

**THE HIGH COURT  
JUDICIAL REVIEW**

[2006 No. 357 J.R.]

**IN THE MATTER OF ARTICLE 40.3 OF THE CONSTITUTION AND IN THE MATTER OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003 SECTIONS 2, 3, 5 AND 6**

**BETWEEN**

**JEAN RYAN HAKIZIMANA**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, REFUGEE APPLICATIONS COMMISSIONER, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**AND**

**THE HUMAN RIGHTS COMMISSION**

**NOTICE PARTY**

**Judgment of Mr. Justice Feeney delivered on 14th day of November, 2006.**

1. The Applicant in this case arrived in Ireland from England in January of 2004. He is a national of Burundi and immediately upon arrival he sought asylum as a refugee. As part of the asylum process the Applicant was interviewed pursuant to s. 11 of the 1996 Act on the 15th and 30th August, 2005. That resulted in a recommendation from the commissioner that refugee status be refused. The Commissioner's recommendation was the subject of a judicial review application [No. 2005/1180 J.R.]. Those proceedings resulted in an agreement whereby on consent the Commissioner's recommendation was set aside. The settlement also provided that the report which had been prepared pursuant to s. 13(1) of the 1996 Act would be withdrawn and removed from the Applicant's file and it was agreed that a fresh consideration of an application for refugee status would be considered.

2. Thereafter, the Applicant was notified that in relation to his application for a declaration as a refugee that an interview would take place on Thursday, 23rd March, 2006. That notification was forwarded to the Applicant by letter dated the 13th March, 2006. Following consultation with his solicitors MacGeehin Toale Nagle they sent a letter on the Applicant's behalf dated the 21st March, 2006, in which it was stated:

"In previous High Court proceedings brought by our client, he has disputed the accuracy of the records of previous interviews. While his High Court proceedings have been settled, they were specifically settled by both sides on the basis that none of the grounds advanced were either conceded or withdrawn. In the circumstances, our client requires that the interview on the 23rd March, be electronically recorded in full rather than being merely reduced to writing by way of 'notes of interview' or otherwise, and that a copy be provided to him as soon as possible after the interview. Alternatively, our client wishes to record the interview with his own equipment. Please confirm that you with (sic) either record the interview or permit it to be recorded."

3. The following day the office of the Refugee Applications Commissioner replied by letter dated the 22nd March, 2006, wherein it was stated in the second paragraph:

"The position is that it is not the policy of this office to electronically record interviews. In the circumstances we will not be acceding to your request."

4. The letter of the 22nd March, 2006, was faxed to the Applicant's solicitors who replied on the same date stating:

"Even if it is your policy not to record interviews, this does not impinge on the recording of the interview by the Applicant. We note that though you have stated in the telephone conversation that our client would not be permitted to record the interview although this is not specifically stated in your fax. If it is your policy that nobody is allowed to record the interview please confirm and please also state the reasons."

5. A notice of motion was duly issued within these proceedings on the 23rd March, 2006 and that motion duly came on for hearing on notice to the Respondents before the High Court and the Applicant was given leave to apply by way of judicial review for the reliefs set forth at paragraph (d), section A, 1, 2, 3 6, 7 and 9 in the statement of the grounds set forth at paragraph (e)1 and 5 therein. It was also ordered that the relief set forth at paragraph (d), section A(1) be amended by deleting legitimate expectations therefrom. The grounds for the application for judicial review considered by this court are set forth in the (amended statement grounding application for judicial review amended in accordance with the order of the High Court of the 6th April, 2006, dated the 19th April, 2006). It is the relief therein claimed on the grounds therein set out that this court has to consider.

6. The main issue to be considered relates to the request for the electronic recording of the interview of the Applicant to be conducted by the Refugee Applications Commissioner. The Applicant claims a declaration that he is entitled to make his own tape recording of the proposed interview or alternatively that the Applicant is entitled to require the second named Respondent to tape record the said interview and a further declaration is sought that the failure or refusal of the second named Respondent to tape record the interview or permit the Applicant to do so and/or to furnish the record to the Applicant prior to a decision being made, is contrary to the Applicant's rights under article 40.3 of the Constitution and/or is an unlawful exercise of the second named Respondent's statutory powers.

7. In the statement of opposition dated the 29th May, 2006, the Respondents contend that the Refugee Applications Commissioner is not required to record the interview with the Applicant and that the procedures of the Refugee Applications Commissioner in relation to the carrying out of interviews under s. 11 of the Refugee Act 1996 (as amended) are fair and comply with the requirements of natural and constitutional justice.

8. The issue to be considered by this court is whether the procedures used by or intended to be used by the Refugee Applications Commissioner in carrying out the interview of the Applicant under s. 11 of the Refugee Act 1996 are fair and comply with the requirements of natural and constitutional justice in circumstances where there is a refusal to record or to permit a recording of such interview. During the course of the hearing it was acknowledged by counsel on behalf of the Respondents that it was the policy of the second named Respondent that there would be no recording made nor would the Applicant be permitted to record the interview.

9. The procedures which apply to such interviews and applied to the Applicant's interview are as follows, namely:

(a) An Applicant who makes an application for refugee status is provided with an application form in an appropriate language. That form is available in 25 different languages. In the case of this Applicant his native language was Kirundi – Kinyarwanda also called Kinyarinanda and an application form in the French language was provided as the Applicant also spoke French.

(b) At the time of making an application an Applicant, as did this Applicant, signs a form known as the ASY1 form confirming that the information set forth in that form is correct and confirming that he has been given an opportunity to amend any inaccuracies. That form also confirms, the fact that the Applicant had received documentation/information namely an information leaflet for applicants for refugee status in Ireland, a questionnaire in connection with his application for a declaration as a refugee, change of address forms, a refugee legal service information leaflet and verbal advice of his right to consult a solicitor/UNHCR. This Applicant received the above documentation at the time of his initial arrival in Ireland on the 19th January, 2004. Thereafter there is a process leading to interview and recommendation.

(c) The information leaflet for applicants for refugee status in Ireland is provided in the same language as the language of the questionnaire. Therefore in the case of this Applicant it was in the French language.

(d) That information leaflet confirms, which is the case, that an Applicant for refugee status is entitled to seek legal assistance from the refugee legal service which is an independent body. An information leaflet about that service is given to an Applicant at the time when he makes his initial application.

(e) The information leaflet also indicates, as is the case, that every effort will be made to provide an Applicant with an interpreter where necessary and possible. In this case the Applicant's first language was Kinyarinanda and the two interviews carried out in August, 2005, were carried out with an interpreter speaking that language present on each occasion.

(f) The process then includes the completion of a questionnaire after certain other initial steps such as the finger printing and photographing of an Applicant.

(g) Once an application is made an investigation takes place by the Refugee Applications Commissioner and the questionnaire confirms that the purpose of the interview is to establish the full details of an Applicant's claim for a declaration as a refugee and indicates that an Applicant should explain clearly and precisely why the Applicant is seeking a declaration as a refugee and should provide all the information and details relevant to the Applicant's particular circumstances. It is also confirmed in the information leaflet that an Applicant has a duty to fully cooperate and to be completely truthful.

(h) An interview is arranged with an Applicant to be carried out by a trained authorised officer acting on behalf of the Refugee's Application Commissioner and the leaflet confirms that that officer has received full training in interviewing persons seeking a declaration and will have detailed information available on the Applicant's country of origin.

(i) Either prior to or at an interview an Applicant is entitled to make a written submission and to submit any documents.

(j) Prior to the interview an Applicant is entitled to avail of the services of the Refugee Legal Service. That service is provided free of charge (but means tested) by the State and it is for that service to determine whether or not it is appropriate or necessary to seek to accompany an Applicant to an interview. The fact that an Applicant can be accompanied at the interview is not expressly stated in the guide but the court was informed that it does occur on certain occasions. Express reference is made to providing assistance in applications and advice before a questionnaire is submitted.

(k) The information leaflet confirms, as is the case, that if an Applicant wishes to bring his own legal representative (paid for by himself) with him such representative would normally be allowed to observe at the interview. That would equally apply to a legal representative from the Refugee Legal Service. It is also confirmed in the leaflet, as is the case, that a legal representative would be given an opportunity at the end of the interview to make any points which were considered necessary.

(l) It was confirmed during the course of the hearing that the procedure which would be followed is that a solicitor or the solicitor's representative, if present, would be allowed and permitted to take notes but that no recording would be permitted.

(m) An interpreter attending at an interview is provided with instructions and confirms by signature acceptance of such instructions which includes a direction that where an interpreter becomes aware of any reasons for potential conflict or difficulties (such as ethnic/racial/political/gender issues), between the interpreter and an asylum Applicant for whom she/he has been engaged to provide interpretation services, this must clearly be made known to the interviewer as soon as possible and prior to the commencement of the interview and also that where an interpreter encounters any difficulty in interpreting during an interview, such as problems with dialect, this should be clearly stated to the interviewer.

(n) Prior to the interview an applicant is provided with an information leaflet regarding the interview and the Applicant signs such information leaflet. This also applied to the Applicant.

(o) In the said information leaflet it is expressly stated that the Applicant should explain clearly and precisely his fears and provide all information and details relevant to his particular circumstances and that the interview is the Applicant's opportunity to explain in detail why he fears returning to his country of origin. It is also expressly stated that a written record of the interview will be kept by the interviewer of the relevant and potentially relevant aspects of the Applicant's claim. It is further confirmed that the record so kept will be read back to the Applicant during the course of the interview and that that process is the Applicant's opportunity to correct any detail which the Applicant considers has not been recorded accurately.

(p) The information leaflet also states, as is the case, that an applicant will be required to sign the agreed record of the interview. This is done on a page by page basis and each page is read to the applicant and the interviewer confirms by signature that it has been so read and agreed and the Applicant confirms on each page by his signature that it has been so read and agreed. It is important to recognise that the written record of the interview which is kept is not and does not purport to be a verbatim account but rather a written account of the relevant and potentially relevant aspects of the

Applicant's claim.

(q) If the Applicant is unsuccessful in his application for refugee status he is so notified and at that stage the Applicant receives copies of all documents including the written record of the interview.

10. It is necessary to set out in some detail the procedures followed by the second named Respondent so that this court can endeavour to ascertain whether or not such procedures are fair and in compliance with the rules of natural justice. It is contended by the Applicant that absent a recording or an entitlement to record the interview carried out on behalf of the second named Respondent that there is an absence of fairness and a failure to comply with the rules of natural justice.

11. There is no issue but that procedural fairness in compliance with the rules of natural and constitutional justice should and must attend the process to determine an application for refugee status. Nor is there any issue that the procedures followed by the second named Respondent are other than in compliance with paragraph 192 of the UNHCR Handbook 1992 Edition which identifies the basic requirements for asylum procedures.

12. The process being carried out by the interviewer is an inquisitorial process and not an adversarial process. This is in accordance with paragraph 196 of the UNHCR Handbook which indicates that whilst the burden of proof in principle rests on the Applicant that the duty to ascertain and evaluate all the relevant factors is shared between the applicant and the examiner. The inquisitorial nature of such enquiries has been confirmed in numerous decisions such as the judgment of McGuinness J. in *V.Z. v. Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 135 at pp. 159 and 160. The importance and duties of the inquisitorial as opposed to adversarial process has been reaffirmed and highlighted in numerous High Court judgments.

13. The statutory provisions in relation to an investigation of an application by the Refugee Applications Commissioner are set forth in s. 11(8) of the Refugee Act 1996 (as amended). The statutory requirements are to give an Applicant without delay a statement in writing specifying, where possible in a language that the Applicant understands, the procedures to be observed in the investigation of the application, the entitlement of the Applicant to consult a solicitor, the entitlement of the Applicant to contact the High Commissioner, the entitlement of the Applicant to make written submissions, the duty of the Applicant to cooperate and to furnish relevant information and the possible consequence of the failure of the Applicant to attend an interview under s. 11. All of those statutory requirements are incorporated in the procedures followed by the second named Respondent and apply to this Applicant. There is no issue of any breach of statutory obligations on the part of the second named Respondent.

14. The issue, as expressly contended for in the submissions on behalf of the Applicant, is that absent an entitlement on the part of this Applicant to keep an electronic record of his interview either by having it recorded by the second named Respondent or recorded on the Applicant's behalf that there is an absence of fair procedures and a breach of the rules of natural and constitutional justice. This claim is to be viewed against a statutory framework which can result pursuant to a report provided for in s. 13 of the 1996 Act as amended by s. 7 of the Immigration Act 2003 that any appeal which the Applicant would have would be determined without an oral hearing. In other words if an adverse finding under the relevant section in the Act is made in the report of the investigation then the appeal available to the Applicant is in writing and without an oral hearing.

15. There is no doubt but that the second named Respondent must apply fair procedures. However fair procedures vary depending upon the nature of the process being conducted. The process being conducted by the second named Respondent is an important and significant quasi judicial process with the result impacting upon the potential safety, welfare and life of an Applicant. In considering a claim that there has been a breach of fair procedures or a failure of the constitutional duty to apply fair procedures by an administrative body the court should have regard to a number of factors including, namely:

(a) The nature and type of the statutory function which the decision maker is carrying out:

(b) The statutory framework within which the function is carried out:

(c) The possible detriment that an Applicant might suffer arising from the alleged failure.

16. In considering the issue of the requirements of fair procedures assistance can be gleaned from the approach which the Irish courts have adopted in relation to criminal investigations leading to a criminal trial. This court is satisfied that it could not be reasonably contended that the obligations for fair procedures as viewed by the courts in respect of criminal investigations or trials could be in any way lower than the requirements for fair procedures to be followed in an administrative body albeit one carrying out an important quasi judicial function. In other words this Court is satisfied that the requirements identified as being necessary in criminal investigations and trials represent the imposition of the highest requirements for fair procedures.

17. The asylum process is of such moment that only high standards of fairness will suffice. Against that background consideration of how the Supreme Court has approached matters of procedure in relation to the criminal law is of benefit.

18. The issue of recording interviews during a criminal investigation was considered by the Supreme Court in *The People (Director of Public Prosecutions) v. Quilligan* (no. 3) [1993] 2 I.R. 305 where O'Flaherty J. (at p. 357) dealing with the issue of the electronic recording of police interviews in part of his judgment stated as follows:

"Like other members of the court, I do not shut my mind to the fact that there has been expressions of public unease about certain cases where confessions were obtained. The Oireachtas, too, has become alive to the rights of the suspects in this regard and to the need to afford him proper protections and, thus, it is pertinent to have regard to the protections set out in the Criminal Justice Act, 1984, in regard to persons in custody. I think we are, at this stage of our development, fairly and squarely in an area of policy which should properly be left to the Oireachtas. The question of having electronic recording of police interviews is provided for in s. 27 of the Act of 1984. Regulations have not yet been brought in to implement the provisions of the section. It is not for me to reason why this has not been done but the introduction of audio/visual recordings is as likely to be of benefit to the Gardaí as it is to the accused. It would, I am convinced, be a much better way to ensure that a just verdict is reached than the introduction of a corroboration warning requirement."

19. O'Flaherty J. expressed in that portion of his judgment the clear view that the issue of the introduction of audio/visual recordings, even where there was a statute providing for same which had yet to be implemented was a matter of policy.

20. Whilst the statement by O'Flaherty J. is indicative of a court being disinclined to enter into the area of policy it does not mean that a court must not review procedures to ascertain whether on the particular facts procedures offend objective considerations of

fairness. In doing that the court is obliged to look at the totality of the administrative procedure. It is not for the court to direct an administrative body as to its procedures nor does judicial review exist to direct procedure in advance but rather judicial review by the courts is there to ensure that administrative bodies which have made decisions susceptible of review have carried out their duties in accordance with law and in conformity with natural and constitutional justice. It is important that the High Court does not anticipate or direct an administrative body. In relation to the issue of recording interviews there is no such anticipation as it is clear that the procedures followed by the second named Respondent are such that an Applicant is precluded as a matter of policy from making or obtaining a recording of the interview.

21. The procedures followed by the second named Respondent, set forth in detail above, clearly go well beyond what is strictly required by statute and provide *inter alia* that the interview notes must be signed and agreed by an Applicant on a page by page basis. The notes are a summary of what has been said rather than a verbatim account. The Respondents submitted that such procedures are sufficient to ensure compliance with natural justice in the conduct of refugee interviews and pointed out that there is no legal authority to support the proposition that where interpretative facilities are provided and interview notes are read back and signed by the interviewee, that there is a residual obligation either to permit an interviewee to make a separate recording or to furnish the interviewee with a recording. Reliance was placed on the Supreme Court decision in *Lavery v. Member in Charge* [1999] 2 I.R. 390 in particular on the part of the judgment O'Flaherty J. (at pp. 395/396) where he stated, as follows:

"The State appeals to this court. The question for resolution is this: Does such deprivation as the solicitor for the detained man suffered in this case mean that the detention of the applicant was rendered unlawful? Without any doubt, if a person in custody is denied blanket access to legal advice, or if he is subjected to ill treatment by way of assaults, for example, then that would render his detention unlawful.

However, the Gardaí must be allowed to exercise their powers of interrogation as they think right, provided they act reasonably. Counsel for the State submitted to the High Court Judge that in effect what Mr. MacGuill (solicitor for the complainant in that case) was seeking was that the Gardaí should give him regular updates and running accounts of the progress of their investigations and that this was going too far. I agree. A solicitor is not entitled to be present at the interviews. Neither was it open to the Applicant, or his solicitor, to prescribe the manner by which the interviews might be conducted, or where. The point of whether there were adequate notes taken of any interview might, or might not, be of significance if there was a subsequent trial... it should be noted, too, that of course if a charge had followed on the detention both the accused and his legal advisors would have been entitled to all relevant documentation."

22. This authority is of assistance to this court in demonstrating the reluctance of the courts to prescribe the manner in which interviews must be conducted or recorded. Such approach does not remove the overall requirement of the court to ascertain if the overall process offends objective considerations of fairness.

23. The courts in England have on two recent occasions considered the question of the tape recording of interviews as part of the asylum process. The first consideration was by Pitchford J. in *Mapah v. Secretary of State for the Home Department* (Unreported judgment of the 25th February, 2003) also at [2003] EWHC 306 (Admin) and the later decision is of the Court of Appeal in 2005, in the case of *R(Dirshe) v. Secretary of State* [2005] 1 WLR 2685. In the first decision Pitchford J. determined that the policy of the Secretary of State to refuse permission to tape interviews during an immigration interview was lawful and did so on the basis that his consideration of the overall procedure in place did not in his judgment offend objective considerations of fairness (paragraph 63). The Court of Appeal some two years later arrived at a different view but expressly did not overrule the decision in *Mapah*. The different view was based upon the different administrative procedures in place at the time of the Court of Appeal's consideration of the matter.

24. From those two cases a number of matters can be identified which are of assistance to this court in arriving at its decision.

25. The court should have regard to the following matters in assessing fair procedures, namely:

1. That in assessing the fairness of procedures a high standard of fairness will be required.
2. That the record of an interview during an asylum process is important and can be crucial in the outcome of the process. (The same also applies in Ireland).
3. In asylum cases the duty to establish the facts is shared. (This is even more so in this country given the clear identification of the process as being inquisitorial).
4. The existence of an appellate procedure provides a safeguard. (This is equally applicable to Ireland).
5. That access by an Applicant to legal advice (including free legal advice) and including the potential for representation at an interview is a significant factor in assessing overall fairness.
6. That the issue of a recording must be viewed against the entirety of the procedures followed by the administrative body.
7. That regard must be had to the need for a speedy and fair disposal of applications.
8. That any requirement for recording must be viewed against the precise obligation laid down such as to have a verbatim account of the interview.

26. When one comes to look at the position in Ireland and the special application of the Irish authorities a number of other matters arise, namely:

1. That great care must be taken to ensure that the court does not involve itself in imposing a policy on an administrative body.
2. That the Irish courts have placed great emphasis on the significance of the inquisitorial nature of the enquiries being carried out by the second named Respondent and have emphasised the non-passive role of an Applicant.
3. That the Irish courts have recognised the appropriateness of the use and the admissibility in evidence of signed statements in criminal prosecutions.

4. That the courts must show deference to administrative bodies' independence in that the court does not seek to impose procedures no matter what its view as to what might be better or improved procedures provided such procedures are deemed to be fair.

5. That there is a presumption that administrative bodies will discharge its own procedures in a fair manner (see *East Donegal Cooperative Livestock Mart Limited v. Attorney General* [1970] I.R. 317 at p. 341.

27. The core issue which this Court has to decide is whether or not the procedure followed by the second named Respondent meets the appropriate standard of fairness required in the light of the important decisions made by that body.

28. This Court is satisfied that an analysis of the entire process demonstrates that the procedure cannot be said to offend objective considerations of fairness. The approach adopted by the Court of Appeal in England to declare that it was unlawful to decline to permit an Applicant who is not accompanied at his asylum or human rights interview by a legal representative and/or an interpreter to tape record that interview was based upon the precise procedures in England. The procedures in this jurisdiction are significantly different in important aspects. The procedure in this jurisdiction does not seek to have a verbatim account and therefore a central finding of the Court of Appeal to the effect that a tape recording provides the only sensible method does not apply in this jurisdiction. Also the process followed in this jurisdiction is that each and every page is signed by the Applicant and agreed by the Applicant. That procedure was not present as of the date of the Court of Appeal hearing in 2005. There is also no time gap between the Applicant hearing what is recorded and signing and agreeing same as the procedures provide for it to be done on the day of the interview and at the time of the interview. It is also the case that in this jurisdiction there is access to free legal advice in advance of the interview and the possibility of being accompanied at an interview by a representative of the Refugee Legal Service if there is advice to that effect. There is also an entitlement to have your own legal representative present at the interview. This court must also have regard to the appeal processes provided for by statute and the extensive use of judicial review to ensure fair process. Further in viewing the fairness of the procedures regard must be had to the capacity in this jurisdiction to submit documents and statements in advance or at the interview. Finally, and by no means least, it is the case that the statute (s.11(2)) does not require a verbatim account of the interview but rather a report in writing in relation to the interview.

29. I am satisfied that the answer to the central question is that having regard to the entirety of the procedure adopted by the second named Respondent that that procedure meets the appropriate standard of fairness and the procedure in place does not offend objective considerations of fairness. That is not to say that there is not always scope for refinement and improvement of procedures but in the light of the above determination it is not for this court to make such judgment.

30. The court therefore declines the reliefs sought in the amended statement grounding application for judicial review and determines that the second named Defendant has not erred in law and has not acted contrary to the Applicant's right to fair procedures under Article 40.3 of the Constitution or under the European Convention on Human Rights Act 2003 and I also hold that there has not been any unlawful exercise of discretion contrary to the Refugee Act 1996.