THE HIGH COURT

JUDICIAL REVIEW

2000 No. 533 JR

IN THE MATTER OF THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000

BETWEEN

VALERIE ZGNAT'EV

APPLICANT

AND

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM, JAMES NICHOLSON SEATING AS THE APPEALS AUTHORITY IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Finnegan J. delivered on the 17th day of July, 2001.

In this matter I gave the Applicant leave to apply for Judicial Review pursuant to the provisions of the Illegal Immigrants (Trafficking) Act 2000 Section 5 for the relief sought in the statement to ground application for Judicial Review at d(1)(c) upon the grounds at e(1)(j) therein. The relief sought is as follows:-

> *"An Order of Certiorari by way of application for Judicial Review quashing the decision of the first named Respondent his servants and/or agents refusing the Applicant's appeal against the said decision of the first named Respondent his servants and/or agents that the Applicant's claim for recognition of his refugee status is manifestly unfounded."*

The grounds relied upon are as follows:-

> *"The procedures established pursuant to paragraphs 12 - 14 inclusive of the Hope Hanlan letter fail to satisfy the requirements of natural and constitutional justice and/or are bad in law and/or violate article 6(1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms in that the said procedures do not provide an appellant with an opportunity for an oral hearing of his or her appeal. In particular the Applicant herein was not afforded an oral hearing of his appeal against the decision at first instance.*

The issue before me accordingly is whether an applicant for refugee status pursuant to the provisions of the Hope Hanlan procedures whose application has been deemed to be manifestly unfounded is entitled to an oral hearing of his appeal.

While the grounds quoted above refer to the Convention on the Protection of Human Rights and Fundamental Freedoms I have already held on this application that the Convention is not part of domestic Irish law at present and accordingly I do not propose to have regard to the provisions thereof. The issue therefore is whether as a matter of Irish domestic law the Applicant is entitled to an oral hearing of his appeal.

The procedures in the State for dealing with applications for refugee status at the time of the Applicant's application are those set out in two letters addressed by the Minister to the representative of the United Nations High Commissioner for Refugees Mrs. Hope Hanlan and dated the 10th December, 1997 and the 13th March, 1998 respectively. The letter of the 13th March, 1998 modified the accelerated procedure for dealing with applicants where the application was deemed to be manifestly unfounded. Initially the same procedure is adopted in relation to all applications. A person appointed by the Minister interviews the applicant and prepares a report thereon. If necessary an interpreter will be provided. The applicant may be accompanied at the interview by a representative who will however refrain from answering questions for the applicant or intervening in anyway in the conduct of the

interview. The representative will be given an opportunity at the end of the interview to make briefly any points which are considered necessary. At any point before or up to five working days after the interview the applicant or his or her representative may make written representations relating to the case. A person appointed by the Minister will assess the case having regard to the interview, the report of the interview and any written representations duly submitted and such information as may be obtained from the United Nations High Commissioner for Refugees or other internationally reliable sources and will make a recommendation as to whether refugee status should be granted or refused. A person duly authorised by the Minister will make a decision based on the information made available during this process. In the matter of appeals from the decision to grant or refuse refugee status the procedure differs in the case of applications deemed to be manifestly unfounded and other applications. In the latter cases there is an appeal to the Appeals Authority before whom the applicant has an entitlement to an oral hearing. An applicant whose application has been deemed to be manifestly unfounded has no right to an oral hearing.

With regard to manifestly unfounded applications the letter of 10th December, 1997 requires that the applicant be notified by registered post of the decision on his application and of the reasons for the same and of his right to appeal the decision within seven days of the notification being sent setting out the grounds on which the appeal is based. The appeal is to be decided by a person of more senior rank on the basis of the papers available in the case and of any submissions made by or on behalf of the applicant. By the letter of the 13th March, 1998 the period of seven days was replaced with seven working days and the following paragraph was substituted for paragraph 13 of the letter dated 10th December, 1997:-

> *"13(a) The appeal will be determined by an Appeals Authority a person independent of the Minister and the Department with not less than seven 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 papers available in the case and with such submis-*

sions as may be made by or on behalf of the applicant in connection with the appeal. The Appeals Authority will make a determination based on the papers only. Where the UNHCR has made no observations on the case within seven working days of the decision under appeal it will be assumed that no observations are being offered.

(b) The Appeals Authority will make a recommendation to the Minister as to whether the original determination should stand or whether the application should be considered substantively.

(c) A duly authorised officer of the Department will make a decision based on the recommendation of the Appeals Authority but subject to considerations of national security or public policy (ordre publique).

(d) if the appeal is decided in favour of the applicant, the applicant will be notified of the decision and processing of the application will resume. Otherwise the applicant will be notified of the decision and the provisions of paragraph 21 below will have effect."

Where at any time following the receipt of an application any of the grounds upon which an application may be deemed to be manifestly unfounded emerges a person authorised by the Minister may decide to terminate further examination of the case on the grounds that it is manifestly unfounded and refuse the application for refugee status.

Manifestly unfounded cases therefore differ from other cases in that at any time the procedures in such cases may be terminated without proceeding to substantive consideration and a decision to refuse to grant refugee status made and in these circumstances the applicant for refugee status will be confined to an appeal on the basis of the papers available in the case and any submissions made by or on behalf of the applicant in connection with the appeal and without the right to an oral hearing.

The Supreme Court in ***Glover -v- BLN Limited & Ors*** 1973 IR 388 at 425 per Kenny J. said:-

> *"The Court in **In Re Haughey** held that that provision of the Constitution (Article 40.3) was a guarantee of fair procedures. It is not, in my opinion, necessary to discuss the full effect of this article in the realm of private law or indeed of public law. It is sufficient to say that public policy and the dictates of constitutional justice require that statutes, regulations or agreements setting up machinery for taking decisions which may effect rights or impose liabilities should be construed as providing for fair procedures".*

In ***In Re Haughey*** 1971 IR 217 at 264 O'Dalaigh CJ. sets out the requirements of natural justice where a person whose conduct is impugned is appearing before a committee or tribunal as follows:-

(a) that he should be furnished with a copy of the evidence which reflected on his good name

(b) that he should be allowed to cross examine by Counsel his accuser or accusers

(c) that he should be allowed to give rebutting evidence and

(d) that he should be permitted to address, again by Counsel, the committee in his own defence.

However the requirements of natural justice will vary with the nature of the inquiry and the seriousness of the consequences: in ***Russell -v- The Duke of Norfolk*** 1949 1 All ER 109 Tucker LJ. said:-

> *"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth."*

These words were quoted with approval by Henchy J. in ***Kiely -v- Minister for Social Welfare*** 1977 IR 267 at 281. In that case Henchy J accepted that tribunals exercising *quasi* judicial functions may act informally - "to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore court room procedures and the like" - but they may not act in such a way as to imperil a fair hearing or a fair result. Thus an oral hearing is not always required: ***Galvin -v- Chief Appeals Office*** 1997 3 IR 240, ***Selvarajan -v- Race Relations Board*** 1976 1 All ER 12.

In granting leave to the Applicant to bring this application I was influenced by dicta in ***Goldberg -v- Kelly*** 397 US 254 at 268/269 where delivering the Judgment of the Court Mr. Justice Brennan said :-

> *"The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard. It is not enough that a welfare recipient may present his position to the decision maker in writing or second hand through his case worker. Written submissions are an unrealistic option for most recipients who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentation; they do not permit the recipient to mould his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision."*

The circumstances in that case were that the Respondents on the appeal were New York City residents who had been in receipt of financial aid. They complained that their aid had been terminated by the State Commissioner of Social Services pursuant to State regulations which permitted termination of payments by officials without affording an oral hearing. The procedures provided that where a case worker has doubts about the recipient's entitlement to receive aid he must first discuss these with the recipient. If he concludes that

the recipient is no longer eligible he recommends termination of aid to his superior. If the latter concurs he sends a letter to the recipient stating the reasons for proposing to terminate and allowing seven days within which the recipient may request a higher official to review the record and in which to submit a written statement to such higher official. If the higher official concurs aid is stopped immediately. Thereafter there is provision for an independent evidence at which the recipient may appear personally, offer oral hearing, confront and cross examine the witnesses against him and have a record made of the hearing. The Supreme Court was concerned with the decision being made in circumstances where great hardship could be caused without the opportunity of a pre-determination oral hearing. The circumstances in which Mr. Justice Brennan made his pronouncement can be distinguished from those in the present case: here the applicant for refugee status has the opportunity pre-determination to present his case at interview and the decision is made by a superior official on the basis of the record of the interview and the report of the interview. Further, all papers which are before the deciding official are made available to an applicant for refugee status in order to enable him to formulate his appeal in writing to the Appeals Authority.

The credibility and veracity of an applicant for refugee status in many cases lies at the heart of the decision that an application is manifestly unfounded. The procedures in place do not afford to the decision maker at first instance or to the Appeals Authority on appeal an opportunity to assess the applicant's credibility or veracity the sole opportunity to do so being that afforded at the interview. Central to the definition of refugee is the concept of a well founded fear of persecution which concept has both objective and subjective elements on both of which credibility, more often than not, will be highly relevant: See UNHCR Handbook on Procedures and Criteria for Determining Refugee Status paragraphs 37 - 50. The credibility and veracity of an applicant as to his history prior to arriving in the State will in many cases be determinative of the decision at first instance. Further the consequences of an erroneous decision on an application for refugee status are potentially at least as serious as the consequences faced by the welfare recipients in ***Goldberg -v- Kelly***.

However in providing a single oral procedure the procedures for dealing with manifestly unfounded applications satisfy the requirements of the United Nations High Commissioner for Refugees, who is recognised in the Convention as being charged with the task of supervising the same in co-operation with States. Further they conform with the resolution adopted by the Council of the European Union on the 20th June, 1995 annex 1.4. II paragraphs 18 - 22. There is provision for the United Nations High Commissioner for Refugees to partake in the procedures. Finally the procedures for determining applications as manifestly unfounded have there origin in UNHCR Executive Committee Conclusions on International Protection no. 30/1983 which also clearly limit the type of application which may be subjected to the manifestly unfounded procedure. It defines manifestly unfounded applications as follows:-

> *"The Executive Committee...considered that national procedures for the determination of refugee status may usefully include special provision for dealing in an expeditious manner with applications which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure. Such applications have been termed either "clearly abusive" or "manifestly unfounded" and are to be defined as those which are clearly fraudulent, were not related to the criteria for granting of refugee status laid down in the 1951 United Nations Convention Relating to the Status of Refugees nor to any other criteria justifying the granting of asylum."*

This must be considered in conjunction with the Handbook on Procedures and Criteria for Determining Refugee Status paragraphs 195 to 204. While the Handbook is not incorporated into the Hope Hanlan letters it sets out the approach to be adopted by State parties to the Convention in assessing applications. The Handbook is a legitimate aid to interpretation of the Convention: see Bennion Statutory Interpretation 2nd ed. Section 231. It is likewise relevant to the Hope Hanlon letters. The relevant paragraphs are as follows:-

"195: The relevant facts of the individual case will have to be furnished in the first place by the applicant himself. It will then be up to the person charged with determining his status (the examiner) to assess the validity of any evidence and the credibility of the applicant's statements.

196: It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, applicant may not be able to support his statement by documentary or other proof and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases the person fleeing from persecution will have arrived with the barest necessitates and very frequently even without personal documents. 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. Indeed in some cases it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases if the applicant's account appears credible he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

197: The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.

198: A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-a-vis any authority. He may

therefore be afraid to speak freely and give a full and accurate account of his case.

199: While an initial interview should normally suffice to bring an Applicant's story to light, it may be necessary for the examiner to clarify any apparent inconsistencies and to resolve any contradictions in a further interview, and to find an explanation for any misrepresentation or concealment of material facts. Untrue statements by themselves are not a reason for a refusal of refugee status and it is the examiner's responsibility to evaluate such statements in the light of all the circumstances of the case.

200: An examination in depth of the different methods of fact finding is outside the scope of the present handbook. It may be mentioned, however, that basic information is frequently given in the first instance by completing a standard questionnaire. Such basic information will normally not be sufficient to enable the examiner to reach a decision and one or more personal interviews will be required. It will be necessary for the examiner to gain the confidence of the applicant in order to assist the latter in putting forward his case and in fully explaining his opinions and feelings. In creating such a climate of confidence it is of course of the utmost importance that the applicant's statement will be treated as confidential and that he be so informed.

201: Very frequently the fact finding process will not be complete until a wide range of circumstances has been ascertained. Taking isolated instances out of context may be misleading. The cumulative effect of the applicant's experience must be taken into account. Where no single incident stands out above the others sometimes a very small incident may be "the last straw"; and although no single incident may be sufficient, all the incidents related by the applicant taken together could make his fear "well founded" (see paragraph 53 above).

202: 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 the spirit of justice and understanding and his judgment should not, of course, be influenced by the personal consideration that the applicant may be an undeserving case.

203: After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above (paragraph 196) it is hardly possible for a refugee to prove every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognised. It is therefore frequently necessary to give the applicant the benefit of the doubt.

204: The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible and must not run counter to generally known facts."

Thus in reaching a decision, regard is had to the peculiar circumstances which may affect a refugee. The benefit of the doubt is given. An application can only be considered manifestly unfounded on the specific grounds set out in paragraph 14 of the Hope Hanlan letter of 10th December, 1997.

Having regard to the foregoing I find as follows:-

1. An Applicant for refugee status is accorded an interview and he has an opportunity to make submissions in writing prior to and subsequent to the same and at the end of the interview an oral submission may be made on his behalf.
2. The manifestly unfounded procedures only apply to applications which are so obviously without foundation as not to merit full examination at every level of

the procedure and which are clearly fraudulent or are not related to the criteria for the granting of refugee status under the Convention.

3. The grounds on which an application for refugee status can be determined to be manifestly unfounded are restricted to those set out in paragraph 14 of the letter of 10th December, 1997.

4. An appeal is provided and for the purposes of the same the Applicant for refugee status is provided with all the material which was before the decision maker including the notes of his interview and the report on the interview and the grounds of the decision.

5. The applicant has the benefit of the approach expounded in the Handbook on Procedures and Criteria for Determining Refugee Status paragraphs 195 to 204 in relation to the burden of proof and the benefit of the doubt.

Taking the foregoing into consideration I am satisfied that the absence of provision for an oral hearing of the appeal from a decision that an application for refugee status is manifestly unfounded does not infringe the right of an applicant for refugee status to natural and constitutional justice.