THE SUPREME COURT

RECORD NO. 198/00

Denham J.
McGuinness J.
Hardiman J.

BETWEEN/

PETREA STEFAN

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM,
THE REFUGEE APPEALS AUTHORITY, IRELAND,
THE ATTORNEY GENERAL

RESPONDENTS/APPELLANTS

Judgment of The Hon. Mrs. Justice Susan Denham delivered on the 13th day of November, 2001 [Nem. Diss.].

1. Appeal

This is an appeal by the Minister for Justice, Equality and Law Reform, (hereinafter referred to as the Minister), the Refugee Appeals Authority, Ireland and the Attorney General (hereinafter referred to collectively as the respondents) against an order made by the High Court (Kelly J.) on 8th June, 2000. The High Court granted an order of *certiorari* in respect of the order of the Minister notified to Petrea Stefan (hereinafter referred to as the applicant) by letter dated 29th December, 1998, informing him that his application for refugee status in the State had been refused. It was ordered that the matter be remitted back to the Minister to be considered in accordance with law.

2. Facts

The applicant is a Romanian national who arrived in Ireland in 1998 and applied for refugee status. He was furnished with a questionnaire which he returned to the respondents on the 1st May, 1998. Subsequently he was notified of and attended at an interview that took place on the 22nd June, 1998. The application was assessed and a decision was made to refuse the applicant refugee status, which was notified to him by the said letter dated the 29th December, 1998. An appeal form was lodged on the 11th January, 1999. Following further correspondence the applicant was notified by letter of the 2nd March, 1999 of the appeals procedure and furnished with all the material upon which the decision to refuse refugee status had been taken. By letter dated the 22nd March, 1999 the applicant was notified that the appeal hearing was scheduled for the 21st April 1999. By a letter dated the 14th April, 1999 the applicant challenged the decision to refuse refugee status and requested that it be rescinded. On the 20th April, 1999 the applicant applied for and was granted leave to apply for judicial review on a number of grounds. The application was heard on the 8th June, 2000 and an order of *certiorari* was granted on the grounds that the questionnaire submitted by the applicant had not been fully translated and accordingly the decision to refuse refugee status was made in circumstances where the entire of the material submitted by the applicant was not considered.

A key document in this matter is the letter written by Ms. Molyneux on the 29th December, 1998 informing the applicant of the finding against him. That letter stated, *inter alia*:

> "I am directed by the Minister for Justice, Equality and Law Reform to refer to your application for refugee status in the State.
> Your application has been considered on the basis of the information you provided in support of it, both in writing and at interview, and it has been

> decided that your application is not such to qualify you for refugee status in accordance with the definition contained in the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol and as defined in section 2 of the Refugee Act, 1996.
>
> On the basis of the information available you have not fulfilled the requirements of the refugee definition under Article 1A of the 1951 Convention. You have not established a well founded fear for any Convention reason, and furthermore your account lacks credibility in many respects.
>
> It is open to you to appeal this decision. If you wish to lodge an appeal against the decision you must do so by notifying the Asylum Appeals Unit of the Asylum Division, Department of Justice, Equality & Law Reform, Timberlay House, 79-83 Lower Mount Street, Dublin 2 in writing within 14 days of the date of this letter. Any further information which you wish to submit to support your case should be forwarded to the Asylum Appeals Unit of the Asylum Division within that time limit. Asylum Appeals Section will advise you of the procedures which apply for processing an appeal following receipt of written notification of your intention to appeal.. . . "

The translation of the questionnaire filled in by the applicant was incomplete in that the applicant's reply to question 84 was incomplete in the English translation. As was deposed to by Brendan Toal, on behalf of the applicant, in his affidavit of the 20th April, 1999:

> "Question 84 of the questionnaire is as follows:-
>
> > 'Why are you seeking asylum? (give full details of your claim, bearing in mind that you must demonstrate a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion and are unable or unwilling to avail yourself of the protection of your country of origin or residence) - extra pages may be used.'
>
> As appears from exhibit B the Applicant replied to this question with approx. two and a half pages of cursive script. The English translation is incomplete, in that after the word 'finish' at line 10 thereof, the following should appear (per translation provided on 20th April 1999 by a translation agency):-
>
> > 'school and get their leaving cert. Then my family and myself exiled to Roman, it's a neighbouring city to the one I was born and grew up in. My wife and children were very distressed and could not come to terms with why I took the decision to move. They asked me why all the time. I told them lots of excuses. My wife and children told me about things that happened to them. The children said older children in school were threatening them and they did not want to go to school They said, they would end up worse that *(sic)* Ceausescu. The threats were not only from students, they were from people in the street who were unknown to them. For a period of time I tried to avoid certain places and streets to avoid any threats. But anywhere I applied for work they required the records from my

> last employment. After I produced my records I had to wait a few days to hear if I got work. All the answers were that they could not give me work. They told me that they could not give me work. They told me that I would not get work anywhere, maybe, if there is another revolution I will get work. These events were what force me to move to roman city.'"

3. The High Court

The High Court (Kelly J.) held:

> "The entire answer to question 84 was not before the Officer who made the decision. As he didn't have all the information then prima facie the decision was defective. The defect can be looked at in either of two ways. First, it can be said that the decision in suit was ultra vires the Minister insofar as in making the order all of the written submissions validly made to the Minister were not considered by him. Secondly, it can be said to have been a decision arrived at in breach of fair procedures in that the question was not considered fully as a result of the omissions in the translated Questionnaire.
>
> The question that arises is whether or not certiorari should be ordered as a result of the defect. The first consideration that has been put to me on behalf of the respondents is that as the information is of no or so little relevance certiorari should not be ordered. I am not convinced it is necessarily appropriate for me to look at the relevance of the omitted information. But without deciding whether it is or is not appropriate, it cannot be said that the omitted information in this case was in fact immaterial. There are two reasons for this. First, the clear tenor of Mr. Cummins' assessment makes reference to matters touched upon in the omitted material. Secondly, the credibility of the applicant was considered in the said assessment. I do not have to sit in Mr. Cummins' chair and make his decisions but I reject the notion that I should treat the omitted material as irrelevant.
>
> The second question that arises then is whether or not the appeals mechanism which was available to the applicant from the decision constituted an adequate alternative remedy to that of the Judicial Review. The appeal to the Refugee Appeals Authority is not in the form of a re-hearing. It is in the nature of a review that can be conducted;
>
> 1. By means of a review of documents; or
> 2. If a request by an oral hearing is made it must be granted and the Refugee Appeals Authority hears testimony and reviews the documentation.
>
> It is argued that the procedure before the Refugee Appeals Authority is a cure for the complaints made in the present case. I do not agree. It does not seem to me

that this form of review is such that the certiorari should not go. No criticism is made of the Hope Hanlan procedure. This provides for a hearing at first instance. The review is premised on a full and proper hearing having taken place before the Deciding Officer. This was not present in this case.

Even if I am wrong in this, even if a full rehearing was available I take the view that it would be unsatisfactory. An insufficiency of fair procedures at first instance is not cured by a sufficiency on appeal.

It is not necessary for me to embark on a consideration of the second argument - that being the alleged substandard performance of the Interpreter and I do not propose to make any finding thereon.

I therefore grant certiorari directed to the decision made and that decision will be quashed and the recommendation by Mr. Cummins must likewise fall. I therefore quash the recommendation and decision made on foot of the recommendation dated the 29th December, 1998. The matter will be remitted for interview before an Officer of the Department of Justice, Equality and Law Reform other than Mr. Cummins on the basis of the Questionnaire as already completed by the Applicant."

4. Grounds of Appeal

The respondents appealed the said order of the High Court on the following grounds:

1. That the trial judge erred in law and in fact in finding that the appeal to the Refugee Appeals Authority was not a rehearing but was more of a review.

2. That the learned trial judge erred in law and in fact in finding that a full and proper hearing was a prerequisite of a full and proper appeal.

3. That in exercising his discretion the learned trial judge failed to consider whether the appeal to the second named respondent was adequate to remedy the error complained of.

4. That the learned trial judge erred in law and in fact in exercising his discretion in favour of the applicant in circumstances where the relief was unnecessary to protect the applicant's rights.

5. That in exercising his discretion the learned trial judge failed to take into account the fact that in determining the issue in question, namely whether the applicant is a refugee, the Refugee Appeals Authority would be in possession of all relevant material.

6. That in exercising his discretion the learned trial judge failed to take into account the fact that at the hearing of appeal before the Refugee Appeals Authority there would be an oral hearing at which it would be open to the applicant to advance any reasonable argument in support of his claim.

7. That in exercising his discretion the learned trial judge failed to take into account the fact that in hearing the appeal so far as relevant the second named respondent would be in a better position than the court to determine whether the error complained of was material to the decision.

8. That in exercising his discretion the learned trial judge failed to take into account the fact that the appeals procedure was designed to correct errors and to this end it specifically provides that all material upon which the original decision was based be furnished to the applicant.

5. Submissions

Mr. Frank Callanan, S.C., counsel on behalf of the respondents supplied written submissions and made oral submissions to the court. In summary the written submissions submitted that the applicant's complaint is adequately met by the appeal procedure provided in the Hope Hanlan letter. It was submitted that the procedure may be said to form part of a single, undivided process or alternatively to constitute an adequate alternative remedy. On either approach, it was submitted that having heard all the circumstances of the case, this is a case in which the learned trial judge of the High Court misdirected himself in law in granting an order of *certiorari* and that the respondents' appeal ought to be allowed.

Mr. Gerard Hogan, S.C., counsel on behalf of the applicant, provided written submissions and made oral submissions to the court. In conclusion, in the written submissions, it was submitted that the decision of the Minister notified to the applicant on the 29th December, 1998 was *ultra vires* the Minister insofar as in making the order all of the written submissions validly made by the applicant were not considered by him and secondly because it was a decision arrived at in breach of fair procedures in that the application was not considered fully as a result of the omissions in the translated questionnaire. It was submitted that judicial review should be available to the applicant in respect of the original decision, that the

Refugee Appeals Authority hearing is not sufficiently adequate to warrant withholding *certiorari*. In those circumstances it was submitted that the appeal ought to be dismissed.

6. Decision

In effect there are two issues to be determined on this appeal. First, whether the process under the Hope Hanlan letter is a single undivided process. Secondly, whether *certiorari* should lie in view of the alternative remedy of appeal to the Appeals Authority.

The first issue, as to the process under the Hope Hanlan letter, was not the strongest of the issues raised by the respondents. The administrative procedures which applied to the applicant's application were set out in the letter dated 10th December, 1997 from the Minister to Ms. Hope Hanlan. The letter sets out the process which includes at paragraph 11:

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

Thereafter the letter deals with the accelerated procedure of "manifestly unfounded" cases. The matter of appeals is covered in paragraphs 15 to 18 as follows:

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

> information provided to the applicant and with such submissions as may be made by or on behalf of the applicant in connection with the appeal. The Appeals Authority will make a decision based on the papers only or, where the applicant has so requested, following an oral hearing.
>
> 16. Where an applicant fails to attend at an appeal hearing, having requested and being granted an oral hearing an having been duly informed of the date thereof, the appeal shall be considered on the basis of written documentation already available to the Appeals Authority.
>
> 17. The Appeals Authority will make a recommendation to the Minister as to whether refugee status should be granted.
>
> 18. A duly authorised officer of the Department will make a final decision on refugee status on behalf of the Minister based on the recommendation of the Appeals Authority, but subject to considerations of national security or public policy."

While the whole process is a procedure culminating ultimately in a decision on refugee status on behalf of the Minister by a duly authorised officer of the Department of Justice, Equality and Law Reform based on the recommendation of the Appeals Authority, subject to considerations of national security or public policy, the procedure itself has to be analysed to see whether within the process there are two separate distinct decisions. I am satisfied that there are. The Hope Hanlan letter itself in plain language refers to the primary part of the process as culminating in "a decision": see paragraph eleven. It is so described again in the first line of paragraph fifteen. Further, the Appeals Authority is described also as making "a decision" on the papers only or (if so requested) following an oral hearing. The clear words create a two tier process with two separate decisions. That this is plainly the situation is apparent also from the underlying policy apparent on the face of the document, the policy to have a transparent, credible and independent process. An example of such policy can be seen in paragraph fifteen:

> " . . . The appeal will be determined by an Appeals Authority, a person independent of the Minister and the Department with at least ten years practice as a solicitor or barrister appointed by the Minister for this purpose . . ."

For the purpose of the analysis for judicial review I am satisfied that the Hope Hanlan letter process is bifurcated. It will involve two decisions, if an applicant appeals to the Appeals Authority. The decision furnished to the applicant by letter dated the 29th day of December, 1998 was a final decision on the applicant's application for refugee status subject to his right of appeal, which if taken would involve a second decision. On this first issue of the appeal the respondents fail, in my view. *Certiorari* may lie in relation to the decision on the application for refugee status.

The second issue was pressed, on behalf of the respondents, as the stronger ground of appeal. Counsel submitted that The State (Abenglen Properties Limited) v. Dublin Corporation [1984] IR 381 should be applied and on its application the respondents would succeed. There being the alternative remedy of appeal (including the right of an oral hearing) it was submitted that the High Court erred in the exercise of its discretion in granting an order of *certiorari.*

In State (Abenglen Properties Ltd.) v. Dublin Corporation [1984] IR 381 Henchy J. at p. 405 stated:

> ". . . where Parliament has provided a self-contained administrative and quasi-judicial scheme, postulating only a limited use of the Courts, certiorari should not issue when, as in the instant case, use of the statutory procedure for the correction of error was adequate (and, indeed, more suitable) to meet the complaints on which the application for certiorari is grounded."

Other cases have recognised that a judicial review is discretionary and may be refused where there is an adequate alternative remedy; see The State (Glover) v. McCarthy [1981] ILRM 46; Nova Colour Graphic Supplies Ltd. v. Employment Appeals Tribunal [1987] IR 426;

Memorex v. Employment Appeals Tribunal [1992] IR 184; McGoldrick v An Bord Pleanala [1997] 1 IR 497.

However, to take the above quotation of Henchy J. in Abenglen in isolation is too simplistic an approach in light of the judgment as a whole. An analysis of the judgment of Henchy J. in Abenglen indicates a comprehensive approach to the issues. There were several reasons for refusing *certiorari*. First, Henchy J. held that where an inferior court or a tribunal errs within jurisdiction without recording that error on the face of the record, *certiorari* does not lie. He stated that it was only in such cases when there is the extra flaw that the court or tribunal acted in disregard of the requirements of natural justice that *certiorari* will issue. In Abenglen's case there was no suggestion that the respondents acted in disregard of the requirements of natural justice. However, in this case, there was the error of omission of part of the evidence before the decision maker. Such a situation brings into consideration the basic fairness of the procedures. Henchy J. gave two further reasons in Abenglen why *certiorari* should not issue. First, the merits of the application were considered. Henchy J. considered that if it could be held that the respondents acted in excess of jurisdiction the granting of *certiorari* would be a matter of discretion for the court for no benefit would accrue to Abenglen by the granting of the order. However, counsel for Abenglen admitted that the only purpose of the application to quash the respondent's decision was a technical one to gain monetary advantage. Counsel for Abenglen sought to quash the decision so that it could lay claim to a grant of development permission by default, greatly to their advantage. Henchy J. found the process of the reasoning totally unacceptable. He stated at p. 401:

> ". . . Since the ability to make such a contention successfully is the only reason for bringing these certiorari proceedings, an absolute order of certiorari would be worthless to Abenglen. In such circumstances, the grant of certiorari is a matter of discretion, and it does not seem to me that it could be a proper exercise of the Court's discretion to grant certiorari when the sole purpose of the quashing is the

> attainment of an object which is legally unattainable. That being the position here, even if the respondents made a decision which they had not the required jurisdiction to make, Abenglen, on their own admission regarding the reason for bringing their application for certiorari, have no standing to have that decision quashed."

The circumstances are entirely different and distinguishable in this case. Certain evidence of the applicant was not before the decision maker. The finding of the learned trial judge that ". . . it cannot be said that the omitted information was immaterial" was not challenged. This was correct in my view. Clearly the applicant has standing and on the facts his merits, unlike the situation in Abenglen, cannot be impugned. An order for *certiorari* would not be worthless, it would enable the primary decision be made in light of all the evidence. In such a circumstance the purpose is entirely different to that in Abenglen.

Secondly, Henchy J. refused to grant *certiorari* even if the respondents in Abenglen acted in excess of jurisdiction because the correct procedure for the correction of the legal errors complained of lay in an appeal to An Bord Pleanála. He stated at p. 404:

> "The present case does not seem to me to exhibit the exceptional circumstances for which the intervention of the courts was intended. On the contrary, certiorari proceedings would be singularly inapt for the resolution of the questions raised by Abenglen.. . .
>
> . . . Because of the technicality of the objections raised by Abenglen, because the resolution of these objections require oral evidence, and because the resulting decision would probably govern cases, past, present or future, I would in the exercise of my discretion, refuse certiorari on the ground that Abenglen should have pursued the appellate procedure that was open to them under the Acts.. . ."

The entire passage containing the oft quoted passage cited previously states:

> "I pause to stress that the primary reason why I would refuse certiorari in this case is because the alleged errors of law were not made in excess of jurisdiction and do not appear on the face of the record of the respondents' decision. I am merely explaining why I would exercise my discretion against Abenglen in the event of the Court deciding that certiorari lies as a matter of discretion. Such an exercise of my discretion would appear to accord with the practice in the United

> States, which is stated as follows in 14 Am. Jur. 2d, p 787 - 'Under the prevailing practice, a writ of certiorari will not issue if there is another adequate remedy, such as an appeal or writ of error, an action at law or in equity, or intervention with the right of appeal secured. It is only in cases of unusual hardship and in the furtherance of justice that the use of the writ of certiorari is permitted to *supplement the method of review expressly provided by statute.*' I have added the emphasis. It may be that not all the limitations in that passage on the issue of *certiorari* accord with the law as it has evolved in this jurisdiction; but where Parliament has provided a self-contained administrative and quasi-judicial scheme, postulating only a limited use of the Courts, certiorari should not issue when, as in the instant case, use of the statutory procedure for the correction of error was adequate (and, indeed, more suitable) to meet the complaints on which the application for certiorari is grounded."

It is clear that the above analysis related to circumstances very different to the circumstances of this case and that insofar as principles were applied there they would not be so applicable in this case. A theme throughout that judgment is the protection of fairness of procedures. Hederman J. agreed with the judgment of Henchy J. Griffith J. agreed also but stated at p. 406:

> "With the reservation hereinafter mentioned, I agree with the judgment delivered by Mr. Justice Henchy. The primary reason given by him for refusing certiorari in this case is that the errors of law alleged to have been made by the respondent planning authority were not made in excess of jurisdiction and do not appear on the face of the record of their decision. Notwithstanding that this was his primary reason, as I am in complete agreement with the other reasons given by him refusing *certiorari*, and which are adequate to determine this appeal, I do not consider it is necessary to decide or offer an opinion on that question."

It is clear that Griffin J. was referring to aspects such as the furtherance of justice, the protection of fair procedures.

While the reasoning of Henchy J. is somewhat different from that of the Chief Justice the core principle is similar. O'Higgins C.J. refused to grant *certiorari.* He stressed the importance of retaining the discretion of the court to attain justice. He stated at p. 393:

> "The question immediately arises as to the effect of the existence of a right of appeal or an alternative remedy on the exercise of the court's discretion. It is well established that the existence of such right or remedy ought not to prevent the court from acting. It seems to me to be a question of justice. The court ought to take into account all the circumstances of the case, including the purpose for which certiorari has been sought, the adequacy of the alternative remedy and, of course, the conduct of the applicant. If the decision impugned is made without jurisdiction or in breach of natural justice then, normally, the existence of a right of appeal or of a failure to avail of such, should be immaterial. Again, if an appeal can only deal with the merits and not with the question of the jurisdiction involved, the existence of such ought not to be a ground for refusing relief. Other than these, there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint, or where administrative legislation provides adequate appeal machinery which is particularly suitable for dealing with errors in the application of the code in question. In such cases, while retaining always the power to quash, a court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate."

Walsh J. grounded his judgment in the concept of justice. He stated at p. 398:

> "There is no doubt that the existence of alternative remedies is not a bar to the making of an order of *certiorari*. A court, in its discretion, may refuse to make such an order when the alternative remedy has been invoked and is pending. However, a court ought never to exercise its discretion by refusing to quash a bad order when its continued existence is capable of producing damaging legal effects. A court's discretion cannot in justice be exercised to produce or permit a punitive or damaging result to be visited upon an applicant as a mark of the court's disapproval or displeasure when such result flows from, or is dependent upon, an order which is bad in law - even when the applicant (by his conduct or otherwise) has contributed to the making of such an order. Such conduct can be dealt with in deciding the question of costs."

The approach taken in subsequent cases illustrates that the words of Henchy J. should be read in their context and that in each case the circumstances, the facts, the appeals and processes being considered, must be considered. For example, in P. & F. Sharpe Ltd. v. Dublin City and County Manager [1989] IR 701, the respondents refused the applicants planning permission to build an access road onto a new dual carriageway. The applicants sought *certiorari* quashing the respondents' refusal of the planning permission. The respondents argued that as the applicants had commenced an appeal to An Bord Pleanala they should be

confined to that remedy and *certiorari* should be refused on discretionary grounds. Finlay C.J. stated at p. 721;

> "The powers of An Bord Pleanala on the making of an appeal to it would be entirely confined to the consideration of the matters before it on the basis of proper planning and development of the area and it would have no jurisdiction to consider the question of the validity, from a legal point of view, of the purported decision by the county manager. It would not, therefore, be just for the developers who are respondents in this appeal to be deprived of their right to have that decision quashed for want of validity."

In Mythen v. Employment Appeals Tribunal [1990] 1 IR 98 the court quashed the decision of the Employment Appeals Tribunal on the ground that it had misapplied the Council Directive 77/187/EEC of 14th February, 1997 on the Approximation of Laws on Safeguarding Employees' Rights in the Event of Transfers of Undertakings, Businesses or Parts of Businesses. Barrington J. decided that *certiorari* should not be refused on the ground that the applicant should have appealed to the Circuit Court.

In a criminal law case the High Court (Lynch J.) has upheld the right to judicial review when there is the alternative of an appeal. In Gill v. Connellan [1988] ILRM 448 the applicant had not received a satisfactory hearing before the District Court and the question was whether an appeal to the Circuit Court was an adequate alternative remedy. Lynch J. held at pp. 454-455 that it was not, stating:

> "In the present case however, both facts and law are at issue. Neither the facts nor the law have been adequately heard in the District Court. On an appeal to the Circuit Court, therefore, the appeal could hardly be said to be by way of re-hearing - the case would more truly be heard for the first time. The applicant and his solicitor would be deprived of the possible advantage of having gone over the whole facts and law and having heard the submissions and cross examination by the prosecuting superintendent in the District Court."

It is clear that whilst the presence of an alternative remedy, an appeal process, is a factor, the court retains jurisdiction to exercise its discretion to achieve a just solution.

The stage of the alternative remedy may be relevant, though it may not be determinative of the issue. This is a case where an appeal had been lodged but had not been opened. It is therefore a situation to be distinguished from that in The State (Roche) v. Delap [1980] IR 170.

In this case the appeal is pending. It is for the court to determine in the circumstances whether judicial review is an appropriate remedy. The presence of the pending appeal is not a bar to the court exercising its discretion. It is a factor to be considered. It is a matter of considering the requirements of justice. This has been expressed clearly in McGoldrick v. An Bord Pleanala [1997] 1 IR 497 at 509 by Barron J.:

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

In Buckley v. Judge Brian Kirby and the Director of Public Prosecutions, Unreported, Supreme Court, 18th July, 2000, Geoghegan J. adopted the view of Barron J.

Certiorari may be granted where the decision maker acted in breach of fair procedures. Once it is determined that an order of *certiorari* may be granted the court retains a discretion in all the circumstances of the case as to whether an order of *certiorari* should issue. In considering all the circumstances matters, including the existence of an alternative remedy,

the conduct of the applicant, the merits of the application, the consequences to the applicant if an order of *certiorari* is not granted, the degree of fairness of the procedures, should be weighed by the court in determining whether *certiorari* is the appropriate remedy to attain a just result.

In this case the decision of the Minister notified to the applicant by letter dated the 29th day of December, 1998 was a decision made in breach of fair procedures in that evidence, which was not immaterial, was not before the decision maker because of the section omitted from the translation. The application was not considered fully as a result of the omissions in the translated questionnaire. This was a breach of fair procedures. It cannot be said that the omitted information was immaterial both because of the nature of the decision made on the information and because of the determination as to the credibility of the applicant. Consequently the procedures were unfair. There may well be many instances where omissions in translation occur but which are <u>not</u> such as to render the proceedings unfair. However, in this case in light of the material omitted there was such an omission as to be a breach of fair procedures. Consequently an order of *certiorari* may lie. It was for the High Court to exercise its discretion and determine whether the order of *certiorari* would be appropriate. I would not interfere with the discretion exercised by the High Court. I am of the opinion that the learned High Court judge was correct in granting the order of *certiorari*. The original decision was made in circumstances which were in breach of fair procedures and which resulted in a decision against the appellant on information which was incomplete. The Appeals Authority process would not be appropriate or adequate so as to withhold *certiorari*. The applicant is entitled to a primary decision in accordance with fair procedures and an appeal from that decision. A fair appeal does not cure an unfair hearing. Consequently I am satisfied that the appeal should be dismissed.

7. Conclusion

For the reasons stated I would uphold the decision of the High Court to grant an order of *certiorari*. I would dismiss the appeal and affirm the order of the High Court being that the matter be remitted back to the first named respondent to be considered (by a person other than Mr. Cummins) in accordance with law.