**Judgment Title:** Nyembo -v- The **Refugee** Appeals Tribunal & anor

**Neutral Citation:** [2007] IESC 25

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**Court:** Supreme Court

**Composition of Court:** Denham J., Fennelly J., Finnegan J.

**Judgment by:** Denham J.

**Status of Judgment:** Approved

**THE SUPREME COURT**

**Appeal No. 395/2006**

**Denham J.**
**Fennelly J.**
**Finnegan J.**

**BETWEEN/**

**RICHARD NYEMBO**

**APPLICANT/APPELLANT**

**AND**

**THE REFUGEE APPEALS TRIBUNAL AND JAMES NICHOLSON**

**RESPONDENTS**

**Judgment delivered the 19th day of June, 2007 by Denham J.**

1. This is an appeal by Richard Nyembo, the applicant/appellant, hereinafter referred to as 'the applicant', from the decision of the High Court (Feeney J.), delivered on the 6th October, 2006, which ordered that two issues of law should be determined as preliminary issues. These were stated as:-

> "1. Whether as a matter of law statistical evidence on the outcome of decisions of the second respondent as a member of the **Refugee** Appeals Tribunal is admissible in evidence.
>
> 2. Whether as a matter of law statistics and/or evidence relating to the outcomes or results of decisions made by the**Refugee** Appeals Tribunal can without more constitute a basis for a finding of actual and/or apparent bias."

The learned trial judge further ordered that the agreed facts upon which to base the trial of the preliminary issues be:

> "The second named Respondent has not during the period from the 1st day of January 2002 to the 30th day of June 2004 set aside any recommendation of the **Refugee**Applications Commissioner and during that period he heard hundreds of Appeals"

2. Trial of a preliminary issue was requested in the High Court by the respondents in judicial review proceedings. On 8th March, 2006 the High Court (Butler J.) granted leave for judicial review, after a two day hearing. Having explained that he generally did not give a written judgment when he is granting leave, the learned High Court judge stated:-

> "Mr. Nyembo is from the Democratic Republic of Congo. He now lives in Cork and arrived here on the 23rd April, 2003. In a nutshell, he alleges serious risk of injury or death if he is returned to the Democratic Republic of Congo. He appealed the ORAC decision in September 2004 and was notified that his appeal was due to be heard by Mr Jim Nicholson. He was advised by Mr Colm Stanley, his Solicitor, that he had never known a positive decision from that particular member. There is uncontested evidence from a number of solicitors that they feel obliged to advise appellants that there is no prospect of success before this particular member. The reliefs sought are listed in the Notice of Motion.
>
> Mr MacGrath S.C. convincingly argued that statistics alone are not enough to prove bias and he put forward strong authorities in that regard. But the situation here is unique in that in any cases involving an oral hearing before the**Refugee** Appeals Tribunal, no Applicant has even succeeded before this Tribunal Member. Mr MacGrath was correct in stating that this case goes beyond statistical analysis and in relation to judicial decisions it is hoped that one would never reach a situation where legal advisors feel that they have to advise their clients that there is no possibility of success before a particular Judge. I note the argument in relation to statistics and I am not granting leave on that point. I am therefore excluding all grounds in relation to statistics and I am granting leave to Nyembo on the following grounds:"

3. In relation to the relief sought, the High Court limited the reliefs to those set out in paragraphs 4 b, c, f and g, being:

> (b) In the alternative to (a), an Order of Prohibition restraining the second named respondent from hearing the applicant's appeal to the first named respondent.
>
> (c) Further to (b), and in the alternative to (a), an Order of Mandamus requiring the first named Respondent to re-assign the applicant's appeal to a Tribunal member other than the second named respondent.
>
> (f) Such further or other Order as to this Honourable Court shall seem meet.
>
> (g) An Order providing for costs.

Also, the grounds were limited to those set out in paragraph 5 a, d, e, f, g and m (sub paragraph a only). This was essentially the evidence proposed by the applicant.

4. The grounds upon which leave was granted were as follows:-

(a) Statistics available to the applicant, as compiled by one of the main legal practitioners in the area of **refugee** law, lead to the conclusion that there is no prospect of success for an appellant appearing by way of oral hearing before the second named respondent.

…..

(d) The applicant has been advised by legal practitioners working extensively in the area of **refugee** law that, to their knowledge, the second named respondent has never found in favour of an appellant in an oral hearing, despite having determined hundreds of cases.

(e) By reason of (a) … and (d), the applicant believes that the second named respondent is biased and predisposed against appellants who appear before him by way of oral hearing, and the applicant believes that he will not receive a fair hearing from the second named respondent and that, by reason of the second named respondent's bias, he has no prospect of success if his appeal is heard and determined by the second named respondent.

(f) By reason of (a) … and (d), the applicant has objective and reasonable grounds for his belief that the second named respondent is biased and predisposed against appellants who appear before him in an oral hearing.

(g) By reason of (a), … and (d), there is strong evidence that the second named respondent is biased and predisposed against appellants who appear before him in an oral hearing.

(m) The applicant has a reasonable fear that his hearing will not be heard in a fair and/or unbiased manner. Such reasonable fear of bias is based, *inter alia*, on the following reasons:

(a) the applicant is aware that in the last 57 hearings presided over by the second named respondent, in which the **Refugee** Legal Service in Cork have acted, the second named respondent gave no decisions in favour of appellants.

5. The applicant has appealed from the High Court order permitting that a preliminary issue of law, as moved by the respondents, together with an additional issue ordered by the learned High Court judge, be heard at a prior hearing.

In essence the applicant submits that this is not an appropriate case for the trial of preliminary issues as there are contested facts.

6. On behalf of the applicant it was submitted that:-

(i) the conceded facts by the respondents fell short of the case mounted by the applicant - their concession failed to take account of the applicant's evidence and belief that the second named respondent's decision-making is at great variance to the Tribunal generally; that the second named respondent has determined in the region of 900 to 1,000 cases in the years 2002, 2003 and 2004; and, that solicitors who are experienced in the area of **refugee** law felt it necessary to warn clients about the second named respondent, and one solicitor felt compelled to advise clients that

they had no prospect of success in front of the second named respondent; and that the applicants were informed of these matters by their solicitors;

(ii) the conduct of the respondents in the proceedings has added to the applicant's belief of bias on the part of the second named respondent, such that it was necessary to obtain discovery in respect of various averments made on affidavit on behalf of the respondents;

(iii) the trial of a preliminary issue would add a cumbersome and unnecessary layer to the proceedings, there having already been a two-day leave application before Butler J., and it was appropriate to proceed to the substantive hearing;

(iv) it was not accepted that discovery would cause large costs and delay, as alleged by the respondents - no particulars or substantiation of this allegation was provided by the respondents.

7. In the Statement of Opposition filed on behalf of the respondents it is stated, *inter alia*,

> "8. The record of the second named respondent is not at variance with other members of the first named respondent."

Thus the issues were knit, and the conflicting facts exposed. However, there is no evidence in the affidavits filed on behalf of the respondents vindicating the assertion that the record of the second named respondent is not at variance with other members of the first named respondent. In essence, there is a stark conflict of fact.

8. The law is well established as to the foundation upon which a preliminary issue may be heard. Order 25 of the Rules of the Superior Courts makes provision for the determination of a preliminary point of law raised on the pleadings. Order 34 r.2 makes provision for the determination of a question of law in a special case. The Order of the High Court in this case was made on the basis of Order 34.2. It may be that the procedure under Order 25 would be the more appropriate. However, I make no findings or decision on the rules of procedure in this case. I note the analysis in *Civil Procedure in the Superior Courts* (2nd Edit) by Delany and McGrath, at p.505, paragraph 19-01:

> "Issues of law may arise in pleadings which lend themselves to being determined by means of the trial of a point of law as a preliminary issue. Provision for the determination of a point of law as a preliminary issue is made in two separate orders. Order 25, rule 1 provides that, by the consent of the parties, or by order of the court, on the application of either party, any point of law may be set down for hearing and disposed of at any time before the trial. Order 25, rule 2 goes on to provide that if in the opinion of the court, the decision on this point substantially disposes of the action, or any distinct cause of action, ground of defence, counterclaim or reply, the court may dismiss the claim or make such other order as may be just. In addition, Order 34, rule 2 provides that if it appears to the court that any question of law arises which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, it may direct such question of law to be raised for the opinion of the court, either by special case or in such other manner as the court may deem expedient and such further proceedings as the decision of such question of law may render unnecessary can be stayed. As Lavery J. stated in *McDonald v Bord na gCon* these two rules 'cover the same ground'. In his view the only relevant difference between them is that Order 34 rule 2 expressly provides that it should appear to the judge to be convenient to have the particular issue decided before any evidence is

given or any question of fact tried, whereas Order 25, rule 2 is more general in its terms."

9. At the heart of this case is the circumstance that there are facts in dispute. There is no agreement on the facts - even for the determining of the preliminary issues. There is a wealth of precedent on such a situation. In *Kilty v. Hayden* [1969] 1 I.R. 261 at p.265 O'Dálaigh C.J. stated:

> "Turning now to the practice, I have found only one example of a case - an English case - where an order was made under Order 25 where the facts, in relation to which the point of law was taken, were in dispute; but the Court of Appeal (Lord Reading C.J. and Phillimore L.J. and Lush J.) for this very reason discharged the order: *Western Steamship Co Ltd v. Amaral Sutherland & Co Ltd*. Wylie (Judicature Acts - 1905) in his notes on the corresponding old rule (Order XXV, r.2) states:- 'For the purpose of the argument the facts will be taken as admitted'. He refers at p.433 to *O'Brien v. Tyssen* where the point of law raised by the defendant in his defence was, by consent of both parties, set down for hearing; and Bacon V.C., in the course of his judgment at pp.376-7 of the report makes it quite clear it was his duty in deciding the point of law to take it that there was a secret trust as alleged by the plaintiff in her statement of claim. As examples of the form of pleading raising a point of law it may be noted that Wylie refers at p.432 to Appendix E, Section III, Nos. 1 and 2. The heading to Section III is:- 'Defence including an objection in point of law.' The examples of objection in point of law given are:- '(i) 'The defendant will object that the guarantee discloses a past consideration on the face of it'; and (ii) 'The defendant will object that the special damage stated is not sufficient in point of law to sustain the action.'
>
> I am satisfied that the procedure laid down under Order 25, r.1, corresponds to the old hearing on demurrer, and may not be availed of where the facts giving rise to the point of law are in dispute between the parties. For the reasons stated I would allow this appeal."

In *Tara Mines v. Minister for Industry and Commerce* [1975] IR 242, O'Higgins C.J. stated, at p.257:

> "I am not satisfied that it would be possible to answer all of these questions without some additional factual information as to the significance and possible effect of the terms and conditions in dispute between the parties. Order 34. r. 2, can only apply to questions of pure law where no evidence is needed and no further information is required. For example, in dealing with these questions, a judge may find it necessary for his decision to get evidence as to matters such as the share capital of the plaintiff company, the terms of its articles of association, and the nature of the clauses that are normally found in commercial agreements for the protection of minority interests. Once this is so, r.2 of Order 34 cannot apply, for such are matters of fact. In my view, therefore, the defendant's application cannot succeed and this appeal should be dismissed."

In *B.T.F. v. Director of Public Prosecutions* [2005] ILRM 367, this Court overturned a High Court decision to concede to an application by the respondent to try a preliminary issue. Hardiman J. stated:

> "It is often a difficult and delicate decision as to whether to try a particular issue as a preliminary matter. In a case where a point is raised which in and of itself and without regard to anything else may terminate the whole proceedings, clearly a strong case can be made for its trial as a preliminary issue. The classic example is where the statute of limitations is pleaded. In other cases, however, the position may be much less clear."

That Court endorsed the principles laid down in *Tara Mines* and in*Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd*. [1961] Ch. 375, in which Lord Evershed M.R. stated (at 396):

> "I repeat what I said at the beginning, that the course which this matter has taken emphasises, as clearly as any case in my experience has emphasised, the extreme unwisdom - save in very exceptional cases - of adopting this procedure of preliminary issues. My experience has taught me (and this case emphasises the teaching) that the shortest cut so attempted turns out to be the longest way round."

I would endorse and apply these principles to this case.

10. In this case these are contested facts which are relevant to the issues of law. There is no agreement on the facts. Nor are the facts conceded for the purpose of the preliminary issues. In such circumstances it is not appropriate, practical or convenient to have preliminary issues of law determined. It is well settled in law that where there are disputed facts an application for the hearing of a preliminary issue cannot succeed. In all the circumstances, also, I would merely reflect that, as Lord Evershed M.R. pointed out, the attempted short cut turns out to be the longest way. I would allow the appeal.

**11. Conclusion**

Accordingly, I would allow the appeal and remit the case to the High Court.