THE SUPREME COURT

293/01

Keane CJ
Denham J
Murphy J
Murray J
McGuinness J

Between:

The Minister for Justice, Equality and Law Reform
And The Refugee Appeals Commissioner
Appellants/Respondents

AND

U
Respondent/applicant

Judgment of Mr Justice Francis D Murphy delivered the 28th day of February, 2002

These proceedings are concerned with the interpretation of *s*.28 of the Refugee Act, 1996, and the application of that section to the particular facts of this case.

Ireland is a signatory to the United Nations Convention on the Status of Refugees and Stateless Persons 1951 and the 1967 Protocol thereto. The Convention of 1951 (the Geneva Convention) related primarily to the treatment of the countless thousands of persons who had been displaced as a result of the Second World War and the horrific events to which it gave rise. In addition to prescribing the treatment to be accorded by contracting states to persons who were, within the meaning of the Geneva Convention,

refugees, the Convention expressly provided that no contracting state should expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of particular social group or political opinion.

For various political and economic reasons few refugees were resident in Ireland at the time when the Geneva Convention was made and the number of aliens who sought permission to reside in the State in the decades immediately following that Convention was insignificant. The United Nations, through their High Commissioner for Refugees, did seek to establish arrangements in relation to the admission of refugees into the State. These negotiations culminated in a letter dated the 13th December, 1985, from Cathal Crowley, Assistant Secretary to the Department of Justice to Mr R Von Arnim, UNHCR representative in London (widely referred to as the Von Arnim Letter) which set out the procedure which the Minister proposed to adopt for the determination of refugee status in Ireland. At the outset Mr Crowley explained that the very limited number of asylum applications received in this country did not warrant legislation incorporating the procedures suggested by Mr Von Arnim but that the proposals were acceptable generally to the Minister. Instead applications for refugee status would be determined in accordance with the procedures set out in the letter to Mr Von Arnim which the Department believed to be in line with Ireland's international obligations and humanitarian traditions. The letter then went on to set out in ten numbered paragraphs the procedures which would be adopted. In concluding his letter Mr Crowley went on to recognise that the scheme outlined did not envisage a formal right of appeal, which apparently had been suggested in proposals made by Mr Von Arnim, but claimed that there was an element of appeal inherent in the scheme in view of the number of agencies brought into the examination in accordance with the stated procedures and the practice which was adopted by the Department under which every application was submitted to the Minister personally.

The Von Arnim letter has been quoted in full in several reported cases and it is unnecessary to repeat the details here. It is sufficient to note that the letter on behalf of the Minister for Justice to Mr Von Arnim was just that - a letter. It was significant in the context of international obligations and valuable in humanitarian terms. However, in terms of domestic law it was important in that it recorded an administrative scheme which a minister of government had determined to operate and did in fact administer.

In the mid 1990s the position changed dramatically. Official figures show that the number of applications for asylum increased from 31 in 1991 to 1,179 in 1996. No doubt it was figures such as those and the trend which they revealed - and which was subsequently maintained - that persuaded the

Minister to introduce legislation - the Refugee Act, 1996 - putting the administrative arrangements on a legislative footing. Whilst the Act of 1996 was enacted on the 26th of June, 1996, it was not brought into operation for some time thereafter. By statutory instruments SI 290/96 and SI 339/97 section 24(1) came into force on 1st October, 1996, and sections 1, 2, 5, 22 and 25 took effect as from the 29th day of August, 1997. However the greater part of the Act - and the provisions particularly relevant to the present proceedings - were not brought into operation until the 20th day of November, 2000. Pending the legislation becoming operational, changes were made to the then existing administrative procedures. The scheme outlined in the Von Arnim letter was replaced by a somewhat more extensive arrangement set out in a letter dated the 10th day of December, 1997, from the Chief State Solicitor to Ms Hope Hanlan, who was the successor of Mr Von Arnim as UNHCR representative. Amendments were made to that scheme by a letter to Ms Hanlan from the Chief State's Solicitors office dated the 13th of March, 1998. For convenience of reference I attach the two Hope Hanlan letters as an appendix to this judgment. As the official figures show that the number of applications for refugee status had exceeded 3,000 in the year 1997, it was understandable that the situation was becoming a matter of concern for all of the persons concerned.

As Mr Feichin McDonagh, SC, on behalf of the respondent/applicant pointed out the interpretation of the 1996 Act generally, and in particular the transitional provisions contained in *s*.28 thereof, is complicated by the fact that the legislation was enacted at a time when the relevant administrative scheme was set out in the Von Arnim letter but only came into operation - so far as material - when the system was governed by the terms of the scheme contained in the Hope Hanlan letters.

After his arrival in Ireland on the 2nd of August, 2000, Mr Israr U (Mr U) applied for refugee status. It was not suggested his claim for refugee status fell to be dealt with otherwise than in the State in accordance with the provisions of the then Dublin Convention (Implementation) Order, 1997. Accordingly the application proceeded to substantive consideration in accordance with the provisions of the scheme set out in the Hope Hanlan letters. On the 9th of August, 2000, the applicant completed a questionnaire giving particulars of his personal history and profile. That form was completed in Russian and, for the purposes of assessment, translated into English.

On the 28th day of August, 2000, the applicant was interviewed by a Mr Tom Conroy, presumably a person appointed by the Minister for that purpose. It appears from the report prepared by Mr Conroy dated the 31st August, 2000, that Mr U left Afghanistan in 1987 and went to live, first, in

the Ukraine and subsequently in Leningrad where he graduated in 1995 with a diploma in medicine. The report records that the applicant returned to Afghanistan via Pakistan in February 2000 and opened a medical clinic in his home village of Azmar. Mr U explained that he closed the clinic in June and fled Afghanistan for Ireland on the 20th of July, 2000. He claimed that he was in fear of reprisal from the Taliban, who then dominated Afghanistan, for five specified reasons perhaps the most significant of which was that, as he had studied medicine in Russia under the Communist regime, it would be inferred that he too was a Communist and was responsible for the destruction in or to Afghanistan. Mr Conroy was unconvinced by the account furnished by Mr U. In his report he purported to test the account given to him against information contained in various documents or appendices referred to in his report. It was Mr Conroy's belief that the applicant's motive for coming to Ireland was economic and that he came here *"to obtain residency in Ireland and not safe refuge as claimed".* At the end of his report under the heading "Conclusion" Mr Conroy stated that:-

> *"Having carried out an analysis of this application, it is concluded (for the reasons outlined above) the applicant has not fulfilled the requirements for refugee status as defined in section 1 (A) of the 1951 Convention and section 2 of the Refugee Act 1966.*
>
> *Submitted for your assessment and recommendation, in accordance with paragraph 10 of the procedures for processing asylum claims."*

The report of Mr Conroy, which was addressed to Eamon Mulligan, APO, and Gerry Shannon, HEO, was received by the latter who reviewed and assessed the contents thereof and concluded his report dated the 17th November, 2000, with the following paragraph:-

> *"I have examined all the papers in relation to the applicant's asylum application and I have noted the issues raised in Mr Conroy's assessment regarding the applicant in this case. The applicant has not proven a well founded fear of persecution for a Convention reason. <u>The applicant's application for asylum is refused</u>."* (emphasis added)

It is clear that Mr Shannon who, again it appears, is a person authorised by the Minister to make such a decision in accordance with the provisions of the Hope Hanlan procedures, did make a decision on the issue as to whether refugee status should be granted or refused. On the date on which the purported decision was made an appeal lay from an adverse decision to "an Appeals Authority" for which provision was made in paragraph 15 of the Hope Hanlan letter.

The difficulty in this case is that subsequent to the decision of Mr Shannon on the 17th of November, 2000, and before its communication to the applicant, the material provisions of the 1996 Act came into operation on the 20th of November, 2000. The problems to which this transition gave rise fell to be resolved under *s*.28 of the 1996 Act which provides as follows:-

> *"Where, before the commencement of this section, a person had made an application to the Minister for asylum but a decision in relation thereto had not been made by the Minister then, the application should be deemed to be an application under section 8 and should be dealt with accordingly. Any step taken by the Minister before such commencement in relation to the application (being a step required to be taken under this Act in relation to an application under this Act) shall be deemed to have been taken under this Act."*

In general where legislation is repealed or statutory instruments revoked, the terminating provisions are continued in force in relation to rights and liabilities accrued thereunder. The Interpretation Act, 1937, contains a statutory presumption to that effect. The Hope Hanlan letters are neither legislation nor regulation. They are not subject to repeal or revocation. As a ministerial scheme the Minister might, as pointed out in *Latchford .v. The Minister for Industry and Commerce* [1950] IR 33, alter or withdraw the conditions thereof but unless and until he did so he was required to implement the scheme in accordance with the published terms thereof. It is clear that the Minister has now discontinued entirely the Hope Hanlan procedure. Applications which were initiated under that procedure were, unless finally disposed of, deemed to have been commenced under the 1996 Act when it came into operation on the 20th November, 2000. All provisions by which acts which were not done are deemed to have been done create fictions which are a fruitful source of difficulty. The potential for error or misunderstanding is multiplied in the present case, partly, by the status of the procedures which it sought to transpose but more particularly by the generality of the terms in which the transitional section is expressed.

On the 20th of December, 2000, Mr U applied for leave to seek judicial review of the decision made by or on behalf of the Minister on the 17th November, 2000. While the proceedings were subject to the provisions of *s*.5 of the Illegal Immigrants (Trafficking) Act, 2000, the learned trial judge, at the request of the parties, heard and disposed of, first, the preliminary issue whether there were substantial grounds for contending that the applicant was entitled to the relief sought and, secondly, whether the appropriate order should be granted. Both these matters were dealt with in a judgment and order of the learned trial judge given and made on the 3rd of

July, 2001. By a further order dated the 31st day of July, 2001, the learned trial judge gave the respondents leave to appeal to this Court on the following point of law, namely:-

> *"Whether or not by virtue of section 28 of the Refugee Act 1996 the decision taken by the first named respondent (acting by an authorised officer) on the 17th of November 2000 to refuse the applicant's application for asylum was decided to be and, or to have the effect of a recommendation of the second named respondent made under the Refugee Act (as amended) for the purposes of that Act."*

In his judgment the learned trial judge set out the Hope Hanlan procedures which had been adopted by or in relation to the applicant from the date when his application for refugee status was first made on the 9th August, 2000, to the 17th November of the same year when that application was refused by or on behalf of the Minister. The judgment then goes on to consider the content and effect of the letter written by the Refugee Appeals Commissioner (the Commissioner) to the applicant on the 1st of December, 2000. That letter included the following statements:-

> *"The determination of your application was made prior to the 20th November 2000 and was undertaken under the procedures for processing asylum claims which were in use up to the 19th November 2000. Under the transitional arrangements for the Refugee Act this determination is now deemed to have been a step taken under the Act.*
>
> *On the basis of the investigation of and report on your application, the Refugee Applications Commissioner proposes to furnish a recommendation to the Minister for Justice, Equality and Law Reform that you not be granted a declaration of refugee status.*
>
> *I enclose a copy of the investigation of and report on your application together with information used in regard to your application."*

It is not and never was suggested that the Commissioner as such had ever carried out any investigation into the application by the applicant or made - or could have made - any determination in respect thereof prior to the 20th November, 2000. On the other hand the applicant's application had been investigated in the manner already described culminating with the decision issued under the name of Mr Shannon in the letter dated the 17th November,

2000. The purpose of the letter from the Commissioner's office dated the 1st day of December was to inform the applicant of the decisions taken and to notify the applicant of his right to appeal to the Refugee Appeals Tribunal within the 15 working days which, the statute provided, would commence from the sending of such a notice. As it emerged that the letter from the office of the Commissioner dated the 1st December was signed by the same Gerry Shannon who signed the letter on behalf of the Minister for Justice dated the 17th November it might seem that the deeming provisions had escalated from the fictional to the metaphysical.

In his careful analysis of the procedures adopted prior to the 20th November, 2000, the learned trial judge accepted that Mr Tom Conroy had made an assessment of the facts relating to the application for refugee status and reported thereon on the 31st of August, 2000. He likewise accepted that Mr Gerry Shannon had purported to make a decision on the application in his report dated the 17th November, 2000. However the learned trial judge drew attention to the fact that an intermediate stage was envisaged by the Hope Hanlan procedures. In addition to an assessment, a recommendation was required and, the judge held, in the absence of that recommendation appropriate steps had not been taken under the ministerial scheme which could be adopted or applied by virtue of *s*.28 of the 1996 Act. Whilst this does not appear to have been an argument advanced before the learned trial judge very considerable reliance was placed upon it in this Court. It was pointed out that paragraphs 8, 10 and 11 of the first Hope Hanlan letter seemed to envisage a three stage process involving an interview, a recommendation and a decision. Again it was submitted that the documentation generated in the Department envisaged that three stage process. Most particularly attention was drawn to the fact that the word *"recommendation"* was not used in the report prepared by Mr Tom Conroy.

On the other hand the appellant submits - as indeed the learned trial judge accepted - that the Hope Hanlan procedures and those under the 1996 Act were designed to give effect to the Geneva Convention which enjoins prompt determination of applications. It was argued that it was that consideration which influenced the Oireachtas to salvage, as far as practicable, the proceedings taken under the Hope Hanlan scheme for the purposes of the 1996 Act rather than duplicate them. The wisdom of this course is reinforced by the fact that the different procedures may be operated by the same officials. In my view the submissions on behalf of the applicant place an undue reliance on the use of the word *"recommendation"*. Whilst Mr Tom Conroy in his report dated the 31st August, 2000, did expressly request a recommendation *"in accordance with paragraph 10 of the procedures for processing asylum claims"* there could be no doubt that his views, his analysis and his conclusion made it abundantly clear that he was advising against granting refugee status.

There are significant differences between the details of the Hope Hanlan procedure and that provided by the 1996 Act. It would be impossible to equate with precision acts done under the different procedures. On the other hand one can readily identify the broad thrust of what was required. It is essential under both schemes to gather information from the applicant as to his personal history and the circumstances which compelled him to leave his country of origin. Any information so supplied, insofar as it related to political or historical matters generally, could be tested against information provided from other sources. A view had to be taken as to the accuracy of the information supplied and, perhaps, the credibility of the person making an application. Ultimately a decision was required to be taken. Under the Hope Hanlan procedure, the decision of the Minister to refuse or allow the application could be given either as a preliminary to an appeal or as a final decision subsequent thereto. Under the 1996 Act the decision which falls to be made by the Commissioner following upon investigation takes the form of a recommendation which may or may not be favourable to the applicant. That decision/recommendation likewise triggers off a right of appeal. Accordingly though the persons arriving at the particular conclusion are different officers and their conclusion is described in different terms the function which they exercise is similar.

No doubt the administrative procedures specified in the Hope Hanlan letters could be subdivided into various different categories of ministerial or even clerical functions. It would seem to me, however, that the word *"step"* as used in *s*.28 of the 1996 Act envisages a stage in the procedure by which a significant and discernible movement was taken towards the determination of the status of an applicant. It would seem to me that the interview of the applicant, the assessment of the merits of his account and an operative decision taken on it constitute such steps and as such would properly be deemed to have been taken under the 1996 Act.

I have no doubt that an unfavourable or negative (as it is described) decision taken by an authorised officer of the Minister for Justice is a step in the asylum seeking process which is equivalent to and, for the purposes of the 1996 Act must be equated with, a decision - in the form of a recommendation - of the Commissioner under *s*.13 of the 1996 Act. If the position were otherwise the Commissioner would be required to carry out an independent investigation of the application which would merely duplicate that which had already taken place. It seems to me that this is precisely the mischief which the transitional provision seeks to avoid. The fact that officials operating the Hope Hanlan scheme did not use the terminology envisaged by it or elided the procedures by permitting different functions to be carried out by a lesser number of officials than might otherwise have been the case could not, in my view, alter the substantive nature of the duties

performed by them or constitute inadequate compliance with the scheme.

Having regard to the purpose for which the Hope Hanlan letters were designed and the relatively informal terms in which they were cast I have no doubt that all of the actions taken under the administrative scheme up to and including the letter of the 17th November would be properly described as steps taken by the Minister in relation to the application which were required to be taken under the 1996 Act and accordingly deemed to be taken thereunder. In my view the letter from the Commissioner to the applicant dated the 1st day of December, 2000, represented a correct analysis of what was undoubtedly a confused legal situation.

Accordingly I would allow the appeal.