

**THE HIGH COURT  
JUDICIAL REVIEW**

**2003 No. 607 J.R.**

**BETWEEN**

**VIRGINIJUS USELIS**

**APPLICANT**

**v.**

**THE REFUGEE APPLICATIONS COMMISSIONER  
AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW  
REFORM**

**RESPONDENT**

**JUDGMENT of Gilligan J. delivered on the 29th day of April, 2005.**

**Factual Background**

The applicant is a Lithuanian National who entered the State and applied for a declaration of refugee status on 16th August, 2002. The applicant made an application to the Refugee Applications Commissioner, and completed a questionnaire. On 27th May 2003 he attended for interview in accordance with the procedure under section 11 of the Refugee Act 1996.

The applicant was advised by letter prior to his interview that he was entitled to submit any documentary evidence or other information prior to the interview, at the interview, or within 7 working days of the interview. He was also advised that he was entitled to seek legal advice and was provided with an information leaflet in relation to the Refugee Legal Service. The applicant was advised that any information provided by him would remain confidential and the duty to co-operate and importance of all information being truthful were reiterated.

The letter also stated that -

*“following the interview, a report of your application will be made by the authorised officer who interviewed you. The report may draw on generally available information about your country of origin and any other information considered relevant. You will be provided with copies of all information taken into consideration in this case.”*

The applicant did not make any submissions within the seven working days provided by section 11(3) of the Refugee Act 1996.

The Refugee Applications Commissioner notified the applicant by letter dated 17th July 2003 that the recommendation of the Commissioner was that the applicant not be declared to be a refugee. The Commissioner provided the applicant with copies of the reports drawn up under sections 11 and 13 of the Refugee Act 1996. In this case, the country of origin information, the subject of these proceedings, was relied on in the section 13 report, but not

in the section 11 report. The applicant was advised of his right to appeal.

The applicant was granted leave by this court (Kearns J.) on the 1st day of April, 2004, to apply by way of an application for judicial review for the following reliefs;

- (a) A declaration that the decision of the first named respondent of 17th July, 2003, to deny the applicant refugee status and the recommendation of the first named respondent of 30th June, 2003, are *ultra vires* and without efficacy.
- (b) A declaration that the investigation report and recommendation and decision of the first named respondent of 30th June, 2003, were carried out, conducted and concluded in infringement of the applicant's constitutional right to fair procedures and natural justice.
- (c) An order of *certiorari* quashing the decision of the first named respondent of 17th July, 2003, refusing the applicant refugee status and the reports and recommendation of the respondent of 30th June, 2003, pursuant to s. 13(1) and s. 11(2), Refugee Act, 1996.
- (d) An order of *mandamus* remitting the applicant's application for refugee status for an investigation by the first named respondent in accordance with the directions of this court.
- (e) An injunction restraining the second named respondent from taking any steps pursuant to s. 17(1)(b) of the Refugee Act, 1996, to affirm the decision to deny the applicant refugee status and/or make a proposal to deport and/or to deport the applicant.
- (f) Further and other relief including if necessary an extension of time for the making of this application pursuant to s. 5(2)(a), Illegal Immigrants (Trafficking) Act, 2000.
- (g) Costs, V.A.T and interest as made and provided for.

On the following grounds -

- (i) The applicant was denied in breach of his constitutional rights and the principles of natural justice and fair procedures and in breach of statutory duty of the first named respondents an opportunity to consider address and/or rebut material and information obtained, considered and relied upon by the authorised officer including in particular country of origin information obtained in the course of the investigation and referred to and relied upon by the authorised officer in the report and results of the investigation under s. 13(1), Refugee Act, 1996. The authorised officer relied upon extracts from country of origin reports in relation to the availability of State protection against breaches of human rights in the report pursuant to s. 13(1) to justify his conclusion that there would have been redress or State protection available to the applicant against the difficulties he experienced within the State Security Department in Lithuania. By reason of a failure of the authorised officer to disclose this material and country of origin information to the applicant until after the completion of the

investigation the applicant was denied the right to make representations in relation to same and/or address the contents thereof and/or rebut same by way of submissions in relation to the country of origin information relied upon and/or by way of presentation of country of origin information or otherwise.

(ii) The applicant has the right and entitlement pursuant to s. 11(3), Refugee Act, 1996, to make representations in writing to the first named respondent in relation to any matter relevant to the investigation of his application and the first named respondent shall take account of any such representations. Failure by the authorised officer of the first named respondent to disclose to the applicant matters material and information relevant to the investigation at any stage during the investigation has denied the applicant his statutory right to make representations in connection with same. The applicant was not in a position to make representations concerning matters of which he was not aware and had not been made aware.

The applicant is claiming that he was entitled to have been provided with the country of origin documents relied upon by the Commissioner in the s. 13 report prior to making such report, and/or prior to the making of the s. 11 report. It is alleged that this amounts to a breach of fair procedures, natural and constitutional justice and/or breach of statutory duty. It is further alleged that the applicant was denied his right to make representations to the Commissioner under s. 11(3).

### **Submissions of the Applicant**

The applicant claims that he was denied the right to fair procedures and the right to make representations due to a failure to disclose to him relevant information which was relied upon by the Commissioner.

The applicant submitted that he was denied an opportunity to consider, address and/or rebut material and information obtained and considered and relied upon by the Commissioner including country of origin information obtained in the course of the investigation and referred to by the Commissioner in the reports under section 11 and section 13.

It is submitted by the applicant that the Commissioner relied upon extracts from country of origin reports in relation to the availability of State protection against breaches of human rights in the report pursuant to section 13(1) to justify his conclusion that there would have been redress or state protection available to the applicant against the difficulties he experienced with the State Security Department in Lithuania. The applicant claims that by reason of a failure of the Commissioner to disclose this material and

country of origin information to the applicant until after the completion of the investigation, the applicant was denied the right to make representations in relation to same and/or address the contents thereof and/or rebut same by way of submissions in relations to the country information relied upon and/or by way of the presentation of contrary country of origin information or otherwise.

### **Submissions of the Respondents**

It is submitted by the respondent that the principles of natural and constitutional justice do not require the Commissioner to make available to the applicant documents considered by her prior to the reports and recommendation being furnished to the applicant.

Counsel for the respondents refer to the case of *Article 26 Reference* [2000] 2 IR 360, 395. Here the Supreme Court has held that an applicant for asylum in the State “is not a passive participant” in the process: The respondents submitted that this places an onus on the applicant to include all material considered relevant by him in his application and to be truthful.

The respondents submit that the applicant is not a “*passive participant*” in the process. The applicant was aware that country of origin information may be relied upon by the Commissioner and the applicant was entitled to put any country of origin, or other, information before the Commissioner, at any time up to 7 days after the date of the interview. It is submitted by the respondents that the Oireachtas did not intend to require the Commissioner to provide country of origin information in such circumstances; otherwise it would have been stated in the Act.

In this case the country of origin information was not the only basis on which the Commissioner decided to recommend that the applicant would not be declared a refugee. The applicant’s evidence in relation to the reason he claimed to be in prison was considered to be “incredible”. The Commissioner was unable to find any country of origin information to support the allegation of illegal recruitment activities. It is stated that “there is not information to suggest that there is a complete breakdown of law and order in Lithuania”. The Commissioner also referred to country of origin information and concluded that redress would have been available to the applicant.

Counsel for the applicant referred to the case of *State (Williams) v. Army Pensions Board* [1983] IR 308 to show that there is a constitutional right to fair procedures in the decision making process. The respondents claim that this case can be distinguished from the instant case as the information / documents sought in this case are in the public domain and could have been obtained by the applicant.

### **The Asylum Application Procedure**

The process by which the Refugee Applications Commissioner considered the application for a declaration of refugee status was a two-step process. According to section 11 of the 1996 Act, the applicant is interviewed by the authorised officer who is required to prepare a report. A subsequent report is prepared under section 13(1). The provisions of section 13 provide that this report must contain the recommendation of the Commissioner, and must be furnished to the applicant. If the recommendation of the Commissioner is negative, the applicant has a right of appeal to the Refugee Appeals Tribunal. The Minister must grant a declaration if the recommendation of the Commissioner or Tribunal is to that effect. If the Commissioner or/and Tribunal recommends that the applicant is not a refugee, the Minister has a discretion whether or not to grant a declaration of refugee status.

### **The Law on the Asylum Process**

The purpose of the Refugee Act 1996 is to set out in statutory form the status and rights of person recognised in the Act as refugees and the procedures to be followed in determining whether or not a person should be afforded recognition as a refugee in the State.

The provisions of the Refugee Act 1996 as amended by the Immigration Act 1999 and Illegal (Trafficking) Act 2000 apply. By virtue of section 28A Refugee Act 1996, as inserted, the Act shall be interpreted as if section 7 of the Immigration Act 2003 had not been enacted as the applicant's interview was held prior to 15th September 2003.

Previous case law on the Refugee Act 1996 goes to show that in interpreting the Act, the courts have favoured a literal approach. In *S v. The Minister for Justice*, Unreported, Supreme Court) 10th June 2004, Hardiman J refers to Bennion, Statutory Interpretation, at section 285, which states;-

*“Prima Facie, the meaning of an enactment which was intended by the legislature in other words its legal meaning is taken to be that which corresponds to the literal meaning”*

Here the court held that the minister's decision under s. 17(7) of the Act of 1996 is a “refusal” within the meaning of s.5(1)(k) of the Illegal Immigrants (Trafficking) Act 2000. In *S*, Hardiman J also refers to the case of *Zambra v. McNulty* [2002] 2 IR 351 as authority for the literal interpretation of the Refugee Act 1996. In *Zambra*, it was held that a decision taken pursuant to a power or requirement in a statute is aptly described as taken “under” the relevant section.

It is sections 11 and 13 of the 1996 Act that are under scrutiny in this instance and a literal approach is to be recommended in their interpretation.

## **Section 11 of the Refugee Act 1996**

Section 11(3), Refugee Act 1996, pre-amendment by the Immigration Act 2003 states:-

*“The applicant concerned, the High Commissioner or any other person concerned may at any time but not later than 7 working days after the conduct of the interview under subsection 2, make representations in writing to the Commissioner in relation to any matter relevant to an investigation by him or her under this section and the Commissioner shall take account of any such representations.”*

Section 11 of the Refugee Act provides that it shall be the function of the Commissioner to investigate applications for refugee status. It also sets forth the procedure to be followed in relation to such investigations. It should be noted that the Act does not envisage an adversarial procedure in this regard.

The explanatory memorandum to the Refugee Bill is helpful in setting out the purpose of this section. According to the latter, it is envisaged that an applicant, who may invoke the assistance of a solicitor, will make a written submission to the Commissioner setting out their case. The applicant will be interviewed by an officer of the Commissioner who shall report in writing to the Commissioner.

This section 11 report shall deal with any matter raised by the applicant and which the officer considers appropriate. In this respect, it may be noted that this section was amended from an obligation only to include matters in the report which the officer considered appropriate to an obligation to also include any matter raised by the applicant “in the interest of fairness”.

The applicant has also referred to section 11(6) of the Refugee Act 1996, which has not been altered by the amendments made by the Immigration Act 2003.

Section 11(6) Refugee Act, 1996 states:-

*“Subject to subsection (7), the Commissioner shall furnish the applicant concerned with copies of any reports, documents or representations in writing submitted to the Commissioner under this section and an indication in writing of the nature and source of any other information relating to the application which has come to the notice of the Commissioner in the course of an investigation by him or her under this section.”*

Pursuant to subs 6 a copy of all material and a written indication of any other information obtained by the Commissioner with respect to the application will be furnished to the applicant so that he or she can make further submissions. The explanatory memorandum to the Refugee Bill

states that this is to ensure that the applicant is fully informed of the material on which the Commissioner will make their recommendation and to give the applicant an opportunity to refute any material he or she disagrees with. (Emphasis added).

In my view section 11(6) imposes an obligation that the applicant be furnished with such information prior to the making of a recommendation by the Commissioner.

Section 11 (7), which has been deleted by the Act of 2004, read;-

*“Where information has been supplied to the Commissioner, a Department of State or another branch or office of the public service by or on behalf of the government of another state in accordance with an undertaking (express or implied) that the information would be kept confidential, the information shall not, without the consent of the other state, be produced or further disclosed otherwise than in accordance with the undertaking.”*

This subsection gave an opt out clause to subsection (6) where certain material supplied by another state shall not be disclosed if this would lead to a breach of confidentiality.

The legislation clearly envisages that the applicant will be furnished with all relevant information gathered during the investigation under section 11 and prior to the making of a section 13 report.

The timing for this transfer of information is provided for in section 11(8) of the Act of 1996. Subsection (8) provides for the information to be furnished to the applicant once an application has been referred to the Commissioner.

### **Section 13 of the Refugee Act 1996**

Section 13 provides as follows;-

*“(1) Where the Commissioner carries out an investigation under section 11, he or she shall, subject to section 12, as soon as may be, prepare a report in writing of the results of the investigation and such a report 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, and shall furnish the report to the Minister.*

*(2)(a) The Commissioner shall, when furnishing a report under subsection (1) to the Minister, send a copy thereof to the applicant concerned, to his or her solicitor (if known), and to the High Commissioner.*

*(b) Where a report under subsection (1) includes a recommendation that the applicant should not be declared to be a refugee, the Commissioner shall furnish a copy thereof to the Appeal Board and shall at the same time send to the applicant a notice in writing stating that the applicant may appeal to the Appeal Board under section 16 against the recommendation and may request an oral hearing within 21 days from the sending of the notice.”*

A section 13 report is based on the results of the investigation under section 11, and as such the two are interlinked. Section 13 does not create an opportunity for a new investigation. Given a literal interpretation section 13 envisages a completed investigation under section 11 before the section 13 report is drawn up by the Commissioner.

### **Conclusion**

The issue that arises is whether or not the principles of natural and constitutional justice require the Commissioner to make available to the applicant documents considered by him prior to the reports and recommendations being furnished to the applicant.

It is clear that section 11 (6) envisages a situation whereby the applicant is furnished with all relevant documentation before a report under this section is finalised. The only information which can be excluded from section 11(6) is that which comes under section 11(7), which is anything which might be in breach of inter state confidentiality clause, and no such claim is made in this instance.

In omitting to furnish the applicant with material that was relied on by the Commissioner in his recommendation, section 11(6) was not complied with and therefore the applicant lost his statutory right to make relevant submissions under section 11(3).

In these circumstances I will grant the applicant the relief sought at paras. (c) and (d).