35. This approach has been followed in other cases including, for example, *A.D. v. Refugee Applications Commissioner* [2009] IEHC 77 at paragraph 19(g) where this Court held that:

> "The fact that the appeal does not provide for an oral hearing, while relevant, is not itself a ground for granting relief. An oral hearing is not always an essential ingredient of a fair appeal."

Similarly, in *X.L.C. v. Minister for Justice* ([2010] IEHC 148) this Court pointed out that the Procedures Directive:

> " ... does not require that an appeal or an effective remedy against a decision taken on an asylum application involve any fresh interview or any oral hearing (see Article 39). Indeed, it is to be noted that the Procedures Directive does not require that an applicant be allowed to remain in the Member State concerned pending the outcome of any appeal."

The Court did, however, also say:

> "The exclusion of an oral hearing does not preclude the applicant giving evidence. He is entitled to require the Tribunal to consider such testimony as he wishes to have taken into account by way of written statement. The absence of an oral hearing is only a disadvantage where the contested issues of fact depend upon an appreciation of the personal truthfulness of an applicant."

36. The potential of s. 13(5) to work an injustice where a subs. (6) finding is included in the s. 13 report was also adverted to by Clarke J. in *Moyosola v. Refugee Applications Commissioner* [2005] IEHC 218. In considering the arrangements under the Act of 1996 as they had been amended by the Immigration Act 2003, he noted one curious feature of the system:

> "It would appear that where the RAT hears an appeal in a case to which s. 13(6) applies, the only options open to the Tribunal are to allow the appeal or affirm the decision of the RAC. It does not appear that the case can be referred back to the RAC. This raises difficult questions as to the jurisdiction of the RAT in a case where there is as. 13(6) finding which is based in material part on a view as to credibility. If the RAT feels, for example, that such a finding (i.e. as. 13(6) finding) was not justified but nonetheless has doubts as to the credibility of the applicant the RAT cannot, apparently, conduct an oral hearing to satisfy itself on credibility. How should it then act. I would leave a consideration of this question to a case where it directly arises."

Clearly therefore, Clarke J. was alive to the potential problem posed by the exclusion of an oral hearing on appeal when doubts are raised as to the reliability of

a finding of lack of personal credibility in a s.13 Report.

37. Clarke J. went on to consider whether that statutory scheme failed to comply with the principles of constitutional justice having regard to the particular sequence of events that occurred in that case. He held:

> "Where a report of the RAC contains a finding in relation to one of the matters specified ins. 13(6) so as to deprive the applicant concerned of an oral appeal in circumstances where that finding is at least in material part influenced by a finding of lack of credibility on the part of the applicant concerned, it is necessary, in accordance with the principles of constitutional justice, that prior to the making of any such recommendation including any such finding the RAC will have afforded the applicant concerned the opportunity to deal with any matters which might influence such adverse credibility finding."

He thus held that the scheme of the Act was not incapable of being operated in a manner consistent with the principles of constitutional justice provided that, where it is contemplated that as. 13(6) finding will be made on the basis of lack of credibility, there is an obligation to reconvene the s. 11 interview so that the applicant has an opportunity of rebutting the basis upon which the lack of credibility finding is to be made. The s. 13 reports in that case were quashed upon that basis namely, on the basis of a failure to comply with the principle *audi alteram partem* at first instance and not the ineffectiveness of the appeal remedy or the unfairness of the appeal procedure.

38. The question remains therefore as to whether the essential problem will be resolved even when that precaution is taken before credibility is rejected and the s.13 (6) finding is included. It might be a sufficient safeguard where the proposed rejection is to be based upon a specific contradiction such as independent evidence that a claimed event never took place -the mass arrest of demonstrators or the attack on a particular village for example. That was the position in Moyosola: the country of origin reports relied upon to disbelieve the applicant had not been made known to him by the Commissioner. Where, however, the facts or events of a claim could have happened but the story is rejected because of the applicant's hesitations, apparent evasions, failures of recollection or discrepancies, is a second opportunity to convince the decision-maker of personal credibility then a necessary ingredient of an appeal remedy which is "effective" in the particular scheme of the Act of 1996, bearing in mind that the only further possible remedy is that of judicial review with the limitations which that jurisdiction has in readdressing issues of fact and credibility?

39. Birmingham J. too was alive to the potential problem posed by the mandatory exclusion of an oral hearing on appeal in these circumstances in his judgment of 8th December 2008 in *M O.O.S. v RAC & Anor* [2008] IEHC 399. As already mentioned at paragraph 24 above, in paragraph 47 he rejected the argument that the respondents had a discretion to permit an oral hearing by, in effect, agreeing to waive the s.13(6) finding in the report. He follows both the Supreme Court in the *VZ* case and Clarke J. in *Moyosola* in holding that an oral hearing was not an essential element if an appeal is to be compatible with either constitutional principles of fair procedures or Article 6 of the ECHR. The judgment is however clearly distinguishable from the issues in the present proceeding in a number of important respects:

> 1) The s.13 (6) finding was not that of paragraph (e) but of paragraph (d) - the prior lodgement of an asylum application in another state;

2) The judgment carefully analyses the six areas in which credibility had been found lacking and concludes that they were not such as gave rise to any unfairness in their being dealt with by written submissions or evidence on appeal;

3) The central legal issue concerned the existence of a residual discretion to permit an oral hearing rather than the question considered here namely, the discretion of the Commissioner to omit a s13 (6) finding and the possible obligation to do so in a case turning on credibility; and

4) The issue was decided as one of statutory interpretation in the light of constitutional principles and Article 6 of the Convention uninfluenced by any need to have regard to the specific obligation of Article 39 of the Procedures Directive.

40. Where, as in the present case, a claim for asylum has been rejected in a s. 13 report upon the basis that the applicant has been found not to be telling the truth, the issue of personal credibility is clearly fundamental to the appeal and, accordingly, to the character of the appeal procedure as providing a remedy which is effective to rectify the basis upon which the claim has been rejected. Where, as here, the events and facts described by an applicant are of a kind that could have taken place (as opposed to matters which are demonstrated to be impossible or contradicted by independent evidence), but have been rejected purely because the applicant has been disbelieved when recounting them, it is, in the judgment of the Court, clear that the effectiveness ofthe appeal remedy as a matter of law is dependent upon the availability to the applicant of an opportunity of persuading the deciding authority on appeal that he or she is personally credible in the matter.

41. This is all the more obvious where the removal of the opportunity to avail of an oral re-hearing is the result of a factor which has no necessary or logical connection with the issue to be raised on appeal. Where personal credibility is the sole or primary ground for rejection of an application it is usually only in the s.13 report that the applicant realises that his credibility is in issue and crucial to his claim. The adverse presumption combined with the removal of his opportunity to rectify the personal impression he makes on the decision-maker tips the balance of proof against him in a way which is unfair in the sense that it results from a consideration which has no necessary connection with his conduct, testimony or the inherent nature of his claim namely the fact of his nationality.

42. If the present applicant had the nationality of a country which was not designated as a safe country and had based the claim for asylum on exactly the same facts and events, his appeal would entitle him to an oral re-hearing. It might be said that there is some logical connection between the removal of the oral hearing on appeal and some of the other findings covered by s.13 (6). Thus, for example, if an applicant's claim has been based upon false and misleading information there may be some logic and justification for considering that he has forfeited an entitlement to be heard once again. Similarly, a significant delay in making an application for asylum may give rise to the inference that the applicant is not genuinely a refugee and justify a presumption to that effect.

43. The effect of a designation that a country is a safe country is, however, that an applicant is presumed not to be a refugee unless reasonable grounds for the contention are shown to exist. (See s.11A(1) of the Act of 1996.) In the s.13 report in the present case, it was acknowledged that "the applicant's claim may be

considered sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights and therefore may be considered as being of a persecutory nature and as such could satisfy this element of the refugee definition". This acknowledgement is stated to be made without prejudice to the subsequent examination of the well-foundedness of the claim. Nevertheless, if it is conceded that the essential basis of the claim is, in principle, capable of substantiating an applicant's assertion of refugee status, there is no logic or justification, in the view of the Court, to the removal of an oral hearing on appeal because the persecution is claimed to have occurred in a "safe country" but the account has been disbelieved.

44. The limited reliance that can be placed upon the designation as stated in recital 21 of the Procedures Directive should also be borne in mind:

> "The designation of a third country as a safe country of origin for the purposes of this Directive cannot establish an absolute guarantee of safety for nationals of that country. By its very nature, the assessment underlying the designation can only take into account the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in the country concerned. For this reason, it is important that, where an applicant shows that there are serious reasons to consider the country not to be safe in his/her particular circumstances, the designation of the country as safe can no longer be considered relevant for him/her."

45. It follows, in the judgment of the Court, that where the Commissioner has a discretion (as has been found above) as to the inclusion or non-inclusion in the s. 13 report of a statutory finding under s. 13(6), the obligation to ensure that an applicant has access to an effective remedy by way of appeal under s. 16 to the Tribunal requires that the finding under paragraph (e) ought not to be included when the effect will be to deprive the applicant of an oral hearing in an appeal against a negative recommendation which is based exclusively or predominantly upon lack of personal credibility.

46 From the conclusion the Court has reached above in relation to Article 39 of the Procedures Directive it effectively follows that for the same reasons the second limb of the preliminary issue must also be decided in the applicant's favour. The denial of an oral hearing which is otherwise available to asylum seekers as part of a statutory appeal remedy in a case where assessment of personal credibility is the sole or central issue challenged in the s.13 report, by reason only of a factor (nationality,) which has no rational connection to role of a hearing in the appeal, renders the procedure, in the judgment of the Court, unfair to a degree which is incompatible with the guarantee in Article 40.3 of the Constitution.

47. Referring in *Glover v BLN Ltd* [1973] IR 388 at 425, to the judgment of the Supreme Court in re *Haughey* [1971] IR 217 in relation to the guarantee of fair procedures in Article 40.3, Walsh J said: "It is not, in my opinion, necessary to discuss the full effect of this Article in the realm of private law or indeed of public law. It is sufficient to say that public policy and the dictates of constitutional justice require that statutes, regulations or agreements setting up machinery for taking decisions which may effect rights or impose liabilities should be construed as providing for fair procedures....The plaintiff was neither told of the charges against him nor was he given any opportunity of dealing with them before the board of directors arrived at its decision to dismiss him. In my view this procedure was a breach of the implied term of the contract that the procedures should be fair, as it cannot be disputed, in the light of so much authority on the point, that a failure to

allow a person to meet the charges against him and to afford him an adequate opportunity of answering them is a violation of an obligation to proceed fairly."

48. Although the asylum-seeker knows from the s.13 report the issues that must be addressed in the appeal, in the judgment of the Court, there is a clear failure to afford an adequate opportunity of dealing with the issue of personal credibility when an oral hearing which is otherwise accepted as being an appropriate element of the statutory procedure is denied by reason only of the happenstance of the appellant's nationality. As already observed above, where the key issue in the appeal is the fact that an account of facts given personally at first instance has been disbelieved, the primary if not the exclusive possibility of successfully reversing that result lies in the appellant's prospect of persuading a second decision-maker that he can and should be believed. To remove that possibility when it is not rationally necessary to do so having regard to the fact that the appellant already faces the procedural disadvantage of the s.11A(1)(a) presumption is to render the appeal procedure unfair in the sense of the Constitutional guarantee.

49. Each of the questions posed in the preliminary must therefore be answered in the affirmative.

50. Having regard to the procedural history of the present case as outlined above in paragraphs 6 to 8 and to grounds in respect of which leave was granted, the Court will hear the parties as to whether the above findings are sufficient to permit a final order to be made or whether there are any further issues to be considered or other consequential matters that require to be dealt with.