THE SUPREME COURT

JUDICIAL REVIEW

308/01, 310/01

Keane, C.J.
Denham, J.
Murphy, J.
Murray, J.
McGuinness J.

BETWEEN

Z.

APPLICANT/APPELLANT

AND

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

RESPONDENTS

[Judgment delivered by McGuinness J.; Keane C.J., Murphy J. & Murray J. agreed with the judgment of McGuinness J.; Additional comment from Denham J. in agreement]

Judgment of Mrs Justice McGuinness delivered the 1st day of March 2002

These two appeals arise from judicial review proceedings brought by the Applicant/Appellant in which he sought to challenge a number of decisions and recommendations made in the course of his application to the first named Respondent to be granted refugee status in this jurisdiction. The Appellant has appealed against the judgment and order of Finnegan J. of 29th March 2001, in which the learned trial judge gave leave to the Appellant to bring judicial review proceedings on one ground only and refused leave on

all the other grounds put forward. The Appellant has also appealed against the subsequent judgment of Finnegan J. delivered the 17th July 2001 and his order made the 26th

July 2001. This judgment and order followed on the substantive hearing of the Appellant's judicial review proceedings, in which the trial judge refused the relief sought.

The Appellant is a 53 year old Russian national who arrived in this country on the 18th October 1999 and on that date made an application for refugee status to the first named Respondent. The Appellant was born in Leningrad/St. Petersburg, is divorced and has two daughters. He states that he has *"no religion"* but is ethnically a Jew since his mother was Jewish. He qualified both as a ship's mechanic and as a mechanical engineer and for over twenty years worked for a firm engaged in underwater pipeline construction. He served three periods of military service, gained the rank of lieutenant captain, and remained in the military reserve. He was a member of the Communist Party from 1976 to 1989.

On the 21st October 1999 the Appellant filled in a standard questionnaire in regard to his application for refugee status. On 8th June 2000 he was interviewed by Ms Majella Donoghue of the Department of Justice, Equality and Law Reform. English language versions of the questionnaire and the notes taken by Ms Donoghue at the interview have been exhibited in the proceedings. The Applicant claims that in October 1996 he was sent by the military authorities in Russia to Chechnya to work on the restoration of an oil pipeline there. He was wounded during an attack by Chechnyan paramilitaries and was subsequently kidnapped by Chechnyans and held captive for a period of a year. He states that the Russian authorities made no attempt either to free him or to ransom him. He claims that the Russian authorities brought criminal charges against him for surrendering his weapons to the paramilitaries and for disobeying his superiors' orders, among other matters. However in another part of the questionnaire he appears to state that there is an amnesty at present in

regard to these offences. He claims that eventually in November 1997 he ransomed himself by giving all his property including his apartment in Leningrad, his summer house in Repino and two cars to the Chechnyan paramilitaries. He still owes $5,000 to the paramilitaries and is afraid to return to Russia on this account. As additional grounds to illustrate his fear of persecution Mr Z. stated that during his life in the USSR he was repeatedly subjected to humiliation on the part of his compatriots because of his Jewish origin. He also stated that there were unceasing attacks on him because of his past political views as a member of the Communist Party up to 1989.

In December 1997 Mr Z. left Russia and flew to South Africa, apparently on an ordinary tourist visa. He stayed for one year and ten months in South Africa. He appears to have sought refugee status in South Africa but was told that he must apply to the South African Embassy in Moscow. While in South Africa he worked as a ship's mechanic and states that he had no problems with the authorities there. He decided to leave South Africa because the situation there was impossible for white people. He could not get a job and it was dangerous to go out at night. On the advice of a friend he decided to seek refugee status in Ireland. He travelled by cargo ship from Capetown to Belfast and subsequently came by bus to Dublin.

As soon as the Appellant arrived in this country he applied for refugee status. He was informed that his application would be dealt with in accordance with the Hope Hanlan Procedures, to which I will refer later. He was furnished with a copy of those procedures by letter of 18th May 2000 and as stated above he was interviewed by Ms Majella Donoghue on 8th June 2000. On or about the 21st June 2000 Ms Donoghue sent a report on the Appellant's case to her superior, Mr Enda Hughes, Higher Executive Officer in the Asylum Division of the first named Respondent. In her report she concluded that the Applicant's asylum application should be considered *"manifestly unfounded"*. On the 22nd June 2000

Mr Hughes made a decision that the Appellant's case was *"manifestly unfounded"* on the grounds of paragraphs 14(a), 14(b) and 14(c) of the Hope Hanlan Procedures. The Appellant's case was thereafter dealt with in accordance with an accelerated procedure. The principal effect of this accelerated procedure was that any appeal by the Appellant against the decision of Mr Hughes would be based on the available papers. There would not be an oral hearing of his appeal.

On 29th June 2000 the Appellant received a letter from Mr Hughes informing him of the determination that his case was manifestly unfounded and giving him information with regard to his opportunity to appeal and with regard to the obtaining of legal advice. At this stage the Appellant attended a solicitor attached to the Refugee Legal Service and received legal advice and assistance. An appeal was lodged on his behalf by way of letter with enclosures on the 17th July 2000. This appeal was considered by the second named Respondent James Nicholson sitting as the appeals authority. He made a recommendation to the deciding officer of the first named Respondent, Ms Linda Greally. In accordance with Mr Nicholson's recommendation Ms Greally decided to uphold the original decision and refuse the Applicant's appeal. The Appellant received notification of the refusal of his appeal on 5th September 2000. He received further legal advice and, having obtained a legal aid certificate, he sought leave from the High Court to issue judicial review proceedings on 25th September 2000.

In his Statement grounding his application for judicial review the Appellant sought various reliefs by way of orders of certiorari and declarations. In summary he sought to quash the various decisions and recommendations made by the first and second named Respondent that his claim for refugee status should be treated as *"manifestly unfounded"* and should be dealt with under the procedures relevant to this type of application. In addition he sought a declaration that in all the circumstances the third and fourth named Respondents had

failed to vindicate and protect the right of the Appellant to fair procedures under the Constitution of Ireland 1937 and/or Article 6(1) of the European Convention on Human Rights. In his Statement the Appellant set out a number of grounds on which he relied. In this Court he stated through his counsel that he no longer relied on the grounds set out at (a), (b) and (c) in his statement since these grounds had already been rejected in the judgment of this Court in ***P v The Minister for Justice, Equality and Law Reform [2002] 1 ILRM 16***. The other grounds which were relied on both in written and oral submissions to this Court were, in summary, as follows:-

(i) The first named Respondent in deeming the Appellant's application to be *"manifestly unfounded"* failed to act in accordance with the guidelines and/or directions of the UNHCR in respect of this type of case.

(ii) The first named Respondent also failed to act in accordance with his own guidelines which were laid down for use in the determination of whether applications were manifestly unfounded within the meaning of the Hope Hanlan Procedures.

(iii) Both the decision at first instance and the appeal decision were manifestly unreasonable having regard to the various guidelines, the provisions of the Constitution of Ireland and International Law. The decisions also failed to have regard to the requirements of natural and/or constitutional justice.

(iv) In his initial application the Applicant had established a *prima facie* case for recognition of his refugee status which brought him within the relevant provisions of the Geneva Convention and therefore the decisions of the first named Respondent were manifestly unreasonable or irrational.

(v) The first named Respondent erred in law or acted unreasonably in failing to admit the Appellant to the substantive Asylum Applications Procedure given

that his application *prima facie* brought him within the relevant provisions of the Geneva Convention.

At paragraph E (j) the Appellant set out a further ground as follows:

"The procedures established pursuant to paragraphs 12 to 14 (inclusive) of the Hope Hanlan Letter failed 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 Freedom in that the said procedures do not provide an Appellant with an opportunity for an oral hearing of his or her appeal and, in particular, the Applicant herein was not afforded an oral hearing of his appeal against the decision at first instance."

This ground was the subject matter of the second appeal before this Court.

The Appellant's judicial review proceedings are governed by Section 5 subs. (2) and (3) of the Illegal Immigrants (Trafficking) Act 2000, which provide as follows:-

"(2) An application for leave to apply for judicial review under the Order in respect of any of the matters referred to in sub-section (1) shall -

(a) be made within the period of fourteen days commencing on the date on which the person was notified of the decision, determination, recommendation, refusal or making of the Order concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made, and

(b) be made by motion on notice (grounded in the manner specified in the order in respect of an ex-parte motion

> *for leave) to the Minister and any other person specified for that purpose by order of the High Court, and such leave shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid or ought to be quashed.*
>
> *(3)(a) The determination of the High Court of an application for leave to apply for judicial review as aforesaid or of an application for such judicial review shall be final and no appeal shall lie from the decision of the High Court to the Supreme Court in either case except with the leave of the High Court which leave shall only be granted where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interests that an appeal shall be taken to the Supreme Court."*

The remainder of the section is irrelevant.

The Appellant's application for leave was therefore heard on notice in the High Court by Finnegan J. (as he then was), who delivered his reserved judgment in the matter on the 29th March 2001.

In his lengthy and careful judgment the learned trial judge set out in detail the procedures for dealing with applications for refugee status in this jurisdiction. He then considered in turn and in detail each ground put forward by the Appellant in his Statement of Grounds. He also carefully considered the meaning of the phrase *"substantial ground"* in Section 5 of the Act of 2000 and referred to the judgment of this Court on the Reference of

the Illegal Immigrants (Trafficking) Bill 1999 which was delivered on 28th August 2000. At page 24 of that judgment the Court stated:

> *"As regards the requirement that an Applicant for leave to issue judicial review proceedings establish 'substantial grounds' that an administrative decision is invalid or ought to be quashed, this is not an unduly onerous requirement since the High Court must decline leave only where it is satisfied that the application could not succeed or where the grounds relied on are not reasonable or are 'trivial or tenuous'. This follows from a number of authorities where a similar requirement, as regards the Planning Act, has been judicially considered. Counsel for the Attorney General referred in particular to the judgment of Egan J. in* ***Scott v An Bord Pleanála [1995] 1 ILRM 424, 428****, Carroll J. in* ***McNamara v An Bord Pleanála [1995] 2 ILRM 125*** *and Morris P. in* ***Lancefort Limited v An Bord Pleanála [1997] 2 ILRM 508, 516****."*

The learned trial judge also referred to relevant passages from ***McNamara v An Bord Pleanála*** and ***Jacksonway Property Limited v The Minister for the Environment and Local Government and Others*** (High Court Geoghegan J. 2nd July 1999).

Having considered each of the grounds put forward by the Appellant the learned trial judge held that he was not satisfied that the grounds set out by the Appellant in his statement (other than the ground set out at sub-paragraph (j)) were substantial and accordingly he refused leave on all of those grounds.

With regard to the ground at sub-paragraph (j) - the failure to provide an oral hearing at the appeal stage - the trial judge considered that there was *"no universal requirement or general entitlement to an oral hearing of an appeal."* However having considered the dicta of the United States Supreme Court in ***Goldberg v Kelly 397 U.S. 254*** he felt that this was at

least a substantial ground and accordingly he granted leave to the Appellant to apply for the relief sought under this heading.

Subsequent to the judgment and order of the 29th March 2001, the Appellant applied to Finnegan J. for a certificate of leave to appeal pursuant to Section 5(3)(a) of the Act of 2000. Having heard counsel Finnegan J. certified that the following question should be referred to this Court:-

> *"Whether, on an application for leave to apply for judicial review pursuant to Section 5 of the Illegal Immigrants (Trafficking) Act 2000 brought in respect of a decision to refuse an application for refugee status on the grounds that the application is manifestly unfounded:*
>
> *(i) It was appropriate to apply the principles set out in* ***O'Keeffe v An Bord Pleanála [1995] IR 39****, in particular having regard to the approach of the UNHCR to manifestly unfounded applications for refugee status: and*
>
> *(ii) the methods used and/or the manner in which the manifestly unfounded procedures are and/or were operated by the Respondents, or any of them, and/or as applied to the Applicant's application were in breach of the Applicant's constitutional rights and the requirements of natural and constitutional justice."*

By notice of appeal dated the 26th November 2001 the Appellant appealed to this Court. His grounds of appeal are set out as follows:-

> *"1. The learned judge erred in law in applying the principles set out in* ***O'Keeffe v An Bord Pleanála [1995] IR 39*** *in all the circumstances of this*

case and having regard to the approach of the UNHCR to manifestly unfounded applications for refugee status;

2. The learned judge erred in fact and in law in finding that the methods used and/or the manner in which the 'manifestly unfounded' procedures are and/or were operated by the Respondents, or any of them, and/or as applied to the Appellant/Applicant's application were not in breach of the Appellant's/Applicant's constitutional rights or of the requirements of natural and constitutional justice.

3. The Appellant/Applicant contends that the method used and/or the manner in which the 'manifestly unfounded' procedures are and/or were operated by the Respondents, or any of them, and/or as applied to the Appellant's/Applicant's application were in breach of the Appellant's/Applicant's constitutional rights and the requirements of natural and constitutional justice.

4. The learned judge erred in fact and/or in law in finding that, in respect of paragraphs D(1)(a), D(1)(b) and D(2) - (8) inclusive of the statement of grounds herein, there were no substantial grounds for granting leave to apply for judicial review within the meaning of Section 5(2) of the said Act of 2000. The procedures established and/or adopted by and the acts and decisions of the Respondents, or any of them, are open to review on the grounds set out in the statement of grounds herein."

The Appellant's substantive application for judicial review was also heard by Finnegan J., who delivered a reserved judgment on the 17th July 2001. He rejected the application. Insofar as the application was grounded on the European Convention on Human

Rights he held that the Convention is not part of domestic Irish law at present and accordingly he did not propose to have regard to the provisions thereof. This ground did not form part of the appeal to this Court.

The learned judge then fully considered the procedures for dealing with *"manifestly unfounded"* cases provided in the Hope Hanlan letter. He went on to refer to the requirements of natural justice where a person whose conduct is impugned is appearing before a Committee or Tribunal as set out in ***In Re Haughey [1971] IR 217 at 264***. He went on to say:-

> *"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 E.R. 109*** *Tucker L.J. 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****....thus an oral hearing is not always required:* ***Galvin v Chief Appeals Officer [1997] 3 IR 240, Selvarajan v Race Relations Board [1976] 1 All ER 12.****"*

Having considered the provisions of the United Nations Handbook on Procedures and Criteria for Determining Refugee Status, which he held to be a legitimate aid to the interpretation of the Geneva Convention, he concluded 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.

On the application of the Appellant, the learned trial judge again granted a certificate of leave to appeal to this Court on the following question:

> *"Whether the failure to provide for an oral hearing on an appeal against a determination that an Applicant for refugee status is manifestly unfounded is a breach of the Applicant's constitutional rights and of natural and constitutional justice."*

By notice of appeal dated the 29th November 2001 the Appellant appealed to this Court on the following grounds:

> *"1. The learned trial judge erred in fact and in law in finding that the failure to provide for an oral hearing on appeal against the determination that an application for refugee status is manifestly unfounded was not in breach of the Appellant's/Appellant's constitutional rights and the requirements of natural and constitutional justice.*
>
> *2. The Appellant/Applicant contends that the failure to provide for an oral hearing on appeal against the determination that this application for refugee status was manifestly unfounded was in breach of the Appellant's/Applicant's constitutional rights and the requirements of natural and constitutional justice."*

The history of the development of procedures for processing claims for refugee status in this jurisdiction has been set out in a number of previous judgments both of the High Court

and of this Court and has been fully considered by the learned trial judge in his judgment. It is sufficient here to deal with these procedures in summary. Ireland is a signatory to the United Nations Convention on the Status of Refugees and Stateless Persons 1951 and the 1967 Protocol thereto (The Geneva Convention). The provisions of the Geneva Convention have now been brought into effect in Irish domestic law by the Refugee Act 1996 (as amended). The main provisions of the 1996 Act were not brought into operation until the 20th November 2000, and were thus not applicable to the present Appellant. As already stated, the Appellant's claim for refugee status was dealt with under the procedures set out in a letter dated the 10th day of December 1997 from the Assistant Secretary of the first-named Respondent's Department to Ms Hope Hanlan, who was the UNHCR representative. Amendments were made to that scheme by a letter to Ms Hanlan from the Assistant Secretary dated the 13th March 1998. I attach the two Hope Hanlan letters as an appendix to this judgment. The first named Respondent accepts that the terms of the Hope Hanlan letters are binding on him.

The Hope Hanlan letter for the first time in this jurisdiction dealt with the problem of *"manifestly unfounded"* applications, which had arisen in connection with the very large increase in the number of asylum seekers arriving both in this country and in other countries of the European Union. This problem had previously been highlighted in conclusions and recommendations made in the year 1983 by the executive committee of UNHCR (EXCOM). At paragraph (d) of these conclusions it is stated that EXCOM:

> *"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 or not related to the criteria for the 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."
(EXCOM Conclusion No 30 (XXXIV) 1983)

The Conclusion of EXCOM is reflected in paragraphs 12 to 14 of the Hope Hanlan letter under the heading *"Manifestly unfounded cases: accelerated procedure"*:

> *"12. Where at any time following receipt of an application any of the circumstances set out at paragraph 14 below emerges, a person duly authorised by the Minister may decide to terminate further examination of the case on the grounds that it is manifestly unfounded and to refuse the application for refugee status accordingly. The Applicant will be notified by registered post of the decision and of the reasons for it, and of the right to appeal the decision within seven days of the notification being sent, setting out the grounds on which the appeal is based. UNHCR will also be notified of each such decision and provided with a copy of any appeal submissions made.*
>
> *13. The appeal will be decided by a person of more senior rank, in consultation with UNHCR where possible. Where UNHCR has made no observations on the case within seven days of the decision under appeal, it will be assumed that no observations are being offered. The decision will be made on the basis of the papers available in the case and of any submission made by or on behalf of the Applicant. If the appeal is determined 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.*

14. The grounds on which it may be determined that an application is manifestly unfounded are as follows:

(a) It does not show on its face any grounds for the contention that the Applicant is a refugee.

(b) The Applicant gave clearly insufficient details or evidence to substantiate the application.

(c) The Applicant's reason for leaving or not returning to his or her country of nationality does not relate to a fear of persecution."

Paragraph 14 is continued by a number of further sub-paragraphs numbered (e) to (l) but none of these sub-paragraphs are relevant to the present Appellant's case. His application was rejected on the grounds that it came within paragraph 14(a), (b) and (c).

In this context it is also necessary to refer to the definition of a refugee which is contained both in the Geneva Convention and in the Refugee Act 1996, as follows:

"A refugee means a person who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

It will be seen from this definition that the refugee's fear of persecution must be *"well founded"*. It must also be fear of persecution for one or more of the reasons set out in the

Convention - race, religion, nationality, or membership of a particular social group or political opinion. These are usually known as *"Convention reasons"*.

The learned trial judge held, correctly in my view, that it was appropriate for him to have regard to the Handbook on Procedures and Criteria for Determining Refugee Status published by the Office of the United Nations High Commission for Refugees. Counsel for the Appellant in his argument to this Court relied to a considerable extent on the terms of this Handbook. It was pointed out by counsel for the Respondent that the Handbook did not deal with the accelerated procedure for manifestly unfounded applications and that, in fact, the 1992 edition of the Handbook on which reliance was placed was published before the writing of the Hope Hanlan letters. It seems to me, however, that the guidelines contained in the Handbook are of relevance in considering the arguments made by counsel on both sides in this appeal and according I refer to a number of passages from the Handbook here.

Under the heading *"well founded fear of being persecuted"* the Handbook gives a general analysis of this crucial phrase. Paragraphs 37 to 42 are particularly relevant and I reproduce them here:

> *"37. The phrase 'well founded fear of being persecuted' is the key phrase of the definition. It reflects the views of its authors as to the main elements of refugee character. It replaces the earlier method of defining refugees by categories (i.e., persons of a certain origin not enjoying the protection of their country) by the general concept of 'fear' for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin.*

38. To the element of fear - a state of mind and a subjective condition - is added the qualification 'well-founded'. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term 'well-founded fear' therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.

39. It may be assumed that, unless he seeks adventure or just wishes to see the world, a person would not normally abandon his home and country without some compelling reason. There may be many reasons that are compelling and understandable, but only one motive has been singled out to denote a refugee. The expression 'owing to well-founded fear of being persecuted' - for the reasons stated - by indicating a specific motive automatically makes all other reasons for escape irrelevant to the definition. It rules out such persons as victims of famine or natural disaster, unless they <u>also</u> have well-founded fear of persecution for one of the reasons stated. Such other motives may not, however, be altogether irrelevant to the process of determining refugee status, since all the circumstances need to be taken into account for a proper understanding of the applicant's case.

40. An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no such strong

convictions. One person may make an impulsive decision to escape, another may carefully plan his departure.

41. Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences - in other words, everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified.

42. As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgment on conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin - while not a primary objective - is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable

to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there."

In his submissions to this Court Senior Counsel for the Appellant, Mr Shipsey, argued that the learned trial judge had erred in basing his decision to refuse leave in his judgment of 29th March on the well known text set out in the ***State (Keegan) v The Stardust Victims Compensation Tribunal [1986] IR 6421*** and in ***O'Keeffe v An Bord Pleanála [1993] 1 IR 39***. He referred to paragraph 14(a) of the Hope Hanlan Procedures which provided as a ground for determining that a claim is manifestly unfounded that *"it does not show on its face any grounds for the contention that the Applicant is a refugee."* On the contrary, Mr Z. had claimed that he suffered fear of persecution due both to his Jewish origins and to his former membership of a Communist Party, both of which clearly related to *"Convention reasons"*. Mr Shipsey was critical both of the interview with Mr Z. carried out by Ms Majella Donoghue and of her report on his application. She had, he said, laid far too much emphasis on the detail of his sojourn in South Africa and his reasons for leaving there. Her proper task was to ascertain the reasons why Mr Z. was unwilling to return to Russia, the country of his nationality. She had failed to question him about the *"humiliations"* which he had said in the questionnaire that he had suffered because of his Jewish origin. She had not dealt with his persecution on account of his Communist Party affiliations. She appeared to doubt the credibility of his account of being forced to give his property in St. Petersburg to Chechnyan paramilitaries. Research from independent sources would have informed her that a Chechnyan *"Mafia"* operated in the major Russian cities. While Mr Z.'s kidnapping, captivity and ransom had not been carried out at the hands of the Russian State, it was clear that the forces of the State had been either unable or unwilling to protect him. On the

contrary they had brought criminal charges against him. In view of what was claimed by Mr Z., it might have been reasonable to consider his claim was unfounded, but it was surely unreasonable/irrational to hold that it was *"manifestly unfounded"*.

Mr Shipsey in his submissions regarding the proper test in refugee cases relied on a number of English cases, in particular ***Bugdaycay v Secretary of State for the Home Department (1987) 1 All E.R. 980, R v Secretary of State ex p. Cambolat (1998) 1 All E.R. 161*** and ***R. v Ministry of Defence ex p. Smith (1996) 1 All E.R. 257***.

The English Court of Appeal in the decision in ***Cambolat*** recognised that a Court exercising its judicial review jurisdiction must subject the decision impacting fundamentally on the human rights of a given Applicant to *"anxious scrutiny"*. The Court endorsed the statement of Lord Bridge in the judgment of the English Court of Appeal in ***Bugdaycay*** to the effect that:-

> *"The limitations on the scope of the [the Court's power of review] are well known and need not be restated here. Within those limitations the Court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the Applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."*

In the ***Bugdaycay*** case Lord Templeman had stated that in his opinion *"where the result of a flawed decision may impel life or liberty a special responsibility lies on the Court in the examination of the decision-making process."* (at page 956). In the Irish case of ***Bailey***

and Others v Mr Justice Fergus Flood (unreported Supreme Court 14th April 2000) the Court recognised that:

> *"Any determination of reasonableness would have regard to the subject matter and consequences of the decision."*

In further submissions Mr Shipsey referred to the right to fair procedures and submitted that it was settled law that the Appellant as a non-national was entitled to fair procedures and was entitled to apply to the Irish Courts to defend and vindicate his right to natural and constitutional justice. He analysed the terms of the Geneva Convention and the Refugee Act 1996, referring in particular to Section 5 of that Act which prohibits refoulement, providing that:-

> *"A person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion."*

He submitted that, as a contracting party to the Geneva Convention, the State was obliged under domestic and international law to ensure that refugees presenting themselves in the State seeking protection were identified and their status recognised.

Counsel went on to refer to the UNHCR Handbook quoted above and submitted that it provided that the burden of proof of establishing refugee status was shared between the Applicant and the assessing authority. He drew attention to the section entitled *"Establishing the Facts"* where it was envisaged that *"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..." (para 196). Counsel also referred to the EXCOM document quoted above.

In summary, he submitted that the facility of an accelerated procedure was exceptional and was a limited derogation from the general principles and methods to be applied in the determination process. In the instant case the Appellant had submitted a claim which *prima facie* related to the criteria for the granting of refugee status laid down in the 1951 Convention.

With regard to the Appellant's second appeal concerning the failure to provide an oral hearing on appeal against a determination that an application for refugee status was manifestly unfounded, Counsel for the Appellant relied on the case of ***Galvin v The Chief Appeals Officer [1997] 3 IR 240*** and the ***State (Haverty) v An Bord Pleanála [1987] IR 485***. He submitted that there was no doubt that in the instant case an important right was at issue. The dispute between the parties concerning the reliability of the information given by the Appellant in the questionnaire and at the interview, the reliability of the opinions of the decision-makers at first instance, on the one hand and the accuracy and reliability of the material relied on by the Department on the other, made it imperative that witnesses be examined and if necessary cross-examined under oath before the second named Respondent.

Mr Shipsey laid considerable stress on the need for an opportunity both to cross-examine witnesses and also to expand orally on the material dealt with in the questionnaire and the interview. He stressed that the Appellant had not the benefit of legal advice either when filling in the questionnaire or when attending the interview. He concluded by submitting that in operating a system where no oral appeal was permitted the Respondents were in breach of natural and constitutional justice.

Senior Counsel for the Respondents, Mr Callanan, drew attention to the fact that a deportation order had not yet been made in respect of the Appellant, who had now applied for

humanitarian leave to remain. Prior to making a deportation order the Minister would have to ensure that he had complied with Section 5 of the 1996 Act - the prohibition on refoulement. It was premature for the Appellant to argue that the decision to refuse him refugee status endangered his life or liberty.

At this point I would comment that, while the point made here on behalf of the Respondent is technically correct, it carries a certain air of unreality in the case of a person whose application has been held to be manifestly unfounded. Other aspects of the Respondents arguments carry more weight.

Counsel for the Respondents also referred to the UNCHR Handbook, and stressed that the Handbook did not deal with the issue of manifestly unfounded procedures. The procedure was not dealt with in the Handbook to any significant degree and the Handbook did not envisage or prescribe any appeal against the refusal to grant refugee status. He pointed out that the Appellant was informed that his application would be dealt with under the Hope Hanlan Procedures and were sent a copy of the Hope Hanlan letter which, of course, included paragraphs 12 to 14 setting out the accelerated procedure.

Mr Callanan contended that the learned trial judge had been correct in having regard to the principles set out in ***O'Keeffe v An Bord Pleanála*** in the context of judicial review. There was ample relevant material before the decision-maker to support the decision. The well established irrationality test should apply; in this context Mr Callanan opened a number of Irish and English authorities including ***Chief Constable of North Wales Police v Evans [1982] 3 All E.R. 141,*** the ***State (Keegan) v Stardust Victims Compensation Tribunal [1986] IR 6421, O'Keeffe v An Bord Pleanála [1993] 1 IR 39, Garda Representative Association v Ireland [1994] 1 ILRM 81*** and ***Radio Limerick One v I.R.T.C. [1997] 2 ILRM 1***. In particular he relied upon the dictum of Murphy J. in this Court in ***Devlin v Minister for Arts, Culture and the Gaeltacht [1999] 1 ILRM 462 at 474***:-

"Judicial review is a valuable legal process. Over a number of years it has been invoked to correct some misunderstanding and occasional abuse in the exercise of statutory powers. The manner in which those powers must be exercised has been stated and restated by the Courts in many cases, a number of which were referred to in the judgment of the learned trial judge. The requirements that statutory powers (among others) even those expressed to be absolute, must be exercised in accordance with the requirements of natural and constitutional justice is well known and generally understood. Likewise, it must be widely appreciated that the only function of the Courts in relation to the exercise of such powers is to review the procedures in which they are exercised. In the absence of express statutory provisions the Courts do not have an appellate role by which they can reverse or review the actual decision taken. In these circumstances, it may be expected that the need to invoke the remedy of judicial review in relation to public officials will diminish significantly. Certainly, it will be regrettable if this procedure, which achieves so much good, was to be invoked unnecessarily or in such a way as to delay or defeat the proper exercise of administrative powers. Public officials may not be permitted to exercise their powers improperly: neither should they be impeded from exercising them properly."

In summary Mr Callanan submitted that the circumstances in which the Courts are prepared to interfere with decisions of administrative bodies on the grounds of irrationality are extremely limited. This had been borne out by many decisions of the High Court and of this Court.

Counsel went on to refer to the English cases opened by Mr Shipsey in which reference had been made to the need for *"anxious scrutiny"* or *"heightened scrutiny"* in

dealing with decisions concerning refugees. He pointed out that in the ***Bugdaycay*** case Lord Bridge of Harwich held as follows:

> *"The question whether an Applicant for leave to enter or remain is or is not a refugee is only one of a multiplicity of questions which immigration officers and officials of the Home Office acting for the Secretary of State must daily determine in dealing with applications for leave to enter or remain in accordance with the rules, as for example, whether an Applicant is a bona fide visitor, student, businessman, dependant etc. Determination of such questions is only open to challenge in the Courts on well known Wednesbury principles. There is no ground for treating the question raised by a claim to refugee status as an exception to this rule."*

Mr Callanan argued that the references that were made in ***Bugdaway*** and ***Cambolat*** to anxious or heightened scrutiny were made in the context of deportation and possible refoulement. This was not the case here.

Counsel also submitted that the Appellant's reference in the questionnaire to *"humiliations"* suffered due to the Appellant's Jewish origin referred quite specifically to his life *"in the USSR"*. There was no allegation at all of persecution under the present Russian regime. In respect of his pre-1989 membership of the Communist party, this was a problem which the Appellant shared with millions of Russians including members of the present Government of that country. He gave no indication as to why he particularly should be persecuted for these political reasons. No detail of specific persecution was given. As regards the allegations concerning his fears of the Chechnyan paramilitaries, there was no indication that the Appellant had ever sought protection from the authorities of the State.

With regard to the second appeal on the oral hearing issue, Mr Callanan submitted that there was no legal authority whatever for the proposition that an oral hearing was

necessary in all appeal cases. In addition, as was noted by Finnegan J. in his judgment, the Appellant had at no stage indicated how he had been prejudiced by the failure to have an oral hearing. The Appellant was entitled to make additional written representations subsequent to the interview but did not do so. Neither in his appeal nor elsewhere had he challenged any factual inaccuracy in the interview notes or the report of Ms Donoghue.

Counsel also raised queries as to the context in which cross-examination could take place at an oral appeal of this type. There were no witnesses as such; the independent information regarding conditions in Russia was in purely written form. The Hope Hanlan Letters themselves envisaged an appeal based on the papers; this type of appeal was commonplace in many contexts in other jurisdictions . In Irish law there was no hard and fast rule as to an oral appeal. In ***Mooney v An Post*** this Court had underlined that the principles of natural and constitutional justice could be complied with within a dismissal context without providing an oral hearing. Counsel submitted that the Appellant's rights to natural and constitutional justice were not infringed by the lack of an oral appeal.

Conclusions

The constitutional and general status of non-nationals was considered by this Court in its judgment in ***In the Matter of Article 26 of the Constitution and Section 5 and Section 10 of the Illegal Immigrants (Trafficking) Bill 1999 (28th August 2000)***. At page 27 it was stated:

> *"'[The] State...must have very wide powers in the interest of the common good to control aliens, their entry into the State, their departure and their activities within the State.' This statement of the law by Costello J. in* ***Pok Sun Shum v Ireland***

[1986] ILRM 593 at 599 *reflects an inherent element of State sovereignty over national territory long recognised in both domestic and international law.*

For this reason, in the sphere of immigration, its restriction or regulation, the non-national or alien constitutes a discrete category of persons whose entry, presence and expulsion from the State may be the subject of legislative and administrative measures which would not, and in many of its aspects, could not, be applied to its citizens.

In ***Osheku v Ireland [1986] IR 733, 746*** *where the Plaintiff failed in his claim that the Aliens Act 1935 was unconstitutional, Gannon J. said:-*

> *'The control of aliens which is the purpose of the Aliens Act 1935 is an aspect of the common good related to the definition, recognition and the protection of the boundaries of the State. That it is in the interest of the common good of a State that it should have control of the entry of aliens, their departure, and their activities and duration of stay within the State is and has been recognised universally and from earliest times. There are fundamental rights of the State itself as well as fundamental rights of the individual citizens, and the protection of the former may involve restrictions in circumstances of necessity on the latter. The integrity of the State constituted as it is of the collective body of its citizens within the national territory must be defended and vindicated by the organs of the State and by the citizen so that there may be true social order within the territory and concord maintained with other Nations in accordance with the objectives declared in the preamble to the Constitution.'*

The statement of Gannon J. has been cited with approval in a number of judgments of this Court including that of Keane J. (as he then was) in ***Laurentiu v Minister for Justice (1999) 4 IR 26*** *where he said:-*

> *'It is clear that, altogether apart from the provisions of the 1935 Act and any preceding legislation, Saorstat Eireann as a sovereign State enjoyed the power to expel or deport aliens from the State for the reasons set out in the judgment in Gannon J. in* ***Osheku v Ireland****. It is, of course, the case that in modern times, both here and in other common law jurisdictions, the exercise of the power is regulated by Statute, but that does not affect the general principle that the right to expel or deport aliens inheres in the State by virtue of its nature and not because it has been conferred on particular organs of the State by statute.'"*

This *"inherent element of State sovereignty over national territory"* should, however, be held in balance against the domestic and international obligations which the State has accepted in its role as a signatory to the Geneva Convention. The international community has accepted that the problem of refugees is a world-wide one. The obligation to provide a system of fair procedures to identify and protect refugees reaching our shores is one which we share both with other members of the European Union and with the wider international community. This obligation has now been recognised in domestic law by the enactment and bringing into operation of the Refugee Act 1996. Prior to the coming into force of the 1996 Act, during the period relevant to the Appellant in the present case, that obligation was met by the procedures agreed between this State and the United Nations High Commissioner for Refugees in first the Von Arnim letter and subsequently the Hope Hanlan Letter. In general

terms I would accept the submission of Counsel for the Appellant that the State is obliged under international law to ensure that refugees presenting themselves in the State seeking protection are identified and their status recognised. It must, however, also be accepted that, as agreed in the Hope Hanlan Letter, the State is justified in operating an accelerated procedure where claims to refugee status appear on proper investigation to be manifestly unfounded.

The proceedings brought by the Appellant are based on the facts of his claim to refugee status and on the operation of this State's procedures to assess that claim. They are nevertheless judicial review proceedings, as provided by Section 5 of the Act of 2000. They share the characteristics of all judicial review proceedings. Judicial review is concerned not with the decision, but with the decision-making process. As was stated by Finlay C.J. in ***O'Keeffe v An Bord Pleanála [1993] 1 IR 39, 71***:

> *"The Court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that*
>
> *(a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or*
>
> *(b) that it is satisfied that the case against the decision made by the authority was much stronger than the case for it."*

The Appellant in his challenges to the decisions and recommendations made in the course of assessment of his refugee status claims that those decisions and recommendations were unreasonable or irrational and thus *ultra vires*. The test of unreasonableness is set out in the familiar passage from the judgment of Henchy J. in the ***State (Keegan) v The Stardust Victims Compensation Tribunal [1986] IR 642***:

"...in most cases a decision falls to be quashed for unreasonableness, not because of the extent to which it has departed from accepted moral standards (or positive morality) but because it is indefensible for being in the teeth of plain reason and common sense. I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted ultra vires; for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."

This general approach to judicial review is echoed in the judgment of Kelly J. in the High Court in ***Flood v Garda Compensation Complaints Board [1997] 2 IR 321 at 346***:-

1 *"Even if this Court would have reached a conclusion different from that of the Respondent, it is not entitled on judicial review to substitute its view in that regard for the one formed by the entity charged by statute with forming the appropriate opinion. This limitation on the power of judicial review must be borne in mind so as to ensure that this Court does not trespass on matters in respect of which it has neither competence nor jurisdiction. I would not be justified in interfering with the decision of the Respondent merely on the grounds that on the facts presented to us, I would have reached different conclusions."*

I am therefore satisfied that in the instant case the learned trial judge was correct in applying these well established standards and parameters of judicial review in his consideration of the decision-making procedures of the Respondent.

Should he, in addition, have applied an additional element of *"anxious scrutiny"* or *"heightened scrutiny"* as required in the English cases opened to this Court by Mr Shipsey? I accept that the outcome of the Respondents' decisions, and of this Court's decision, is of crucial importance to the Appellant's future. It is true that no decision has yet been made by the first named Respondent to make a deportation order in respect of the Appellant. It is also true that, pursuant to Section 5 of the 1996 Act, the first-named Respondent must assure himself that the deportation of the Appellant would not amount to refoulement. The determination that his case is manifestly unfounded is, however, likely to be influential in regard to further decisions in the Appellant's case.

The outcome of judicial review proceedings in many cases and in many contexts is of crucial importance to Applicants. The Court is committed to submitting the decision-making process in all cases to careful scrutiny. In the instant case the learned High Court judge delivered two lengthy, careful and detailed reserved judgments. It cannot be argued that he did not subject the Appellant's claim to the most careful scrutiny.

I have a certain difficulty in the interpretation of the phrases used by the English Courts in the cases to which we have been referred - *"anxious scrutiny"*, - *"heightened scrutiny"*, and similar phrases. From a humane point of view it is clear that any Court will most carefully consider a case where basic human rights are in question. But from the point of view of the law, how does one define the difference between, say, *"scrutiny"*, *"careful scrutiny"*, *"heightened scrutiny*", or *"anxious scrutiny"*? Can it mean than in a case where the decision-making process is subject to *"anxious scrutiny"* the standard of unreasonableness/irrationality is to be lowered? Surely not. Yet it is otherwise difficult to elucidate the legal significance of the phrase. It must be said that this aspect of the case was not fully argued before this Court so that my remarks in this context are merely a preliminary impression. Further consideration must await a fuller argument in a future case. For the

present I consider that it is sufficient that the Applicant's judicial review application receive careful scrutiny under the established standards relating to unreasonableness.

Counsel for the Appellant has made a number of criticisms of the decision-making process. Some of these I accept. It seems to me that both in Ms Donoghue's interview of the Applicant and in her report too great attention was paid, and too much emphasis placed, on his sojourn in South Africa and his reasons for leaving that jurisdiction. The question for the assessor and for the first named Respondent was whether the Applicant had a well founded fear for Convention reasons of returning to his own country. Therefore the essential matter to be investigated was why Mr Z. left Russia and why he feared to return there. His reasons for leaving South Africa could be relevant only to his credibility, and there is no suggestion that the reasons he gave were other than credible, even if to some eyes they might not appear creditable. He had no right to remain in South Africa, where he was an alien with only a visitor's visa. His reasons for leaving there are irrelevant to his application for refugee status here.

I would not, however, accept the criticism that Ms O'Donoghue failed in her duty because she did not bring out further information in regard to the question of Mr Z.'s Jewish background or his membership of a Communist Party. The burden of proof of establishing refugee status is on the Applicant and it was open to Mr Z. whether at his interview, by additional submissions after his interview, or in submissions at the time of his appeal, to bring forward detailed evidence of his persecution on either of these (clearly Convention) grounds. He did not do so and in my view this largely justifies the criticism of his claim made in this Court by Mr Callanan. To an extent his difficulties in Chechnya may be ascribed to the fortunes of war rather than to persecution, or to failure of protection by his own State. Again he gave no account of seeking the protection of the authorities from the Chechnyan paramilitaries once he had escaped from their clutches.

I should here refer to Mr Shipsey's argument that in these cases there is a *"shared burden of proof"* between the Applicant for refugee status and the assessor. He referred to paragraph 196 of the UNHCR Handbook:-

> *"196. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an 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 a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the Applicant, the duties 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..."*

This paragraph must, however, be read in conjunction with the previous paragraph:-

> *"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 statement."*

It is, I understand, the practice of those involved in assessing applications for refugee status on behalf of the first named Respondent to obtain in each case independent evidence of matters relevant to the Appellant's evidence of persecution in his or her own country. From the exhibits before the Court it is clear that such was done in Mr Z.'s case. This type of

investigation would, I consider, be a major part of the duty to ascertain and evaluate which is referred to in paragraph 196. From the available information exhibited it is clear, for example, that anti-Semitism is still common in Russia. This would go to proving the objective element in the assessment. This information cannot, however, replace the need for the provision of factual evidence by the Appellant of incidents of actual anti-Semitic persecution of himself which occurred subsequent to the collapse of the U.S.S.R. The burden of proof of establishing that he personally has a well-founded fear of persecution rests on him. This is the subjective element in the definition and cannot be provided by the assessor.

Ms Donoghue in her report on the Appellant's case found that his claim was manifestly unfounded as falling under paragraph 14(a), (b) and (c) of the Hope Hanlan Letter. Mr Hughes in his decision came to the same conclusion, and their conclusions were upheld by Mr Nicholson on appeal. Were any or all of these decisions unreasonable/irrational in the sense used by Henchy J. in the ***Stardust*** case or Finlay C.J. in the ***O'Keeffe*** case? Paragraph 14 of the Hope Hanlan Letter where relevant provides as follows:

> *"The grounds on which it may be determined that an application is manifestly unfounded are as follows:*
>
> *(a) it does not show on its fact any grounds for the contention that the Applicant is a refugee;*
>
> *(b) the Applicant gave clearly insufficient details or evidence to substantiate the application;*
>
> *(c) the Applicant's reason for leaving and or not returning to his or her country of nationality does not relate to a fear of persecution."*

As far as paragraph 14(a) is concerned it seems to me difficult to accept on the material that was before the decision-makers that it was reasonable in this sense, or indeed in any sense, to conclude that the Applicant's application did not show on its face any grounds for the contention that the Applicant is a refugee. As far as paragraphs 14(b) and (c) are concerned, however, it appears to me that there was sufficient material, or lack of material, before the decision-makers to render the decisions reasonable, and therefore *intra vires*.

I would accordingly dismiss the Applicant's first appeal.

I now turn to the second appeal. Here I would accept the submission on behalf of the Respondents that there is no authority to establish that an oral hearing on appeal is necessary in all cases. The Appellant is not in the position of an accused person facing prosecution. There are no witnesses against him. He is not in a position to cross-examine the assessors of his claim and it is difficult to see how in these circumstances a right to cross-examine is relevant. He may certainly wish to expand on either his own evidence or independent evidence concerning the conditions prevailing in his country of origin but it is open to him to provide this information in writing. His appeal was drafted on his own instructions by his solicitor and did not challenge the factual matters set out in the papers provided to him.

Hogan and Morgan in Administrative Law in Ireland (3rd edition) at page 556 discuss the right to an oral hearing, the right to summon witnesses and the right to cross-examine. They state:

> *"Plainly whilst these issues may need to be considered independently, there is often a substantial connection between them. In any case, with each of them, as with other aspects of the audi alteram partem rule it may be misleading to speak of a 'right' since in such an amorphous area, entitlement to the advantage sought will depend on the circumstances of the case. On the question of whether they apply, de Smith states:*

'A fair 'hearing' does not necessarily mean that there must be an opportunity to be heard orally. In some situations it is sufficient if written representations are considered.'"

The authors draw attention to the comments of Keane J. (as he then was) in ***The State (Williams) v Army Pension Board [1981] ILRM 379 at 382***:-

'Whether [there must be an oral hearing] in any particular case must depend on the circumstances of that case...the application in the present case was capable of being dealt with fairly...in the manner actually adopted by [the Board]'."

It should be noted that in these references the authors are dealing with situations where there is no oral hearing even at first instance. Here there has already been an oral hearing at first instance.

The Hope Hanlan Letter itself deals with the matter of appeals in the context of the accelerated procedure and provides for an appeal in writing. An oral appeal is, therefore, not considered necessary in the system set up by agreement between the UNHCR and the first named respondent.

The learned High Court judge held that the absence of provision for an oral hearing of the appeal from a decision that an application for refugee status is manifestly unfounded did not infringe the right of an Applicant for refugee status to natural and constitutional justice. In this he was, in my view, correct.

I would also dismiss the Appellant's second appeal.

THE SUPREME COURT

JUDICIAL REVIEW

308/01, 310/01

Keane, C.J.
Denham, J.
Murphy, J.
Murray, J.
McGuinness J.

BETWEEN

Z.

APPLICANT/APPELLANT

AND

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

RESPONDENTS

Concur, on 1st March, 2002 by Denham J.

I am in agreement with the judgment to be delivered by McGuinness J.

McGuinness J. has indicated that the issue of the test to be applied – often referred to as the test in O'Keefe v. An Bord Pleanála [1993] 1 IR 37 – was not fully argued and that her remarks are merely a preliminary impression; that further consideration must await a fuller argument in a future case. I too await a fuller argument on this issue in a future case.