Neutral Citation: [2015] IEHC 364

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 729 JR]

BETWEEN

S. F. A. (AN INFANT SUING BY HIS MOTHER AND NEXT FRIEND A. A.) & A. A.

APPLICANTS

AND

MINISTER FOR JUSTICE AND EQUALITY, THE REFUGEE APPLICATIONS COMMISSIONER, IRELAND & THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the day of 16th day of June, 2015.

Introduction

1. By notice of motion of 3rd October, 2011, the applicants sought two orders of certiorari in respect of separate decisions made by the second named respondent on their asylum claims.

2. In a recent decision of this court entitled *P.D. v. The Minister for Justice & Law Reform, The Refugee Applications Commissioner, Ireland & The Attorney General* [2015] I.E.H.C. 111 principles governing the appropriateness of judicial review of decisions of the Refugee Applications Commissioner were stated as follows, at para. 39 of the judgment:-

> "1. The High Court is entitled to grant *certiorari* or other public law remedy in respect of a decision of the Refugee Applications Commissioner where an error as to jurisdiction is identified.
>
> 2. The significance of the error will determine whether the court may exercise its discretion to grant judicial review.
>
> 3. Not all errors as to jurisdiction attract judicial review.
>
> 4. The court must carefully consider the nature of the error in deciding whether the interests of justice require the first instance decision to be quashed and taken again rather than the error being the subject of an appeal to the Refugee Appeals Tribunal.
>
> 5. The court should bear in mind the extent of the Refugee Appeals Tribunal's capacity to provide a remedy and reverse the error (The nature of appeals to the R.A.T. has recently been fully described by Charleton J. in the Supreme Court in M.A.R.A. [Nigeria (Infant) v. The Minister for Justice & Equality & Ireland [[2014] I.E.S.C. 71]).".

Those principles derive in part from a consideration of the dicta of Denham J. (as she then was) in *Stefan v. The Minister for Justice, Equality & Law Reform* [2001] 4 I.R. 203. The learned judge, having reviewed the authorities on whether judicial review should lie in circumstances where an administrative appeal was available, said at p. 217:-

> "Certiorari may be granted where the decision maker acted in breach of fair procedures. Once it is determined that an order of *certiorari* may be granted, the court retains a discretion in all the circumstances of the case as to whether an order of *certiorari* should issue. In considering all the circumstances, matters including the existence of an alternative remedy, the conduct of the applicant, the merits of the application, the consequences to the applicant if an order of *certiorari* is not granted and the degree of fairness of the procedures, should be weighed by the court in determining whether *certiorari* is the appropriate remedy to attain a just result."

3. In *P.D. (supra)* I determined that the comprehensive failure of the R.A.C. to identify, much less assess, a very significant part of the applicant's claim for asylum was sufficient error to attract *certiorari*.

4. Having regard to the decision of this court in *P.D.* and the line of authority on which it is based, an applicant seeking to review a decision of the R.A.C. must identify an error as to jurisdiction (assuming no reliance on error on the face of the record) though this alone will not suffice to attract *certiorari*.

5. Decisions of the Supreme Court and of the High Court assist with the somewhat vexed question as to what is an error as to jurisdiction.

6. In *Killeen v. D.P.P.* [1997] I.R. 218 a District Judge had decided that a defect in a warrant had precluded him from sending accused persons forward for trial. The Supreme Court held that his understanding of the law was erroneous and that his order discharging the accused persons was made without jurisdiction.

7. Keane J. made reference to the decision in *R (Martin) v. Mahony* [1910] 2 I.R. 695 and in particular to the judgment of O'Brien L.C.J.. That case concerned an application for an order of *certiorari* quashing a conviction on a charge of operating a betting house. The parties in that case agreed that there was insufficient evidence to support the conviction. Interestingly, the dispute in the case is similar to the legal dispute which has arisen in these proceedings. O'Brien L.C.J., said, at p. 704:-

> "In the first instance, I am very anxious to point out what the question before us is, and what it is not. The controversy before us does not involve the question whether there is any remedy if a magisterial tribunal makes a mistake; that is not the question. The question here is whether the proper remedy is sought, and not whether there is no remedy. In this case it was open to the defendant in the summons to appeal to the Recorder of Dublin, before whom the whole controversy on

> the law and the merits could be exhaustively treated. It was competent also for the accused to get a case stated for High Court, where the question involved could be authoritatively determined…This is an elementary matter which cannot be gainsaid. But the question here is whether the defendant, having omitted to pursue a course that was obvious and patent, can have recourse to another method of challenging an adverse decision; whether, in fact, he can challenge by way of *certiorari* what it was most undoubtedly, indeed *ex concessis*, open to him to challenge by way of appeal or by case stated. If an accused person departs from the beaten path, the *via trita* of our law, and finds himself impeded, fails to attain his object by reason of his having adopted an abnormal course, he must blame himself and not the law; indeed, in this particular instance, there is the less excuse for going wrong, as, not withstanding the warning given by the difference of opinion between the Court of Queen's Bench and the Court of Exchequer, the authorised, the accustomed remedy for the detection and correction of error, if it existed, was not pursued. Unacquaintance with legal methods cannot help or excuse the errors of litigants. If we were to allow such an excuse to prevail, we should ignore one of the most familiar maxims of the law and create a welter of confusion."

8. From this passage one can see the historic roots of the modern Irish jurisprudence which promotes statutory appeals and limits resort to judicial review where such appeals are available.

9. O'Brien L.C.J. went on and said:-

> "What, then, is the question we have to determine and what is the law? The main, the all-important, question we have to determine is whether, in a case of a criminal or penal nature within the summary jurisdiction of magistrates, mere insufficiency of evidence to warrant a conviction or order destroys *jurisdiction*."

10. Noting that the argument in favour of *certiorari* was that the evidence before the magistrate did not authorise conviction had the affect of ousting or destroying jurisdiction, the learned judge said:-

> "Want of jurisdiction is one thing; *error* on the face of the conviction, where the evidence is incorporated, is another.

11. However, the particular passage referred to by Keane J. is as follows at p. 707 of The *King (Martin) v. Mahony* and at p. 226 of *Killeen*:-

> "To grant *certiorari* merely on the ground of *want of jurisdiction*, because there was no evidence to warrant a conviction, confounds…want of jurisdiction with error in the exercise of it. The contention that mere want of evidence to authorise a conviction creates a cesser of jurisdiction, involves, in my opinion, the unsustainable proposition that a magistrate has… jurisdiction only to go right; and that, though he had jurisdiction to enter upon an inquiry, mere miscarriage in drawing an unwarrantable conclusion from the evidence, such as it was, makes the magistrate act without and in excess of jurisdiction."

12. O'Brien L.C.J. usefully, in my opinion, makes further comment on the difference between "want of jurisdiction" which would attract *certiorari* and error in the exercise of jurisdiction, which would not. He said at p. 708:-

> "As to the expression 'want of jurisdiction', I might refer to R v. Bradley (1). The facts and the precise character of the case were, no doubt, different from those of the case before us; but in my opinion the judgment of Cave, J., accurately illustrates what is meant by a clause taking away certiorari, and by the expressions 'want of jurisdiction', 'excess of jurisdiction'. In *R v. Bradley* (1) there was a summons under the Highway Act of 1864. The defendant was convicted. Neither summons nor conviction stated that the defendant had 'encroached' (the word used in the statute) on the highway. As the circumstances showed an 'encroachment' in fact, the Court held that this was a mere objection to the form of the summons and conviction, and that, *certiorari* being taken away, objections on the ground of form should not be allowed to prevail; and, as to the meaning of the expression 'want of jurisdiction' or 'excessive jurisdiction,' Mr. Justice Cave said:-
>
> > 'Excess of jurisdiction may either exist at the time when the summons comes on to be heard, and in that case there is no jurisdiction to hear the case at all, or it may in some cases crop up in the course of the hearing, as, for example, where the question of title to land comes into question, and in such a case the jurisdiction of the magistrate is ousted. Whenever either of those two things happens, if the magistrates proceed to here and determine the case, their decision must be brought up by *certiorari* for the purpose of being quashed as being in excess of jurisdiction…If the magistrates have no jurisdiction, they cannot proceed with the case, either to convict or to acquit; they have no jurisdiction to do either; they must stop short. That is the meaning of the expression 'want of jurisdiction' and that is what is meant by saying that magistrates have exceeded their jurisdiction.'
>
> Later on in his judgment he said:-
>
> > 'Where a magistrate decides one way when he ought to have decided another way, that is not absence of jurisdiction. Absence of jurisdiction only arises when he has no power to decide in the matter at all'.
>
> It is conceded here in the case before us that the magistrate was competent to deal with the case by acquitting. It is manifest, in my opinion that there was not any ouster of jurisdiction. Mr. Mahony was at no time bound to stay his hand. Mr. Justice Cave concluded his judgment in *Bradley's case* (1) by holding that effect could not be given to the objections to mere form, *certiorari* being taken away, and that the conviction could not be interfered with by the court, as there was no want of jurisdiction established to exist in the case. To the same effect is the expression of opinion of Mr. Justice Cave in *ex parte Wake (2)* where he said 'if jurisdiction is not altogether taken away, there is no want of jurisdiction'."

13. In *Killeen* and in *The King (Martin) v. Mahony* (supra) the judges at the beginning and at the end of the twentieth century saw distinction between errors which have the effect of destroying the power to determine a matter and errors of an evaluative nature. The former errors will attract certiorari and the latter will generally not. This distinction still applies.

14. Keane J., in *Killeen* seems to suggest that not every error of law will be an error as to jurisdiction attracting *certiorari*. He said, at p. 227:-

> "It may be that an error of law committed by a tribunal acting within its jurisdiction is not capable of being set aside on *certiorari:* see *The State (Davidson) v Farrell* [1960] I.R. 438. It is otherwise where the error of law has as its

consequence the making of an order which the tribunal had no jurisdiction to make. In *The State (Holland) v. Kennedy* [1977] I.R. 193, a question arose as to the validity of a certificate by a District Judge that a young person was of such an 'unruly character' as to preclude his or her detention in an approved place of detention. This Court held that such a certificate could not be based, as it had been in the instant case, on a single, admittedly serious, assault. The further question then arose as to whether this was an error within jurisdiction, as to which Henchy J. said at p. 201:-

> 'Having considered the authorities, I am satisfied that this error was not made within jurisdiction…it does not necessarily follow that a court or a tribunal…which commences a hearing within jurisdiction will be treated as continuing to act within jurisdiction. For any one of a number of reasons it may exceed jurisdiction and thereby make its decisions liable to be quashed on *certiorari*. For instance, it may fall into an unconstitutionality, or it may breach the requirements of natural justice, or it may fail to stay within the bounds of the jurisdiction conferred on it by statute. It is an error of the latter kind that prevents the impugned order in this case from being held to have been made within jurisdiction.'."

15. It seems to me that Henchy J. was saying that examining the effect of the error assists with the question as to whether it is an error as to jurisdiction which will attract a remedy.

16. Keane J. also finds assistance with the question as to what is an error as to jurisdiction in a decision of Reed L.J. in *Anismimic Ltd v. Foreign Comp Comm* [1969] 2 A.C. 147 at p. 171:-

> "But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with requirements for natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide the question wrongly as is to decide it rightly."

17. The word "jurisdiction" is a lawyer's word. It refers to a legal power to act. Sometimes errors will mean that the decision maker never had the power to act (because a condition precedent for the exercise of the power is absent). Other times, the error will cause the decision maker to loose the power to act. Both are errors as to jurisdiction and the distinction seems to be of little importance in modern times. Other errors arise because of a flawed evaluative process which generally are not considered to be errors as to jurisdiction.

18. It is important to consider the effect of the error before deciding whether *certiorari* should issue.

19. Decisions taken based on inadequate, as opposed to non application, of the law fall into a grey area. For example, a rule might say that a decision maker must consider the personal circumstances of an applicant. If some but not all of the personal circumstances have been considered, has jurisdiction been ousted? The answer must depend on what was omitted and on what the consequence of the omission was. The consequences of the mistake will assist with deciding whether the error destroys jurisdiction. Attempts to set a definition of what error will destroy jurisdiction is a fruitless exercise as the facts and circumstances of the case including the effects of the error will determine this question.

20. This theme was addressed by Hogan J. in *C. E. v. Minister for Justice, Equality & Law Reform and Ors.*, [2012] I.E.H.C. 3 when he said :-

> "28. In the context of asylum matters, it is decidedly preferable that an applicant should exhaust his or her right of appeal to the Tribunal unless there are compelling reasons for suggesting that this would otherwise be unjust or that the error could not be satisfactorily corrected on appeal: see, e.g., the comments of Hedigan J. in *B.N.N. v. Minister for Justice, Equality and Law Reform* [2008] IEHC 308, [2009] 1 I.R. 719 at 732-735. It is, after all, the function of the Tribunal to address the errors (if such there be) disclosed by the first instance decision. Of course, many of these errors can be characterised as jurisdictional, but in truth they often register in the middle of a spectrum which ranges from a pure appeal point on the one hand to that to which goes to the very essence of the jurisdiction on the other. Save where the error registers at the upper end of this spectrum or where the facts disclose a clear injustice, the judicial preference for exhaustion of administrative remedies tends to prevail, again for all the reasons set out by Hedigan J. in *B.N.N.* and the extensive authorities quoted therein.
>
> 29. The error here falls into the middle range. It is quite far removed from that disclosed in *Stefan v. Minister for Justice* [2001] 4 I.R. 203 where material information had been withheld from the Commission member by reason of a translation error. This omission was found to go to the very essence of a fair adjudication before the Commission and, further, that it was one which could not be safely cured by means of an administrative appeal.
>
> 30. The present case is somewhat different, given that the error in question - non-compliance with the requirements of s. 13(10) of the 1996 Act - is a technical one. It would be unrealistic to say that the error goes to the very heart of the Tribunal's jurisdiction, even if it could otherwise be characterised as a jurisdictional error in the sense understood by the modern doctrine of jurisdictional error which has evolved since the seminal decision of the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147."

21. The modern doctrine of jurisdicitonal error referred to by Hogan J posits that the decision in *Anisminic* fundamentally altered the rules in this area by deciding that all errors of law are errors of jurisdicition, though this does not mean that *certitorari* is automatic once an error as to law is found (see Wade , "Adminstreative Law" 11th Ed., pp. 219-226). For my part such an approach is attractive as it focuses on whether the remedy sought is truly required rather than dealing with the vexed question as what type of error was. It seems that the modern position following *Anisminic* has not been expressly adopted in Ireland, if I have correctly understood the decisionof Keane J in *Killeen* (see para 14 above). I would prefer if the court's enquiry were as to whether an error of law had occurred and if so whether *certiorari* was justified by reference to the principles governing exercise of discretion.

Background Facts to the Present Application

22. The second named applicant ("the mother") claimed a fear of persecution from the family of the man who is the father of the first named applicant ("the child"). The father's Muslim family object to their inter-religious relationship. The mother says that this Muslim

family burnt her house and her shop. The applicant arrived in the state on 16th August, 2010. The child was born in the State.

The Decision of the Commissioner

23. By letter of 22nd July, 2011, the Office of the Refugee Applications Commissioner informed the mother that the Commissioner was not recommending that she be declared a refugee having regard to the s. 13 report carried out by his official. The Commissioner's agent interviewed the mother on 16th March, 2011, and delivered a s. 13 report on 1st April, 2011. A negative recommendation was confirmed by a different authorised official of the Commissioner on 16th May, 2011.

24. The s. 13 report appears to me to reject the basis of the mother's alleged fear of persecution. The decision maker says:-

> "Throughout the interview, it is considered that the applicant was being deliberately evasive and vague which only serves to undermine her credibility.
>
> The applicant didn't contribute heavily with regard to her overall claim. It would seem implausible that if the trouble began because of a union between two people regardless of religious backgrounds that at least one of the two would make an effort to maintain contact. If the applicant is to be believed she has heard nothing from her soon to be husband since September, 2010, which to the date of this interview has been over six months.
>
> The applicant has also changed her opinion on what is of immediate importance to her since arriving into Ireland. She did not seem too concerned about her soon to [be] husband and her attempts to be with him. Her current concern is now for that of herself and her child. It would appear that the applicants partner's family have been successful in separating the relationship which so offended them. (Section 11 Interview, Q110.)
>
> Based on the above findings, it is considered that the applicant's account of her forward looking fear and persecution is not well founded."

25. My understanding of this finding is that the decision maker is saying though the past events may have happened, her situation has changed. She is no longer in contact with the father of her child. The source of her fear has dissipated and therefore she does not have a well founded fear of persecution, notwithstanding what happened to her in the past. I observe that the finding is unclear as to whether it is a rejection of credibility or a rejection of the existence of the objectve element of the fear required to be established but no complaint is made in these proceedings about any such lack of clarity.

26. A particular complaint was directed at the manner in which the possibility of internal relocation was addressed. The decision maker's consideration of this matter was in the following terms:-

> "It was reported in a U.K./Danish Fact Finding Mission that the British High Commission stated that they believe internal relocation to escape ill treatment from non state agents is almost always an option, suggesting the applicant could relocate within Nigeria (Appendix C).
>
> It was brought to the applicant's attention that she is well educated and has worked for many years in her home country so relocation should not pose significant problems. She responded, 'That was a plan I had, that's why I went to Abuja but then realised they [Muslims] are everywhere'. (Section 11 interview, Q162).
>
> The applicant was asked how her family or Abimbola would; considering they were her sole persecutors possibly find her in a country the size of Nigeria (Appendix D) to which she responded 'Because they have a network in every state. Each time you offend them they will distribute leaflets to find you.' (Section 11 interview, Q166).
>
> With regard to internal relocation, the applicant was asked as to whether moving to another area in Nigeria was an option, in this instance Port Harcourt, Benin City was given, to which she stated 'These places are worse'. (Section 11 interview Q163).
>
> The applicant did not have any objective information to support the fact that internal relocation was not an option and given that Nigeria has a population of over 150 million and a land area of over 910,000 sq km it is not unrealistic to expect that the applicant could have relocated to another part of Nigeria to escape her partners family. (Appendix D).
>
> Taking this into account, it does not appear plausible that the applicant's partner's family, whom the applicant fears, would be able to find the applicant in a country of this size. It would not be unduly harsh for her to live in another area of Nigeria. Also, considering the amount of education the applicant has and having run her own business, the ability to find employment elsewhere should not prove difficult.
>
> Given the issues outlined above, the applicant has not established that either state protection or internal relocation were not viable options for her."

Alleged Errors as to Jurisdiction Justifying Judicial Review of the Commissioner's Decision

27. There are two sets of written submissions delivered by the applicant in January, 2015 and April, 2015. The applicant refers to regulation 5(1) of S.I. No. 518 of 2006 (Protection Regulations) which provides that:-

> "5(1) The following matters shall be taken into account by a protection decision-maker for the purposes of making a protection decision:-
>
>> (a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of the country of origin and the manner in which they are applied;
>>
>> (b) the relevant statements and documentation presented by the protection applicant including information on whether he or she has been or may be subject to persecution or serious harm;
>>
>> (c) the individual position and personal circumstances of the protection applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm."

28. The applicant argues that these minimum standards were breached in the decision making process. The first set of written submissions claims that "there was no consideration of relevant, laws or the manner of their application". It is also alleged that "the relevant statements of the applicant were not considered…." These general allegations were, with one exception, not fleshed out at the hearing. I do not find that the allegations have been made out. I cannot detect any error of the sort alleged. If such allegations are to succeed much more detail in relation to the alleged flaw in the R.A.C. procedure is required.

The Evidence as to Travel
29. The applicant did elaborate, at hearing, on the allegation that particular evidence of the applicant was ignored or misconstrued. The exchange at interview in relation to travel was as follows:-

> "Question: How did you travel to Ireland?
>
> Answer: We took a plane from Lagos, stopped over, took a car down here.
>
> Question: What airport did you arrive into?
>
> Answer: I can't remember.
>
> Question: Where did you leave in Nigeria?
>
> Answer: Jos, from Abuja to Lagos. I have left Jos in July 2010.
>
> Question: What country did you stopover in?
>
> Answer: I don't know.
>
> Question: How much money did that cost you?
>
> Answer: I didn't spend any money. The pastor introduced me to the person that brought me here.
>
> Question: What is this pastor's name that helped you get here?
>
> Answer: Pastor Kayode
>
> Question: He paid for everything?
>
> Answer: It was my friends Pastor.
>
> Question: What's your Nigerian friend's name?
>
> Answer: Esther
>
> Question: So the Pastor paid for everything?
>
> Answer: I am not sure that he paid everything to the person that brought me here.
>
> Question: What's the name of the person that brought you here?
>
> Answer: Pastor Kayode
>
> Question: Did you not ask the Pastor how much all this travel was going to cost you?
>
> Answer: It wasn't Pastor Kayode who paid for my travel. It was my friend's Pastor who made the arrangement.
>
> Question: What was this Pastor's name?
>
> Answer: I don't know this.
>
> Question: Going back to travel from Lagos to Ireland, by what means?
>
> Answer: By air.
>
> Question: What Airline
>
> Answer: [Thinking] don't know.
>
> Question: What country did you stopover in?
>
> Answer: I don't know. I just knew it was an airport.
>
> Question: Where in Ireland did you arrive?
>
> Answer: We didn't arrive via plane to Ireland. We took a bus.
>
> Question: Where did you get this bus?
>
> Answer: When we came out of the airport.
>
> Question: So you took a bus over the water is that what you were saying.
>
> Answer: We took two planes from Nigeria, Lagos had a stopover, took another plane, alighted, took a bus.

Question: To this office you took the bus?

Answer: Getting off the bus the Pastor took me to a taxi and it took me down here.

Question: Remind me again where you met this Pastor in Nigeria that came with you to Ireland.

Answer: In Lagos.

Question: Just to ask again, what was the name of the airport that you arrived in Ireland?

Answer: I don't know.

Question: But you did arrive in an airport in Ireland?

Answer: I don't think we arrived in any airport in Ireland.

Question: Ireland is an island, you either took a boat or a plane, which was it?

Answer: After we took two planes we took the bus.

Question: Did you pass through any other countries on your way to Ireland besides Nigeria?

Answer: No

Question: Have you any documentation to show the countries you transited through or how you entered into Ireland, e.g. Airline Tickets etc.

Answer: No

Question: If no, why not?

Answer: All the documentation was taken from the Pastor.

Question: Is the Pastor Irish or Nigerian?

Answer: He is Nigerian.

Question: Is he a legal citizen in Ireland?

Answer: I don't think so.

Question: Where is he now

Answer: I didn't see him again. The number he gave me doesn't work.

Question: What passport did you use, was it fake?

Answer: A Nigerian passport, it wasn't mine.

Question: So it was fake?

Answer: Yes.

Question: So you travelled with this fake passport

Answer: Yes

Question: Have you ever had a real passport issued from Nigeria

Answer: No.

Question: Why did you use a fake one, why not apply for an official one?

Answer: I never knew or plan to travel.

Question: Where is this passport?

Answer: The Pastor collected it from me when we alighted from the bus.

Question: Do you not think to hang onto it as identification?

Answer: He said to give it over as it doesn't belong to me

Question: Do you have any other I.D. on you?

Answer: After they burnt my Dad's house everything was gone.

Question: When was this?

Answer: July 19 2010

Question: Did Irish Immigration question you at all with this fake passport?

Answer: No, I was just following the pastor.

Question: What date did you leave Nigeria?

Answer: Lagos 5th August 2010."

30. The applicant complains that this exchange has been seriously misrepresented in the decision maker's account which is as follows:-

> "There are serious credibility concerns in relation to the applicant's travel from Nigeria to Ireland. The applicant maintains that a friend, in this instance a pastor, with whom the applicant was put in contact through another pastor, allegedly, guided her all the way from Lagos, via an unknown stop-over country to Ireland. The applicant maintains she doesn't know what countries she passed through on her way here or how she got through customs and immigration. The applicant also allegedly arrived with no documentation or identification (Section 11 Interview, Q 29- Q 51.)
>
> The applicant was adamant that she was able to travel internationally and through customs without any identification or a passport. When the applicant was informed that this would be impossible, considering international border controls the applicant remained fixed with her earlier reply. (Section 11 Interview, Q 52 – 67.)
>
> The applicants travel details and means of getting through immigration were found to be completely implausible, and lacking in any credibility."

31. I agree with the applicant that the decision maker has given an unfair account of some of the applicant's evidence as to her travel from Nigeria to Ireland. She did not say that she had travelled without any identification or a passport. She said the opposite. She said she had a fake passport. I cannot find any reference in the s. 11 interview to it being put to her that it would be impossible to pass international borders without identification. There is a clear error on the part of the decision maker as to the evidence given by the applicant relative to her travel to Ireland.

32. The legal question for the court is whether this is an error as to jurisdiction sufficient to ground an order of *certiorari* at this stage. The decision maker was entitled to question the applicant as to her journey to Ireland and to question her in relation to documentation she used to pass international borders. The decision maker was lawfully entitled to say that significant parts of her evidence in respect of her travel raised credibility concerns.

33. The applicant has referred to the decision of the Supreme Court in *Stefan v. The Refugee Appeals Tribunal* (supra) where the applicant's reply to a question was incompletely translated into English. The untranslated answer was central to the claim for asylum, it being in answer to the question "why are you seeking asylum?" The applicant replied to the question in two and a half pages and a significant part of the answer was never translated and thus could not have been considered by the decision maker. Kelly J. in the High Court quashed the decision and Denham J., in the Supreme Court, at pp. 217-218 of the judgment, upheld that decision because:-

> "…evidence, which was not immaterial, was not before the decision maker because of the section omitted from the translation. The application was not considered fully as a result of the omission in the translated questionnaire. This was a breach of fair procedures. It cannot be said that the omitted information was immaterial both because of the nature of the decision made on the information and because of the determination as to the credibility of the applicant.
>
> Consequently, the procedures were unfair. There may well be many instances where omissions in translation occur which are not such as to render the proceedings unfair. However, in this case in light of the material omitted there was such an omission as to be a breach of fair procedures. Consequently an order of *certiorari* may lie."

34. In my view, the decision in Stefan does not aid the applicant. Though some of her evidence was mis-described this was not caused by a breach of fair procedures. The decision maker erred in his understanding of some of it. This is an error of an evaluative character. It does not involve an error of law. In my opinion, the error in misstating part of her evidence in respect of her travel is an error within jurisdiction and does not attract *certiorar*i.

35. I also find that the evidence which was misunderstood or mischaracterised did not deal with a material part of the applicants claim for asylum. Significant parts of the applicants evidence as to travel are correctly summarised and lawfully and rationally rejected as lacking credibility. Therefore the overall conclusion of the decision maker as to the lack of credibility of the applicant's account of travel remains a valid conclusion notwithstanding the error made in recounting the applicant's evidence as to whether she used a passport or not to traverse an international border. That error was immaterial.

36. If it be said that the mis-description of the applicant's evidence on the question of traversing borders without a passport was an error as to jurisdiction contrary to what I have held, then in my view it does not, in accordance with what I have said are the guiding principles in *P.D.*, constitute an error as to jurisdiction of such weight or materiality as to warrant interference at this stage and no injustice would be caused to the applicant by resorting to the administrative appeal to the R.A.T.. That forum is perfectly suited to providing the applicant the opportunity to correct the error. (Another approach would be to say if it is an error of law it must either attract *certiorari* or be excused by reference to the principles governing exercise of discretion. This simpler approach has much to commend it though my understanding is that Irish law has not yet approved such an approach.)

Country of Origin Information

37. In a reformulation of a ground first described in the original written submissions, the applicants say that a further error as to jurisdiction is as follows:-

> "…the assessment as to the applicants credibility was conducted without any reference to up to date country of origin. [sic] Regulation 5(1) of S.I. 518/2006 imposes a precise legal obligation on a decision maker to conduct the assessment with reference to country of origin information. The applicant does not disagree with conclusions based on country of origin which was conidered but asserts that the precise legal obligation imposed on the decision maker to take into account relevant country of origin information was not complied with. This failure to apply the rules as to how asylum claims should be investigated was found to amount to an error in *P.D.*, an error which could ultimately amount to an error as to jurisdiction."

38. The first reason I reject this complaint is that the applicant did not attempt to establish as a matter of fact that the decision was taken without reference to "up to date" country of origin information. For such a complaint to succeed an applicant, in my opinion, should establish the existence of information relevant to the applicant's claim which the decision maker ought to have considered but failed so to do. No error, much less error as to jurisdiction is made out on this front.

39. The second reason I reject this complaint is that the reference to the decision in *P.D.* at the end of the quotation mentioned in the foregoing paragraph seems inapt. It appears to be a reference to a proposition that laws in the country of origin must be investigated in the course of processing an asylum application. I reject this proposition. No such principle exists. In *P.D.*, in accordance with the case law of the Court of Justice of the European Union and the Qualification Directive and the Irish implementing regulations, where prosecution is said to derive from discriminatory laws and in particular where gay people fear prosecution, the laws which underlie those fears should be checked by the investigation process. This theme appears to have no application in the present proceedings.

Internal Relocation

40. The next complaint addressed the alleged infirmities in the decision on internal relocation. The matter is expressed thus in the supplemental submissions:-

> "An internal relocation finding was made by the decision maker and that finding formed part of the basis on which it was determined that the fear of persecution held by the applicant was not well founded. It was claimed that it would be reasonable to expect the applicant to return to Nigeria and live elsewhere in the country. However, the decision maker did not identify a specific area of the country to which the applicant could relocate and consequently failed to have regard to the general circumstances prevailing in the unknown area of relocation or to the applicant's personal circumstances. Article 8(2) [of the relevant Council Directive (2004/83/EC)] imposes a legal requirement on the decision maker when assessing, and concluding, that internal relocation is available. The applicant does not dispute the quality of the assessment or disagree with conclusions reached as a result of the assessment but asserts that it did not take place."

41. Article 8 of the Directive provides as follows:-

> "1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.
>
> 2. In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant."

42. The law relating to decisions on internal relocation have been elaborately explained by Clark J. in *K.D. v. Refugee Appeals Tribunal*, [2013] I.E.H.C. 481. At para. 28 Clark J. sets out some of the principles which govern such decisions and in subparagraph 4 he said:-

> "Where it is accepted that an applicant has a well-founded fear of persecution for Convention reasons but that fear is localised and confined to a particular area, it is relevant to consider the possibility of internal relocation as an alternative to refugee status. In such cases, Regulation 7(1) of the Protection Regulations requires the protection decision maker to identify (if only in general terms) a place or area within the country of origin where the risk of persecution does not exist and where the applicant might reasonably be expected to stay. Security from persecution or serious harm and meaningful State protection in the proposed area of relocation are key."

43. At para 28 (8) the learned judge said:-

> "It is not enough for the protection decision-maker to determine that the risk of persecution is absent from the proposed area of relocation. He or she must go on to consider whether it would be reasonable to expect the applicant to stay in that place, having regard to his/her personal circumstances and the general conditions prevailing on the ground, in accordance with Regulation 7(2) of the Protection Regulations. The reasonableness assessment is not concerned with assertions such as 'I won't know anyone', but rather with matters of substance such as whether the applicant is old, infirm, ill, has many small children or is without family support and other real issues"

44. Counsel for the respondent, Mr. Monaghan B.L., points out that the finding in the s.13 report about internal relocation is based upon the description of this possibility for persons in the position of the applicant in a report compiled by a U.K./Danish fact finding mission. This observation by the respondent is important. The decision maker undoubtedly suggested to the applicant that she could move away from the area where the family who allegedly wished to harm her lived. In a general sense it was suggested that she could move to other parts of Nigeria but more specifically it was suggested that she could move to Port Harcourt or Benin City. The country of origin information suggests that Benin City and Port Harcourt are cities where Christians are in the majority, such cities, being located in the Christian part of Nigeria. The decision maker refers expressly to the fact that the applicant is well educated and has worked for many years in her home country and that she has in the past run her own business and therefore that she should not find it difficult to find employment.

45. Part of the complaint in respect of the internal relocation finding is that the decision making process is not compliant with the U.N.H.C.R guidelines on how such decisions should be taken. Counsel for the applicant accepts that there is no significant difference between the U.N.H.C.R. guidelines and the provisions of article 8 of the Qualification Directive.

46. In my view the decision maker did identify a part or parts of Nigeria as places of internal relocation where the applicant would be safe from the persecution she allegedly feared. In addition the conditions on the ground in those places were considered by reference to the information available in the country of origin information. The personal circumstances of the applicant were considered and the decision maker addressed his mind to whether it would be reasonable to expect the applicant to relocate. At best the applicant's complaint is that greater detail of these matters should have been contained in the decision. In my view the decision maker applied the law correctly. No error as to jurisdiction is evident. If I am wrong in this conclusion and if greater consideration should have been evident in respect of any of the particular matters which are required to be addressed then my view is that even if it is an error as to jurisdiction, it is not sufficiently grave or serious as to warrant intervention at this stage.

47. The applicant also sought to argue, in the supplemental written submissions that:-

> "the decision maker is required to conduct a forward looking test and this forward looking test must be conducted with reference to up to date country of origin information as required by Regulation 5(1) S.I. No. 518 of 2006."

In oral submissions, counsel for the applicant indicated that this complaint referred to a requirement to conduct a forward looking test in the context of making an internal relocation determination. In so far as such a requirement exists my view is that this is precisely what the decision maker undertook. The decision maker did consider whether or not the applicant would be safe if she moved to Benin or Port Harcourt, away from the source of her persecution. He did consider what her personal circumstances were and what her prospects would be in a new area of residence. All of these considerations were about what life would be like in the event that she moved to a new place and this inescapably involves a forward looking test and therefore this complaint is rejected.

48. I reject the applicant's application for leave to seek orders of *certiorari* of the decision of the R. A.C..

49. A further submission was made which suggested that the court should adopt a different view of it's role in reviewing decisions of the R.A.C. The applicant refers to the decision of the C.J.E.U. in *Diouf* (Case C-69/10) [2011] E.C.R. I-07151 where an applicant for asylum was subjected to an accelerated procedure and applied to the Court of Justice arising from the fact that there was no appeal against being subjected to an accelerated procedure. The inquiry related to whether such absence breached the right to an effective remedy. The C.J.E.U., at para. 42, said that there must be access to a remedy against a decision in the asylum process if the decisions "…entail rejection of the application for asylum for substantive reasons or, as the case may be, for formal or procedural reasons which preclude any decision on the substance." Self evidently the Irish system which provides a full appeal to the R.A.T. and to judicial review if appropriate grants an effective remedy from the decision of the R.A.C.. But the applicant refers to further dicta of the Court of Justice which addressed the non-availability of an appeal or a review of the decisions to include an application for asylum in an accelerated procedure immediately after such a decision is made. The court said at para. 56:-

> "…The absence of a remedy at that stage of the procedure does not constitute an infringement of the right to an effective remedy, provided, however, that the legality of the final decision adopted in an accelerated procedure – and, in particular, the reasons which led to the competent authority to reject the application for asylum as unfounded – may be the subject of a thorough review by the national court, within the framework of an action against the decision rejecting the application."

50. The applicant's argument is that no rule (with the exception of the statutory limitaions and other limitations set out in s. 5 of the Illegal Immigrants (Trafficking) Act 2000 (as amended) should restrict access to judicial review of the decision of the R.A.C.. In particular, it is argued that decisions of the superior courts which say that review of O.R.A.C. decisions should be rare and exceptional and that failed applicants should instead pursue administrative appeal breach the *Diouff* principles. The heart of the point here is that the applicant says it is not possible to postpone a legal challenge to the decision of the R.A.C. until after the decision of the R.A.T.. Thus, that which saved the Luxembourg scheme which precluded appeal on a decision to accelerate the procedure but permitted judicial review of such decisions after final decision on the substantive application, is absent from the Irish scheme.

51. It is important to note that the C.J.E.U. at para. 56 in *Diouff* was addressing a scheme where there was an absence of a remedy following a certain decision in the decision making process on an asylum claim. No such consideration applies here. Each point of complaint sought to be raised in these proceedings is capable of appeal to the R.A.T.. There is no absence of remedy. If anything there is over provision of remedies of decisions of the R.A.C.. Not only are the limitations on judicial review of R.A.C. decisions acceptable in E.U. terms (because of the unfettered right of appeal to the R.A.T.), but if Ireland prohibited rather than restricted such judicial review, this would not infringe any principle of E.U. law as the applciant would have full access to the R.A.T. where any error of law or fact may be pursued. (Needless to say, a prohibition on judicial review of the R.A.C. would offend Irish law.)

52. The applicant is correct that it would not be possible to seek judicial review of a decision of O.R.A.C. following the decision of the R.A.T.. In my view no breach of article 39 of the Qualification Directive requiring access to adequate remedy is thereby caused. Any error of law or fact in the decision of O.R.A.C. may be appealed to the R.A.T. which can grant a comprehensive remedy if the error caused rejection of an otherwise meritorious claim. The existence of a decision of the R.A.T. renders the decision of O.R.A.C. legally irrelevant relative to the asylum claim. That one cannot challenge an illegality in an O.R.A.C. decision following a decision of the R.A.T. does not deprive an applicant of a remedy for an error contained in a decision of O.R.A.C. because such applicant does not enjoy a right to challenge error in a legally sterile decision. If the applicant succeeds at the Tribunal there will be no need to pursue a complaint of illegality in the decision of O.R.A.C.. If the applicant fails at the Tribunal the refusal of refugee status would be referable solely to that decision and not to the decision of O.R.A.C. Comprehensive access to judicial review, subject to lawful restriction, is available in respect of a decision of the R.A.T.. Therefore, neither the comparatively limited access to judicial review following the decisions of O.R.A.C. nor the impossibility of judicially reviewing O.R.A.C. following the decisions of the R.A.T. constitute a breach of article 39 of the Qualification Directive. In those circumstances I do not accept the argument that the regime which limits access to judicial review of decisions of O.R.A.C. breaches any principle of E.U. law.

The Decision in the Child's Case

53. The s. 13 report in respect of the child's case is as follows:-

> "The applicant presented as a child born in Ireland. The applicant's claim as presented by his mother is similar to and intrinsically linked to his mother's own fears of returning to Nigeria. The applicant's mother stated that the applicant could be harmed by his father's family because of her, '*The people that were after me when I was pregnant, they wanted to kill me and they would want to do the same to the child because I am a Christian and they're Muslim'*…. When asked if her child's claim was wholly related to her own claim she stated 'Yes'…. It should be noted that the applicant's mother applied for asylum, and that her fear of being persecuted was deemed not to be well founded at first stage. As no separate claim had been advanced by this applicant's mother, no separate issues had to be considered in relation to this applicant. Therefore a similar finding is appropriate in this case.
>
> Having due and careful regard for the circumstances of this case and the above analysis of same, and section 3.3.1 below, it is considered that the applicants mother has not established a case which would qualify her son, the applicant, for refugee status as defined in section 2 of the Refugee Act, 1996 (as amended)."

54. The applicant makes a number of complaints in respect of this decision. In the first instance it is said that the claim was not dealt with individually or impartially, because the child's application for asylum is said to have been determined by reference to the result of the mother's claim. In this regard, reference was made to article 8(2)(a) of Council Directive 2005/85EC (The Procedures Directive) which provides that Member States shall ensure that "applications are examined and decisions are taken individually, objectively and impartially."

55. The mother accepted that the child's claim was the same as her own. Where the O.R.A.C. had found that the mother's claim was not made out it was appropriate and indeed unavoidable that the Commissioner would decide the child's claim based upon the outcome of the mother's claim. That this happened does not mean that the child's case did not receive individual objective and impartial assessment. The decision maker did not breach any provision of article 8 in so finding.

56. The second complaint advanced is that the decision maker acted unlawfully in failing to give the mother a copy of the recommendation in her own case prior to the hearing of her sons's case. I note that the decision on the mother's case was dated the 16th May which is two days before the date of the child's s. 11 interview. No evidence has been presented to suggest that the decision makers were aware of the outcome of the mother's case on the 18th May, 2011, when they were interviewing the mother with respect to the child's case. In addition there was no evidence that the Commissioner had accepted the recommendation of 16th May made by his authorised officials on the day that the mother was being interviewed with respect to the child's claim.

57. It is claimed that at some time prior to writing the s. 13 report in the child's case the author's thereof read the mother's decision because they refer to that negative decision in the report and this is of course true. They claim that it was a breach of the child's right to be heard not to give the mother a copy of her decision and to indicate that it's result would determine the child's result, in so far as both cases were the same. I reject this argument. The mother had a right to be heard in respect of her own claim and this was fully vindicated. In addition, she has a right to appeal that decision and in this sense to be heard in respect of why it is wrong. The child has a right to be heard in respect of his own claim and this has been fully vindicated. He does not have a right to be heard in respect of his mother's claim. He has a right of appeal in respect of the extent of the decision in his own case. His right of appeal constitutes comprehensive vindication of his rights to be heard. I can see no advantage accruing to the child by the Commissioner giving the mother a copy of her own decision prior to the hearing in respect of the child. The Commissioner could not have entertained an argument or a submission that it was wrong. Therefore no breach of fair procedures amounting to an error as to jurisdiction occurred.

58. The applicant has failed to establish the existence of errors of jurisdiction or the existence of errors of such weight that injustice would be caused if the alleged errors were not subject to sanction at this stage.

59. I dismiss these applications.