THE SUPREME COURT

JUDICIAL REVIEW

[S.C. No: 459/2004]

Denham J.
Geoghegan J.
Fennelly J.
Kearns J.
Finnegan J.

BETWEEN

A N AND L N, C N, U N, C N AND W N, MINORS SUING BY THEIR MOTHER AND NEXT FRIEND A N

APPLICANTS/APPELLANTS

And

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM AND COMMISSIONER OF AN GARDA SIOCHÁNA

RESPONDENTS

Respondents

Judgment delivered the 15th day of October, 2007 by Fennelly J.

The appellant has been engaged for a number of years in legal proceedings in which he has sought, entirely without success, to have declared invalid a decision of An Bórd Pleanála granting planning permission to Trinity College, the Respondent on this appeal, for a development consisting of new student residences at Trinity Hall, Dartry, Dublin 6. The development has long since been completed.

On 15th December 2000, the High Court (McKechnie J) refused the appellant leave to apply for judicial review of that decision. He also refused a certificate allowing him to appeal that refusal of leave to this Court.

On 7th November 2002, the appellant instituted the present action by plenary summons in the High Court. In the action he seeks an order directing the rehearing of his judicial review application. Effectively and in substance, the relief he seeks in the action is an order setting aside the order of McKechnie J.

In the plenary summons, he pleads that McKechnie J, in refusing the application for leave, had referred to the location of boilerhouse facilities proposed by the Respondent, as developers. In a very brief statement of claim, he alleges that the Respondent, through its counsel, had misled the High Court during the hearing of the leave application. The misleading is alleged to have consisted of the fact that the Respondent, as developers, had submitted "certain architectural plans and drawings" relating to the development purporting to show that boilers would be installed in certain places identified as plant rooms, but had failed to acquaint the High Court with the full facts of an application which it had also made for "the location of some of the aforesaid boilers in the basement of one of the aforesaid buildings to another section of the then Dublin Corporation namely the Fire Prevention Section."

The entire substance of the case pleaded by the appellant is that the order of McKechnie J, refusing him leave to apply for judicial review of the decision of An Bórd Pleanála granting planning permission, should be set aside because it was procured by the single act of alleged misleading mentioned in the preceding paragraph.

The Respondent in March 2003 applied by motion in the High Court for an order pursuant to Order 19 rule 28 of the Rules of the Superior Courts holding that the proceedings be struck out on the grounds that they were frivolous and vexatious and that they disclosed no reasonable cause of action and, alternatively, that they were an abuse of process and in

excess of jurisdiction.
The application to strike out was grounded on two affidavits. One was sworn by Mr Tom Merriman, acting project officer of the Respondent. The other was sworn by Ms George Boyle, an architect in the firm of Murray O'Laoire, Architects, Fumbally Court, Dublin 8. Ms Boyle described herself as acting Project Architect engaged by the Respondent for the development. Mr Merriman deposed that the appellant was seeking to have "re-examined" matters already determined by the High Court on a judicial review application. He described the proceedings as an abuse of process. He also dealt at length with the appellant's complaint regarding the alleged misleading information regarding the proposed location of boiler facilities. Given the nature of the present application, it is unnecessary and inappropriate to give any account of that issue or to comment on its merits. For present purposes, it suffices to note that the appellant alleges that the Respondent misled the High Court regarding the position of boilerhouse facilities in the proposed development and that the allegation is strongly contested. Ms Boyle, in her affidavit, denied that the Respondent had misled the High Court at the time of the judicial review application.
The appellant swore an affidavit, in which he contested that of Ms Boyle at great length. He accused her of seeking to justify the actions of the Respondent in misleading the Court and of herself making misleading choice of words, and of being disingenuous, naïve, self-serving and scarcely credible.
The High Court (Finnegan P), by its order of 2nd April 2003, dismissed the Respondent's application to have the proceedings struck out. Instead, Finnegan P laid down time limits for the delivery of further pleadings in the action. He granted liberty to the appellant to deliver an amended statement of claim, which the appellant has not in fact done.
The Respondent, by notice of appeal dated 28th April 2003, appealed to this Court against the order of the High Court (Finnegan P). That appeal came on for hearing on 20th June 2003, before a Court composed of Murray J (as he then was), Geoghegan J and McCracken J. The Court, in an ex-tempore judgment delivered by Murray J, allowed the appeal and instead made the order sought by the Respondent that the appellant's claim against the Respondent be struck out as disclosing no reasonable cause of action pursuant to Order 19, rule 28 of the Rules of the Superior Courts.
The judgment of the Court (Murray J) stated that the case of the appellant was that the Respondent had been *"guilty of conscious and deliberate dishonesty amounting to fraud."* The judgment pointed out that none of those elements had been pleaded: *"An allegation of misleading information or a simple statement to that effect is not sufficient."* At a later point, the judgment stated:

> *"None of the elements of any alleged fraud are stated other than that certain matters were not disclosed without indicating on what basis the failure to disclose constituted a breach of duty as to amount to a dishonest or fraudulent concealment."*

By the present notice of motion dated 15th January 2007, the appellant applies to the Court for an order vacating the order made on 20th June 2003 on the ground of objective bias together with consequential orders.
The application is grounded on an affidavit of the appellant of 17th October 2006. In it he states:

> *"In the course of the summer 2006, I became aware of the fact that one of the Supreme Court judges who had heard the appeal, namely Murray J., is a brother of a partner in Murray O'Laoire, which had designed the Trinity Hall development, which firm's name appeared on virtually all the documents which were before the Supreme Court, including affidavits from the project architect, Ms G. Boyle, who is identified in her affidavits as being a member of the Murray O'Laoire firm. Also, the Murray O'Laoire name appeared clearly on all the plans which Ms Boyle exhibited and lodged in both the High Court and the Supreme Court."*

The appellant says that the facts set out in that paragraph are sufficient to establish objective bias. The gravamen of the appellant's claim is that one of the judges hearing his application was a brother of an architect in the firm of architects which was responsible for the design and execution of the development which is the subject-matter of the proceedings. That firm of architects is alleged to have participated in the concealment of material from the Court.
It must be said with emphasis that it is not for this Court at this point to express any view whatever on the substance of those allegations. I abstain from any consideration of their

merits. It is of the utmost importance that this judgment should give no hint of any opinion on that matter.
The Respondent relies on two particular aspects of the facts of the case, which indisputably distance the brother of the judge from the facts of the case. Firstly, the architect mentioned had no involvement whatever with the development in question. He was based in Limerick, not in Dublin. Secondly, the architects are not parties but a member of the firm, operating out of Dublin and having charge of the project, is a witness in the proceedings only.
The present case involves an allegation of objective bias. The appellant has made it clear that he makes no allegation whatever of subjective bias. On the contrary, he made it clear at the hearing that he accepted that the learned judge would have recused himself, if he had been alerted to the situation.
The test for deciding whether objective bias exists in the case of any adjudication has been repeated in slightly different terms in many cases over many years. Some of the best known cases are: *State (Hegarty) v Winters* [1956] I.R. 320; *Dublin Wellwoman Centre Ltd and others v Ireland and others* [1995] I.L.R.M. 408; *O'Neill v Beaumont Hospital* [1990] I.L.R.M. 419; *Orange Communications Ltd. v Director of Telecommunications Regulation and another* [2000] 4 I.R. 159; *Spin Communications Ltd v Independent Radio and television Commission* [1001] 4 I.R. 411; *Joyce v Minister for Health and Children and others* [2004] 4 I.R. 293; *Landers v Director of Public Prosecutions* [2004] 2 I.R. 363; *Bula Ltd. v Tara Mines Limited and others* [2000] 4 I.R. 412.
Denham J described the test authoritatively in her judgment in *Bula Ltd. v Tara Mines Limited and others.* At page 441, she is reported as saying:

> *"……it is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test - it invokes the apprehension of the reasonable person."*

The hypothetical reasonable person is an independent observer, who is not over-sensitive, and who has knowledge of the facts. He would know both those which tended in favour and against the possible apprehension of a risk of bias. Thus he would know that the judge and a senior architect in the responsible firm were brothers, but would also know that the architect brother had no involvement in the development. Counsel for the Respondent did not dispute at the hearing that, if that brother had actually been involved in the facts of the development in the way that Ms Boyle was, the test for objective bias might well be met. However, the hypothetical independent reasonable observer would also know the substance and tenor of the allegation made in the proceedings.
The test of objective bias is expressed in general terms. Its application demands an appreciation of all the circumstances of the individual case, followed by a particularly careful exercise of the faculty of judgement. In his judgment in *O'Neill v Beaumont Hospital,* cited above, where the allegation was one of pre-judgment bias, Finlay C.J. expressed the view, at page 439, that, in analysing the facts, he should *"take the interpretation more favourable where there is ambiguity to the plaintiff than to the defendant.."* Whether or not that is a principle of general application, it applies in a special way in the present case, where this Court is asked, in a very real way, to adjudicate on whether one of its own judgments was tainted by objective bias. That fact obliges it, in order to ensure respect for the principle that justice must not only to be done but to be seen to be done, to act with great care and circumspection. It should err on the side of caution.
An important aspect of this case is the substance and character of the allegations being made by the appellant in these proceedings. He alleges that the Respondent engaged in deliberate misleading of the High Court with the result that the Court made an incorrect decision. The affidavits exchanged in the High Court show that the appellant alleges that the firm of architects were implicated in this action by the Respondent.
In his judgment in *Orange Communications Ltd. v Director of Telecommunications Regulation and another,* cited above, Barron J approved a lengthy passage from the judgment of the Court of Appeal in England (consisting of Lord Bingham C.J., Lord Woolf M.R. and Sir Richard Scott V.C.) in *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.* [2000] 2 W.L.R. 870, which contains the following relevant statement:

> *"……a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the*

public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case……"

I infer from that passage that the test of objective bias does not necessarily require that the relationship of which complaint is made be between the adjudicator and a party in the case. A witness will suffice. The question is whether a reasonable observer might have a reasonable apprehension that a judge, hearing such allegations being made against the firm of architects in which his brother was a member, although that brother was not in any way directly involved in the subject-matter of the litigation, might find it difficult to maintain complete objectivity and impartiality. Could such an observer be concerned that the allegations were of a nature to cast doubt on the integrity of at least one member of the firm and that a judge should not adjudicate on such a dispute? Applying the most favourable interpretation of the facts from the appellant's point of view, and bearing in mind that the Court should be especially careful where it is considering one of its own judgments, I believe that the the test of objective bias should be held, in all the circumstances, to be satisfied.
The Court should, accordingly, make an order setting aside the order dated 20th June 2003. No further order is required. The effect of that order is to reinstate the appellant's appeal from the order of the High Court.

Judgment of Mr Justice Finnegan delivered on the 18th day of October 2007

A N (hereinafter the "next friend") is not a party to this appeal her application for leave to apply for judicial review having been refused in the High Court. She is the mother and next friend of the second to sixth appellants named in the title hereof (hereinafter *"the minors"*) whose application for judicial review was refused in the High Court. In the case of the minors the learned High Court judge granted leave to appeal pursuant to section 5(3)(a) of the Illegal Immigrants Trafficking Act 2000 on the following points of law:-

1. Whether the procedures for dealing with an application for asylum pursuant to the Refugee Act 1996 or the pre-existing non-statutory scheme permit the Minister to receive and determine an application for refugee status made by the parent of a minor child (which child accompanies that parent) on the parent's own behalf and on behalf of or including such minor child as the application for asylum of that child either at all or where the parent does not advance or bring to the attention of the Minister any facts or circumstances relevant to that minor separate and distinct from the facts of circumstances relevant to the parent's application.
2. Whether in considering an application for asylum made by or on behalf of an accompanied minor the Minister is obliged to consider the application of an accompanied minor in his or her own right separately and distinctly from that of the accompanying parent and whether for that purpose the Minister is obliged to
(a) Ascertain the views of the minor and more particularly the fears of the minor related to the application for a declaration of refugee status.
(b) Ascertain the capacity of the minor to express his or her views directly and
(c) Interview the minor unless such interview would cause unnecessary hardship and trauma on the minor.

The facts
The minors are Nigerian nationals who arrived in Ireland on the 10th May 1998 in the company of their mother. They were then aged 12 years 5 months, 8 years 11 months, 6 years 3 months and twins 4 years 3 months respectively. On the 11th May 1998 the next friend applied for asylum and was requested to and did complete a questionnaire. She was interviewed on the 30th May 1999. By letter dated 18th February 2000 she was informed that her application for refugee status had been refused. She appealed against the refusal and on the 25th July 2000 a recommendation was made by the Refugee Appeals Authority, following an oral hearing, that the appeal be dismissed on the basis that the next friend had not satisfied the Authority that she had a well founded fear of persecution on a convention ground. By letter dated 23rd August 2000 the next friend was notified of this recommendation and of the fact that it was being upheld and that the Minister proposed to make a deportation

order in respect of her pursuant to the Immigration Act 1999 section 3. She was invited to make any representations as to why she should be allowed to remain in the State within a period of fifteen days. Representations were made on her behalf by her solicitor. By letter dated 1st July 2002 it was confirmed to the next friend and to the minors that the Minister proposed to make a deportation order against each of them in accordance with the Immigration Act 1999, section 3(2)(f) they being persons whose application for asylum had been refused. Up to this date there had been no indication in correspondence or otherwise that the next friend's application was being treated by the Minister as encompassing applications for each of the minors. The letter gave information as to the options open to the next friend and the minors, namely to make written representations as to why they should be allowed to remain temporarily in the State or to leave the State before the deportation orders should be made. Enclosed with that letter were a number of address notification forms, one for the first next friend and one for each of the minors. These were duly completed, signed in each case by the next friend and returned by the next friend's solicitor as requested. By letter dated 8th July 2002 representations were made by the next friend's solicitor: these representations however were merely to repeat representations made on behalf of the next friend in response to the letter of 23rd August 2000 and at a time when the second named applicant had not yet attained the age of sixteen years. By letter dated 9th August 2002 addressed to the next friend and the minors all six were furnished with copies of deportation orders dated 8th August 2002 and requested to present themselves at Trim Garda Station on Friday, 16th August 2002 at 2.30 p.m. to make arrangements for their deportation. By motion returnable on the 10th December 2003 the next friend and the minors sought leave to apply by way of judicial of review for an order of certiorari quashing all six deportation orders. In a reserved judgment of 31st October 2003 Finlay Geoghegan J. refused the next friend leave to apply for judicial review but granted leave to the minors. The ground upon which leave was granted to the minors was as follows:-

> *"The deportation orders of the 2nd August 2002 relating to the second to sixth named applicants are invalid in that the second to sixth named applicants were not on the date persons whose applications for asylum had been refused by the first named respondent within the meaning of section 3(2)(f) of the Immigration Act 1999."*

The application failed in the High Court but the learned trial judge certified the points of law cited above.

The Affidavits on the application

1. The grounding affidavit.

> The grounding affidavit was sworn by the minor's solicitor and largely consists of the chronology set out above. However in paragraph 14 thereof he identified a separate well-founded fear of persecution particular to the minors and separate and distinct from that expressed by the next friend on the application and at interview. He did this in the following terms:-
>
> *"I am instructed that all the applicants herein fear that because of their race, ethnicity or membership of a social group, they will be subjected to female genital mutilation if returned to Nigeria and that their health and life will be severely impaired and threatened if so returned. I believe that such a procedure would be extremely harrowing and dangerous."*

He further deposes that the minors did not apply for asylum nor were they afforded the opportunity of an independent application or separate advocacy of their concerns. They were not interviewed. They did not get an opportunity to outline their concerns.

2. Affidavit of Charles O'Connell

> Charles O'Connell swore an affidavit on behalf of the first-named respondent in response to the grounding affidavit. He deposes that the next friend listed the names and dates of birth of each of her children in her application for refugee status. Five reference numbers were assigned of which reference number 69/1346/98(b) related to the next friend and 69/1346/98 (c), (d) (e) and (f) and (g) to the

minors. The policy of treating the application for asylum of the next friend as being an application on her own behalf and on behalf of each of the minors who accompanied her was applied taking into account the diminished capacity of the minors. The policy has its origin in paragraph 213 of the E.C.H.R. Handbook on Procedures and Criteria for Determining Refugee Status. The reason given by the next friend for seeking asylum was a threat to herself and her children. The first named respondent believes that the next friend acquiesced in the procedures adopted and at no time did she object to the same.

3. The next friend's affidavit.

The next friend swore an affidavit in reply to that of Mr O'Connell.

In her affidavit the next friend deposes that on the 11th May 1998 on applying for asylum she was given a Form ASY/1 for completion which she duly completed: she exhibits a copy of the same. The form states that it must be completed *"by all persons seeking refugee status"*: in fact only one form was completed and that relates to the next friend. It gives the name of the person making application as A N and contains her personal information – date of birth, place of birth, sex, marital status, religion, nationality and so forth. It required her to list her children and give their sex, date of birth, place of birth and where they then were. A great deal of further information was required of the next friend including details of her parents, her brothers and sisters, her education, her employment record and countries in which she had lived. Other than to set out in relation to the minors their name, sex, date and place of birth and where they now are no further information was sought in relation to the minors. She was required to set out why she was seeking asylum and this she did in the following terms:-

"I seek asylum because my brother in the Army and he get problem with Army and they looking for him and he run away and they say they will arrest his family, all the people, and kill them if brother don't come out. Then they phone me to tell me that Army is coming to my house from the village because they go our village to look for brother but was not there. Then I ran to the agent that bring me. Then took me and children to Cotonu, France and Ireland. Then I tell him to take money from uncle in village. Uncle knows him."

By letter dated 11th March 1999 the next friend was requested to attend for interview on the 30th March 1999. The letter contained the following sentence:-

"Unfortunately there are no facilities for children in the Department so arrangements should be made to have them looked after while you attend for interview."

Because of this the children did not attend at the interview. The next friend duly attended for an interview which was recorded as *"questions and answers"* in manuscript: she signed each page of the same. She was asked why she left Nigeria and replied:

"Because of the problem that my brother had. He is in the Army and they planned a coup 1997 in December and it failed and the Government is looking for him. Army officers who did not give me their names called at my house looking for him. I told them that he was not there. They left a message to tell him report at the camp within 24 hours and that if he did not do this his family would be in a problem. This was around the 27.04.98 and they left. They went to the village to threaten my parents so my uncle phoned me and they (military) left another message that if they don't find him (brother) they would kill the family. So now my uncle told me that they said that they were coming back to the house and that if don't find him they were going to arrest me and it is going to be very bad. Could even take my life. So I now ask my uncle what to do. He said that I would have to run away like my brother's wife

ran to America. I moved with the children to live with relatives at 13 Shogunle Street, Lagos. I called my uncle again and he told me to leave the country, that it is not safe. He told me to wait and give him time to contact an agent that he knows. On 3 or 4-05-98 I rang my uncle and he told me that he contacted an agent and that he would take me and children out of Nigeria. Then he gave me the agent's address to meet the agent the following day. I went and met the agent and he talked and he told me that he was taking us to Ireland in a ship. He said that my uncle was paying the cost. I don't know how much. The agent called to the place that I was staying on 8-5-98 and he took us in a bus from Lagos to Cotonu. I think it is in the Benin Republic. We spent some time there as we travelled on bus for 8-12 hours. Then we got a ship to France and I don's know where we arrived in France. Then we went to Ireland arriving on the 10-5-98. Change please to 11-5-98. The agent was with us on the bus and in the ship. I don't know what port in Dublin we came into. The agent's name was Martin Bolojoko."

Later in the interview she was asked the reason the authorities wanted her and she replied as follows:-

"Because I lived with my brother and he was missing and his family said that I was the next person and that they (Army) would arrest me and put me in jail until my brother came out of hiding."

She was asked again as to the grounds for claiming asylum and answered:

"Political grounds because they would kill me and the five children."

She went on to say that the Army arrested her father and mother but let them out after some time and that if she returned to Nigeria she would be killed. At the end of the interview she was asked a number of questions, the answers to which were again recorded and she signed the same. The first question and the answer to the same are as follows:-

"Q. Do you wish to add anything to what you have said?
A That it is up to you to keep us as we can't go back."

The minors were not, save as above, considered at the interview.
A report of the interview was prepared. It deals with the basis of the claim as follows:-

"She is applying for asylum because her brother who was a member of the military was allegedly involved in the December 1997 reported coup plot. Around 27-04-98 Army officers called to her house looking for her brother. She claims they threatened to kill her and her children if she did not find her brother."

The report contains no mention of the minors other than the threat to kill them and on its face relates only to the next friend.

On the 3rd March 2000 the first named applicant was informed of the decision to refuse her recognition as a refugee. Again there was no mention of the minors.

It was not until the letter of 1st July 2002 notifying the Minister's proposal to make deportation orders that mention of the minors was first made in correspondence from the Minister.

Was there an application on behalf of the Minors?

The next friend's application was dealt with on a non-statutory basis in accordance with the State's undertaking to the United Nations in the Hope Hanlan letters. The Supreme Court in ***V.Z v. The Minister for Justice*** [2002] 2 I.R. 135 at 148 accepted the relevance of the U.N.H.C.R. Handbook on Procedures and Criteria for Determining Refugee Status in considering procedures adopted by the State to fulfil Convention obligations. The following matters are drawn from the Handbook. The Convention leaves it to each contracting state to establish the procedure that it considers most appropriate for the determination of refugee status having regard to its particular constitutional and administrative structure. There is no objection to refugee status being considered under informal arrangements. However certain basic requirements are considered essential. The relevant facts in the first place must be furnished by the applicant. While the general legal principle is that the burden of proof lies on

the applicant, cases in which an applicant can provide evidence of his statements will be the exception rather than the rule. Thus while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner and in some cases it may be necessary for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. An initial interview should normally suffice to bring the applicant's story to light. The basic information is frequently given in the first instance by completing a standard questionnaire which will normally not be sufficient to enable the examiner to reach a decision and one or more personal interviews will be required. Since the examiner's conclusion on the facts of the case and his personal impression of the applicant will lead to a decision that affects human lives he must apply the criteria in a spirit of justice and understanding.

The Handbook has a section headed ***"Unaccompanied Minors***". In dealing with unaccompanied minors that section casts light on the approach to be taken to accompanied minors. The relevant paragraphs are as follows:

> *"213 There is no special provision in the 1951 Convention regarding the refugee status of persons under age. The same definition of a refugee applies to all individuals regardless of their age. When it is necessary to determine the refugee status of a minor, problems may arise due to the difficulty of applying the criteria of "well-founded fear" in his case. If a minor is accompanied by one (or both) of his parents, or another family member on whom he is dependent, who requests refugee status, the minor's own refugee status will be determined according to the principle of family unity.*
> *214 The question of whether an unaccompanied minor may qualify for refugee status must be determined in the first instance according to the degree of his mental development and maturity. In the case of children, it will generally be necessary to enroll the services of experts conversant with child mentality. A child – and for that matter an adolescent – not being legally independent should, if appropriate, have a guardian appointed whose task it would be to promote a decision that will be in the minor's best interests. In the absence of parents or of a legally appointed guardian it is for the authorities to ensure that the interests of the applicant for refugee status who is a minor are fully safeguarded.*
> *215 Where a minor is no longer a child but an adolescent, it will be easier to determine refugee status as in the case of an adult, although this again will depend upon the actual degree of the adolescent's maturity. It can be assumed that – in the absence of indications to the contrary – a person of 16 or over may be regarded as sufficiently mature to have a well founded fear of persecution. Minors under 16 years of age may normally be assumed not to be sufficiently mature. They may have fear and a will of their own, but this may not have the same significance as in the case of an adult.*
> *216 It should, however, be stressed that these are only general guidelines and that a minor's mental maturity must normally by determined in the light of his personal, family and cultural background.*
> *217 Where the minor has not reached a sufficient degree of maturity to make it possible to establish well founded fear in the same way as for an adult, it may be necessary to have greater regard to certain objective factors. Thus, if an unaccompanied minor finds himself in the company of a group of refugees, this may - depending on the circumstances – indicate that the minor is also a refugee.*
> *218The circumstances of the parents and other family members, including their situation in the minors' country of origin, would have to be taken into account. If there is reason to believe that the parents wish their child to be outside the country of origin on grounds of well founded fear of persecution, the child himself may be presumed to have such fear.*

The principle of family unity is dealt with in paragraphs 181 to 188 of the Handbook and is also relevant. These provide as follows:-

> *181 Beginning with the Universal Declaration of Human Rights which states that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State", most international instruments*

dealing with human rights contain similar provisions for the protection of a family.

182 The Final Act of the conference that adopted that 1951 Convention:

> *"Recommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:*
> *(i) ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country;*
> *(ii) the protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption."*

183 The 1951 Convention does not incorporate the principle of family unity in the definition of the term "refugee". The above mentioned Recommendation in the Final Act of the Conference is, however, observed by the majority of States, whether or not parties to the 1951 Convention or to the 1967 Protocol.

184 If the head of a family meets the criteria of the definition, his dependants are normally granted refugee status according to the principle of family unity. It is obvious, however, that formal refugee status should not be granted to a dependant if this is incompatible with his personal legal status. Thus, a dependant member of a refugee family may be a national of the country of asylum or of another country, and may enjoy that country's protection. To grant him refugee status in such circumstances would not be called for.

185. As to which family members may benefit from the principle of family unity, the minimum requirement is the inclusion of the spouse and minor children. In practice, other dependants, such as aged parents of refugees, are normally considered if they are living in the same household. On the other hand, if the head of the family is not a refugee, there is nothing to prevent any one of his dependants, if they can invoke reasons on their own account, from applying for recognition as refugees under the 1951 Convention or the 1967 Protocol. In other words, the principle of family unity operates in favour of dependants, not against them.

186 The principle of the unity of the family does not only operate when all family members become refugees at the same time. It applies equally to cases where a family unit has been temporarily disrupted by the plight of one or more of its members.

187 Where the unity of a refugee's family is destroyed by divorce, separation or death, dependants who have been granted refugee status on the basis of family unity will retain such refugee status unless they fall within the terms of a cessation clause; or if they do not have reasons other than those of personal convenience for wishing to retain refugee status; or if they themselves no longer wish to be considered as refugees.

188 If the dependant of a refugee falls within the terms of one of the exclusion clauses, refugee status should be denied to him."

Accordingly to comply with the Convention the procedural requirements are modest and may be met by the following:

1. the applicant for refugee status must furnish the relevant facts.
2. although the burden of proof, in principle, rests on the applicant the duty to ascertain and evaluate all relevant facts is shared between the applicant and the State.
3. an appropriate procedure is to require the applicant to complete a questionnaire giving basic information to be followed by one or more personal interviews as may be required.

Also of some relevance is paragraph 190 of the E.C.H. R. Handbook which has this to say:-

> *"It should be recalled that an applicant for refugee status is normally in a particularly vulnerable situation. He finds himself in an alien environment environment and may experience serious difficulties, technical and psychological, in submitting his case to the authorities of a foreign country,*

often in a language not his own. His application should therefore be examined within the framework of specially established procedures by qualified personnel having the necessary knowledge and experience, and an understanding of the applicant's particular difficulties and needs."

In relation to minors, taking into account the principle of family unity, I take from the Handbook the following guidelines. The same definition of a refugee applies to all individuals regardless of age: thus a minor will have to establish a well founded fear within the Convention and where the minor is of tender years this clearly creates a difficulty. Accordingly a minor accompanied by a parent and whose parent requests refugee status will have his refugee status determined according to the principle of family unity. Where the head of the family fulfils the necessary conditions for admission as a refugee the contracting state should ensure that the refugee's family unity is maintained. Paragraph 184 of the Handbook provides that if the head of a family meets the criteria of the definition of refugee his dependants are normally granted refugee status according to the principle of family unity. However under paragraph 185 if the head of the family is not a refugee there is nothing to prevent any one of his dependants, if they can invoke reasons on their own account, from applying for recognition of their status as refugees: the principle of family unity operates for the benefit of the minor and not against him. Minors under 16 years of age may normally be assumed not to be sufficiently mature to have a well founded fear of persecution. The handbook envisages, it seems to me, an application by the parent of a minor child and if that is successful the minor will be granted status and if unsuccessful the minor can apply based on his own circumstances and reasons: see E.C.H.R. handbook paras. 184 and 185.

Conclusion on the first point of law

Taking guidance from the E.C.H.R. Handbook I am satisfied that on an application by a parent of a minor child the Minister under the non-statutory regime could deal with that application without having regard to the minor. If the application succeeds the minor should be given refugee status. If the application is unsuccessful then the minor is entitled to apply for refugee status based on his own circumstances and reasons. The E.C.H.R. Handbook does not envisage the parent's application as being also an application on behalf of the minor nor that on failure of the parent's application the status of the minor should be determined without regard to his individual circumstances or reasons. Thus the Minister was in error in treating the next friend application as being one on behalf of the minors also. The next friend's application was not an application by the minors but if successful, applying the principle of family unity, would benefit them. In the present case there was no application by or on behalf of the minors. Accordingly on the central issue on the application for judicial review there had been no application by or on behalf of the minors and the Immigration Act 1999 section 3(2)(f) did not apply to them: the basis upon which the Minister purported to make deportation orders in relation to the minors did not exist. I would answer the first point certified in the negative.

There having been no application on behalf of the minors the second question certified does not arise for consideration.

I would allow the appeal and make an order of certiorari quashing the deportation orders made in respect of the minors. Further, I have had the benefit of reading the judgment handed down by Mr Justice Fennelly, the order which he proposes and the reasons which he gives in paragraph 38 thereof and I agree with the same.