Neutral Citation: [2013] IEHC 435

THE HIGH COURT

JUDICIAL REVIEW

Record Nos. 2012/957 J.R. and 2013/292 J.R.

Between:

P. B. N. [DR CONGO]

APPLICANT

-AND-

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT OF MS JUSTICE M. H. CLARK, delivered on the 16th day of September 2013

1. The applicant is a national of the Democratic Republic of the Congo (DRC) from Kinshasa who has been in Ireland since 2007. She has been refused asylum, subsidiary protection and humanitarian leave to remain, and a deportation order was made in respect of her in 2011. She claims that failed asylum seekers returned to the DRC are at risk of treatment contrary to Article 3 ECHR. On that basis she seeks an interlocutory injunction restraining her deportation pending the determination of proceedings, in which she challenges first the Minister's refusal in November 2012 to consent to her re-admission to the asylum process and, secondly, his refusal in February 2013 to revoke the deportation order. An application for leave has not yet formally been heard in either case. Mr Paul O'Shea B.L. appears for the applicant and Ms Denise Brett B.L. for the respondent in both matters.

BACKGROUND

2. When the applicant applied for asylum in December 2007 she presented as a citizen of the DRC who was born in 1962. She is from Kinshasa, is of the Luba tribe, has three children and is a widow. Her story, which was generally told in an inconsistent and confused manner, related to her work as secretary to a named Admiral who, like the former leader Mobutu, came from Equateur province. In 2006 differences arose between her employer and Generals from the east who were supported by President Kabila, and she was asked by the Minister for the Interior – also a General from the east – to come and work for him and to administer poison to the Admiral. When she refused she was arrested, detained and ill-treated. She was released on the order of another General and fled to Congo-Brazzaville. After 50 days there she came to Ireland. Both the Refugee Applications Commissioner and the Refugee Appeals Tribunal made negative credibility findings in relation to her account and she was informed in June 2009 that the Minister had decided not to grant her refugee status. She did not challenge that decision by way of judicial review.

Leave to Remain / Subsidiary Protection

3. On the 7th July, 2009, the applicant's then solicitors applied for leave to remain on her behalf and ten days later they submitted a subsidiary protection application. Both applications referred to extracts from the same nine documents which were dated between 2005 and 2007 and which addressed the issue of the treatment of failed asylum seekers returned to the DRC. A different firm of solicitors then came on record and in March 2010 they forwarded several personal testimonials and a letter from the applicant dated September 2009 stating that her life would be in danger in DRC as a failed asylum seeker. Additional testimonials were furnished in May and August 2010, with additional COI reports relating to general human rights violations in the DRC.

4. In June 2011 the Minister determined that the applicant was not eligible for subsidiary protection. The reasoning noted that the claimed risk faced by returned failed asylum seekers had been the subject of debate in the UK but in December 2008 the Court of Appeal upheld a determination of the Asylum and Immigration Tribunal (AIT) dated the 18th December, 2007, which found that failed asylum seekers do not per se face a risk of persecution or serious harm on return to the DRC. It was also noted that a letter from the British Embassy in Kinshasa dated the 23rd June, 2009, states that all passengers entering the DRC were liable to be questioned by the immigration authorities but they had no evidence that returning failed asylum seekers – from the UK or any other country – were specifically targeted for this or any other adverse treatment. The reasoning referred to and relied on the credibility findings made by the Tribunal. The applicant did not challenge the subsidiary protection refusal by way of judicial review.

5. Shortly after the subsidiary protection decision was notified, seven further COI documents relating to the general situation in the DRC were furnished to the Minister in support of the leave to remain application, this time by a firm of immigration consultants. In fact, none of these documents related to failed asylum seekers.

6. When her file was examined by the Minister's agents in August 2011, specific attention was paid to the issue of the return of failed asylum seekers. The decision of the UK AIT in *BK (Failed asylum seekers) DRC CG* [2007] UKAIT 00098 and a Country Advice on the DRC (COD35823) issued by the Australian Government Refugee Review Tribunal on the 12th December, 2009, were relied upon. The materials on the treatment of failed asylum seekers (i.e. UK AIT decision and British Embassy letter) which had been referenced in the subsidiary protection decision were outlined. It was determined that although some categories of people were likely to face torture, inhuman or degrading treatment upon return, the applicant does not come within those categories. The Minister then made a deportation order in respect of her on the 27th September, 2011. That deportation order was not challenged.

The Current Applications

7. On the 23rd July, 2012 – nine months after the deportation order was made – yet another firm of solicitors made two parallel applications to the Minister on her behalf: first, seeking the Minister's consent under Section 17(7) of the *Refugee Act 1996* for her re-admission to the asylum system and secondly, seeking revocation of the deportation order pursuant to Section 3(11) of the *Immigration Act 1999*.

8. The Section 17(7) application was based on the asserted fear of being subjected to persecution if returned to Kinshasa as a failed asylum seeker. It was submitted that the Tribunal decision was fundamentally flawed in that it was based on outdated and inaccurate

country of origin information. The following documents were furnished:

> • A report by *Justice First*, a UK charity (dated the 24th November, 2011), entitled *Unsafe Return – Refoulement of Congolese Asylum Seekers*;
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> • An article published in *The Guardian* (dated the 11th November, 2011), entitled *Congo civilians beaten for supporting opponents of president, says UN report* which relates to the targeting of anti-Kabila protesters in the lead-up to elections and says nothing about failed asylum seekers;
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> • A document prepared by the Refugee Documentation Centre (RDC) which compiled extracts on the treatment of failed asylum seekers returned to the DRC (dated the 15th July, 2010), including several of the documents furnished with the leave to remain application, a UNHCR response to information request dated the 19th April, 2006, two UK Home Office COI reports on DRC dated January and June 2009, and articles from *The Guardian* and the *Evening Gazette* dated 2009.

9. The applicant's solicitors also – inexplicably – furnished an RDC document on the treatment of MLC members (dated the 3rd June, 2010). To the Court's knowledge the applicant never claimed any affiliation with the MLC.

10. The Section 3(11) application was based on an asserted significant change in the applicant's circumstances since the deportation order was made, namely that there had been a deterioration of conditions in the DRC and in the treatment of returned asylum seekers. The same three documents furnished with the Section 17(7) application were appended together with a May 2005 report from *Médecins Sans Frontières* report on access to healthcare, mortality and violence and two wholly irrelevant newspaper articles on child miners and child soldiers.

Section 17(7) Decision

11. By decision dated the 17th August, 2012, the Minister refused his consent under Section 17(7). The applicant sought a review of that decision and by further decision dated the 8th November, 2012, the earlier decision was affirmed. The review decision outlined that all matters concerning the return of failed asylum seekers to DR Congo would be considered under Section 3(11). The examining officer found that the information and documentation furnished by the applicant did not amount to new evidence. He relied on the credibility findings made by the asylum authorities and noted that when the Irish authorities make arrangements to repatriate persons to the DRC, no mention is made of their failed asylum status. He referred to the 2006 UNHCR report mentioned in the RDC document furnished by the applicant which stated that, although limited information was available to the UNHCR, there was no evidence of systematic abuse of returnees. He also referred to *F.V. v. Refugee Appeals Tribunal* [2009] IEHC 268 and *M.T.T.K. v. Refugee Appeals Tribunal* [2012] IEHC 155 which he summarised as being to the effect that failed asylum seekers are not, as a matter of course, members of a social group and that particularly cogent evidence is required to show that failed asylum seekers are targeted for persecution.

12. In late November 2012 the applicant issued proceedings (2012 957 J.R.) challenging the Minister's decision under Section 17(7). On the 14th January, 2013, her solicitors furnished, in support of the Section 3(11) application, a letter offering full time employment to the applicant.

Section 3(11) Decision

13. By letter dated the 20th February, 2013, the applicant was informed that the Minister had declined to revoke the deportation order. The lengthy Section 3(11) decision casts doubt on the relevance and reliability of the *Unsafe Return* report. It finds that the report was compiled by activists with a particular standpoint and without input from experts knowledgeable in the field and further that it advocated its own cause. The information contained in the report was drawn from a limited base and the report was produced from a subjective perspective. The examining officer then tested the *Unsafe Return* report against other available COI including a BBC report dated December 2005 and a 2006 UNHCR document prepared in response to the BBC programme. (These reports had been highlighted in the RDC document dated the 15th June, 2010, furnished by the applicant.) The examining officer also sourced additional COI including a report dated November 2012 prepared by the UK Border Agency entitled *Report of a fact finding mission to Kinshasa conducted between 18 and 28 June 2012, Information about the procedure for and treatment of Congolese nationals returning to the DRC from the UK and Western Europe*. The examining officer quoted extensively from that report which, he said, found a risk of low level mistreatment by officials, possibly acting without sanction of their supervisors, who extort money or steal belongings from returnees, but that on the whole the majority of agencies considered that, at least in the normal course, there would not be a serious threat of mistreatment to returnees beyond extortion and / or theft by corrupt airport officials. The executive officer said that the report notes that returnees could be detained if they had a contagious disease, for ordinary criminality, if they are on a government 'blacklist' or where their ethnicity or origin is thought to be 'suspect'. He found that *Ms N* did not fall within those categories. As to whether the return of a failed asylum seeker would arouse suspicions, it was emphasised that Ireland does not identify failed asylum seekers.

14. A second set of proceedings was issued (2013 292 J.R.) to challenge that decision refusing to revoke the deportation order. An injunction was sought to restrain the execution of the deportation order pending the determination of the proceedings.

THE APPLICANT'S ARGUMENTS

15. Mr O'Shea, on behalf of the applicant, accepted that in order to obtain an injunction he had to identify a fair issue to be tried. He submitted that on the basis of the *Unsafe Return* report, the question of the balance of convenience could only be answered in one way as the report shows that if deported there was a risk that *Ms N* will face treatment contrary to Article 3 ECHR. He submitted but did not press the argument that if the applicant is not granted an injunction, this would demonstrate that judicial review was not an effective remedy within the meaning of Article 32 of Directive 2005/85/EC (the 'Procedures Directive').

Section 17(7) grounds

16. The grounds pursued at the hearing of the motion in relation to the Section 17(7) decision may be summarised thus, in descending order based on the emphasis placed on them:-

> (a) The Minister erred in finding that the *Unsafe Return* report did not constitute new evidence. The report was not available at an earlier stage and its substance was not previously considered. In refusing to consider it as new evidence the Minister acted in breach of s. 17(7A) of the *Refugee Act 1996* as inserted;
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> (b) The Minister erred in preferring an out-of-date 2006 UNHCR document to the recently published *Unsafe Return* report,

and in failing to explain that preference;

(c) The Minister erred in law in finding that failed asylum seekers do not, as a matter of course, constitute a particular social group. The applicant relies on Article 10(1) (d) of Council Directive 2004/83/EC and the judgment of the UK Upper Tribunal (Immigration and Asylum Chamber) in *KB (Failed asylum seekers and forced returnees) Syria* [2012] CG UKUT 00426 (IAC);

(d) The Minister erred in fact in finding that the Congolese authorities are not informed of the fact that returnees are failed asylum seekers. Their status would be obvious as returnees normally travel on an Irish-issued travel document and arrive on a 'Frontex' flight;

(e) The Minister erred in law in relying on credibility findings made by the asylum authorities which were largely irrelevant to her application under s. 17(7).

Section 3(11) grounds

17. The grounds pursued in relation to the Section 3(11) application overlapped with the Section 17(7) challenge grounds. The latter may be summarised as follows, again in descending order:-

(a) The Minister failed to properly consider the *Unsafe Return* report. The report refers to a practice of taking the names and addresses of returnees and visiting them a day or two later and arresting them. The Minister did not consider this aspect of the report and focussed solely on difficulties encountered by returnees at the airport in Kinshasa;

(b) The Minister failed to explain why he preferred a UK Border Agency report which is no more "independent" than the *Justice First* organisation which published the *Unsafe Return* report. The latter is a registered UK charity and the report seems to be thoroughly researched. Even if 10% of it is true it raises severe doubt that the applicant's rights under Article 3 ECHR would be safeguarded on her return. The UNHCR document expressly states that the UNHCR had limited information and is therefore less reliable than the *Unsafe Return* report;

(c) The Minister acted in breach of the principle of *audi alteram partem* insofar as the applicant specifically requested the Minister to afford her an opportunity to comment on any COI to be relied on by the Minister other than that submitted by the applicant, but he failed to do so. The undisclosed material had an appreciable influence on the decision; and

(d) The system whereby proposed deportees are not informed of the date of the deportation is in breach of the right of access to the courts. This is a serious failing in the system. The State is permitted to 'swoop' on hostels during the night and take people to the airport without having an opportunity to come to court. Foreign nationals enjoy the same right of access to the courts under the Constitution as Irish citizens. A system of pre-deportation detention would be more humane and would avoid the undoubted risk of pre-deportation flight.

THE RESPONDENT'S ARGUMENTS

18. The respondent argued that in *Okunade v. The Minister* [2012] IESC 49 where the law on deportation injunctions was outlined, the applicant had succeeded because of exceptional countervailing circumstances which do not exist in the present case. Reliance is also placed on *M.A.H. v. The Minister* [2013] IEHC 240 and *Khan v. The Minister* [2013] IEHC 186.

19. The respondent makes a very succinct submission: the applicant did not put before the Minister any "*new elements or findings*" which would "*significantly*" add to the likelihood of her qualifying for refugee status, for the purposes of Sections 17(7A) and (7D) of the *Refugee Act 1996*, as amended. The issue of the alleged persecution of returned failed asylum seeker was fully considered and rejected by the Minister at the subsidiary protection and leave to remain stages. The respondent relies on *F.V. v. Refugee Appeals Tribunal* [2009] IEHC 268 and *M.T.T.K. v. Refugee Appeals Tribunal* [2012] IEHC 155, which were referred to in the Section 17(7) review decision. In those cases it was held that returned failed asylum seekers are not per se members of a particular social group; rather, such persons must present cogent, authoritative and objective COI to establish a Convention nexus. The applicant may have produced a new report but she did not furnish any new evidence. In reality, the Minister considered the *Unsafe Return* report in some depth in his Section 3(11) decision and he clearly found it qualitatively wanting and lacking in objectivity. The Minister, as the primary decision maker, was entitled to come to his own conclusions on the report and reject its content. The fact that it was considered at the Section 3(11) stage instead of the Section 17(7) stage is immaterial; in fact it was to the applicant's advantage as the Minister's obligations in Section 3(11) cases are more extensive than at the Section 17(7) stage.

20. The respondent submits that the balance of convenience lies in favour of executing the lawful deportation order made in respect of the applicant. The applicant was required to leave the State in 2011 and she failed to do so. She could have left voluntarily at any stage. As she has no entitlement to be in the State, it is incumbent on the Court to uphold the lawful valid decisions made, which the applicant has ignored. The applicant has been found to be wholly lacking in credibility at each stage of her claim. She can therefore be significantly differentiated from the persons whose interviews formed the basis for the *Unsafe Return* report where it was asserted that those persons had strong political affiliations or would at least be perceived to have such affiliations upon return to the DRC. The same applied to the applicants whose return to Syria was prohibited in *KB (Failed asylum seekers and forced returnees) Syria* [2012] CG UKUT 00426 (IAC). The specific facts pertaining to this applicant are very different.

DECISION

21. It is common case that the law relating to injunctions in deportation cases is as established by the Supreme Court in *Okunade v. The Minister* [2012] IESC 49. The applicant in that case brought judicial review proceedings challenging the Minister's decision to make a deportation order in respect of him. He had brought his challenge within the statutory 14 day time limit and argued that he was therefore entitled to an interlocutory injunction restraining his deportation until the leave application was determined. Clarke J. held that there is no entitlement to a quasi-automatic stay or injunction. Rather, "*a court, when faced with the question as to what is to happen pending a full trial, has to balance the competing legitimate interests involved*" [para. 8.11]. Clarke J. went on to set out the overall test for the grant of a stay or injunction which prevents an otherwise valid deportation order from having effect pending trial, as follows, at para. 9.42:-

"(a) The court should first determine whether the applicant has established an arguable case; if not the application must be refused, but if so then;

(b) The court should consider where the greatest risk of injustice would lie. But in doing so the court should:-

(i) Give all appropriate weight to the orderly implementation of measures which are prima facie valid;

(ii) Give such weight as may be appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and

(iii) Give appropriate weight (if any) to any additional factors arising on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings;

but also

(iv) Give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful.

(c) In addition the court should, in those limited cases where it may be relevant, have regard to whether damages are available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages.

(d) In addition, and subject to the issues arising on the judicial review not involving detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case."

22. Thus if no arguable case has been established it follows that no injunction will be granted. If an arguable case is established, however, the circumstances of the case must be weighed in the balance. Clarke J. held that in immigration cases in particular, "*The default position is … that an applicant will not be entitled to a stay or an injunction. However, it may be that, on the facts of any individual case, there are further factors that can properly be taken into account on either side*" [para. 10.5]. He outlined several such factors which the reviewing court must weigh in the balance:

• The ***public interest*** in the implementation of decisions made in the immigration process which are *prima facie* valid – this carries "*significant weight*" [para. 10.2].

• The ***possible injustice*** caused to a deported applicant who is subsequently successful in his or her proceedings [para. 10.3]. However, success in judicial review proceedings does not necessarily mean the applicant will gain a right to reside in Ireland; it simply means that the authorities will have to reconsider certain issues or engage in a further process before a final decision is made. Unless there are "*material countervailing factors*", this is a factor which will favour the implementation of a deportation order [para. 10.4].

• Whether it is ***necessary for the applicant to be present*** so as to enable any subsequent process to be conducted or a hearing to be held [para. 10.4]. If the presence of the applicant is necessary, "*all due weight needs to be attached to that factor*" and if the applicant would by his absence suffer material prejudice in the presentation of the case at trial then "*very great weight would need to be attached to that fact*" [para. 10.5].

• Whether there is a ***serious risk of criminality*** or other activity contrary to the public interest – these factors would support the refusal of an injunction [para. 10.5].

• Whether the deportation would have any ***practical consequences***, "*such as the relevant conditions in any country to which the applicant is likely to be deported*" [para. 10.5].

• Whether the deportation would, even on a temporary basis, cause ***more than the ordinary disruption*** in being removed from a country in which the applicant wished to live, such as a particular risk to the individual or a specific risk of irremediable damage – "*such factors, if sufficiently weighty, could readily tilt the balance in favour of the grant of an injunction or a stay*" [para. 10.6].

• Whether the deportation would disrupt ***family life*** which has been established in Ireland for a significant period of time – this is "*a material consideration*". Clarke J. held that "*All due weight needs to be attached to the undesirability of disrupting family life involving children in circumstances where, after a successful conclusion of both the judicial review proceedings and any other process which might follow on, the children concerned might be allowed to remain in or return to Ireland*" [para. 10.8]. The court should consider the consequences for the child of being deported only to find he / she may be entitled to return [para. 10.10]. Any such difficulties will depend on the facts of the case and are not necessarily decisive. This is just one factor to be taken into account and the weight to be attached to it depends on all relevant circumstances [para. 10.11].

• The ***strength of the case***, although the court is not require to analyse disputed facts or deal with complex issues of law [para. 10.12].

23. In this case the applicant asserts that there is a fair issue to be tried in both proceedings and that there is a significant countervailing circumstance weighing in favour of the grant of an injunction, namely a risk that because she is a failed asylum seeker she will be arrested and detained upon return to Kinshasa.

24. As a matter of principle, there can be no doubt that if a person can identify a credible basis for the contention that his or her deportation would breach the prohibition of *refoulement* or would expose him or her to a real risk of treatment contrary to Article 3 ECHR, that person will (absent rare and exceptional circumstances) be entitled to an injunction restraining deportation pending the determination of a challenge to the decision to deport. As Clarke J. held in *Okunade* at para. 10.7, "*That the right to be protected from being deported to a situation where one is placed in significant danger is an important or fundamental right can hardly be doubted*." Article 3 ECHR provides that "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment*." The Article 3 guarantee is absolute and non-derogable and implies an obligation upon Contracting States not to deport a person to a country if substantial grounds have been shown for believing that the person concerned, if deported, would face a real risk of being subjected to treatment contrary to Article 3 {see e.g. *Soering v. United Kingdom* (1989) 11 EHRR 438; *Vilvarajah & Others v. United*

Kingdom (1992) 14 EHRR 248; *Saadi v. Italy* (2009) 49 EHRR 30}. However, this does not mean that every person who asserts that such a risk exists will be automatically granted an injunction. The Court must first engage in a rigorous examination of the existence of a real risk of the harm asserted. As Clarke J. stressed in *Okunade*, "*regard has to be had, on the facts of any individual case, to the basis put forward for the suggestion that there is a real risk of harm should the person concerned be deported*." While fundamental rights may be involved, "*it does not necessarily follow that, in each case in which an interlocutory injunction is sought, there is any credible basis for suggesting that truly fundamental rights are, in fact, involved*" [para. 10.7]. Thus, if the applicant can establish a fair issue to be tried, the question for this Court is whether there is a credible basis for the assertion that the deportation would create a real risk of treatment contrary to Article 3 ECHR.

The Role of the Court

25. Mr O'Shea submits that the Court is not confined to considering only those documents which were before the Minister as it follows from *The Minister for Justice v. Rettinger* [2010] 3 I.R. 783 that this Court should, if necessary, obtain materials of its own motion in order to conduct the rigorous assessment required under Article 3. The Court finds this proposition to be misconceived. The findings of the Supreme Court in *Rettinger* with regard to the fact-finding obligations of the High Court in European Arrest Warrant (EAW) cases are of no assistance to this Court when it is exercising its judicial review functions. The High Court has statutory obligations in EAW cases which are fundamentally different from the obligations of the Court in judicial review cases. Before endorsing an EAW or making an order directing the surrender of a person to another Member State, the Court must be satisfied that the provisions of the *EAW Act 2003* have been complied with. Under s. 18 of the Act, as amended, the Court may direct the postponement of a person's surrender if satisfied that circumstances exist what would warrant such postponement on humanitarian grounds, including that a manifest danger to the life or health of the person concerned would likely be occasioned by his or her surrender to the issuing state. Section 37 of the Act prohibits any surrender which would be incompatible with the ECHR or the Constitution or where there are reasonable grounds for believing that the warrant was issued for the purpose of facilitating the person's prosecution or punishment for reasons connected with his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation. Equally the surrender is prohibited under s. 37 if there are reasonable grounds for believing that the person would be subjected to a death sentence or torture or inhuman or degrading treatment. In assessing whether such a risk exists the Court is the primary decision maker and is empowered under s. 20 of the Act to seek additional information from the Minister to enable it to perform its functions.

26. In judicial review cases, in contrast, the Court is not the primary decision-maker; it is engaged in an assessment of the legality and reasonableness of an administrative decision made by another organ of the State. In deportation cases such as this, it is the Minister who is the primary decision-maker and who is required to consider any issue raised alleging a breach of s. 5 of the *Refugee Act 1996* or Article 3 ECHR or of the Constitution. The Court is confined to assessing the legality and reasonableness of the Minister's deportation decisions in accordance with the accepted principles of judicial review. The Court here is decidedly not a primary decision-maker. However, this does not mean that proposed deportees are afforded anything less than a full and rigorous assessment of any asserted risk of treatment contrary to Article 3. It has long been the practice of this Court in deportation proceedings that if new or previously unconsidered evidence is put before the Court which suggests a real risk of treatment contrary to Article 3 ECHR, the Court will recommend that the proceedings should be withdrawn (generally with no order as to costs) and the applicant should bring a fulsome and frank Section 3(11) application, putting all relevant information before the Minister within a specified time frame. This approach has largely resulted in the Minister granting undertakings not to deport pending the determination of a fresh application with a further period of some two or three weeks thereafter to permit the bringing of any challenge to the new decision.. In the limited number of cases where no such undertaking has been forthcoming, the Court has granted an interlocutory junction pending the determination of the fresh application. The proposed deportee's right of access to the Court is thereby protected because if a negative Section 17(7) or Section 3(11) decision issues, he or she has the right to issue fresh proceedings challenging the decision in accordance with the traditional principles of judicial review. Thus, while the Court is limited by the traditional principles of judicial review as to the materials which it may consider in conducting its assessment under Article 3 ECHR, the range of remedies available is sufficient to afford an effective remedy, to ensure that a rigorous analysis of the risk of treatment contrary to Article 3 is undertaken, and to safeguard the foreign national applicant's constitutional right of access to the courts.

Is there a Fair Issue to be Tried?

27. The applicant first complains that in refusing his consent to her re-admission into the asylum process, the Minister acted in breach of Section 17(7) of the *Refugee Act 1996*. Section 17(7) as substituted by Regulation 8 of the *ECs (Asylum Procedures) Regulations 2011* (S.I. No. 51 of 2011) provides that "*A person to whom the Minister has refused to give a declaration may not make a subsequent application for a declaration under this Act without the consent of the Minister*." Section 17(7A) as inserted provides:-

> "*7A. The consent of the Minister referred to in subsection (7)—*
>
> *may only be given following a preliminary examination as to whether new elements or findings relating to the examination of whether the person qualifies as a refugee have arisen or been presented by the person, and shall be given if, following the preliminary examination referred to in paragraph (a), new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee."*

28. This insertion is clearly designed to give effect to Article 32(3) of Directive 2005/85/EC (the 'Procedures Directive'), which provides:-

> *"3. A subsequent application for asylum shall be subject first to a preliminary examination as to whether […] new elements or findings relating to the examination of whether he/she qualifies as a refugee by virtue of Directive 2004/83/EC have arisen or have been presented by the applicant."*

29. Section 17(7D) of the *Refugee Act 1996* as inserted in 2011 further provides:

> "*7D. […] the Minister shall consent to a subsequent application for a declaration being made where he or she is satisfied that—*
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> *(a) since his or her previous application for a declaration was the subject of a notice under subsection (5), new elements or findings have arisen or have been presented by the person concerned which makes it significantly more likely that the person will be declared to be a refugee, and*
>
> *(b) the person was, through no fault of the person, incapable of presenting those elements or findings for the purposes of his or her previous application for a declaration (including, as the case may be, any appeal under section 16)."*

30. Sub-section (b) of Section 17(7D) evidently transposes Article 32(6) of the Procedures Directive, which provides:-

> *"6. Member States may decide to further examine the application only if the applicant concerned was, through no fault of his/her own, incapable of asserting the situations set forth in paragraphs 3, 4 and 5 of this Article in the previous procedure, in particular by exercising his / her right to an effective remedy pursuant to Article 39."*

31. Recital (15) to the Directive is also relevant; it provides:-

> *"Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In these cases, Member States should have a choice of procedure involving exceptions to the guarantees normally enjoyed by the applicant."*

32. These provisions were considered in L.H. v. The Minister [2011] 3 I.R. 700 where Cooke J. summarised their effect as follows at p. 713:-

> *"Accordingly, under s. 17 as thus amended the Minister is only compellable to grant his consent to a new asylum application being entertained and determined when two conditions are fulfilled; namely, firstly, that new elements or findings have arisen making it significantly more likely that the new application will be successful; and, secondly, that these new elements or findings could not have been presented for the earlier application through no fault of the asylum seeker."*

33. The applicant in this case argues that the *Unsafe Return* document published on the 24th November, 2011, and submitted to the Minister in July 2012 is a "*new element*" which significantly adds to the likelihood that she would succeed in being recognised as a refugee if she was permitted to make a fresh asylum application. She says that she was incapable of presenting this "*new element*" during her first asylum application because the report had not yet been published at that time.

34. The Court is not satisfied that the applicant has established an arguable case on this issue. The *Unsafe Return* report is not a "*new element*" which could not have been presented for the original asylum application as the information as distinct to the publication of the asserted experiences of a specific group of DRC citizens contained in the report is for the most part a reiteration of the information which was put before the Minister in support of the leave to remain and subsidiary protection applications in July 2009. Those applications focussed on the risks faced by failed asylum seekers returned to the DRC and referred to in extracts from nine reports on the subject, namely:-

- A *BBC News* report on problems faced by failed asylum seekers upon return to the DRC (23rd August, 2007);
- An article published in *The Guardian* (24th August, 2007) entitled *Judge grants reprieve to Congolese asylum seekers*;
- An article in *The Independent (London)* (13th July, 2007) entitled *Britain 'must stop deportations to Congo'*;
- A *Refugees International* report (28th April, 2006) entitled *Democratic Republic of the Congo: Reintegration Programs Required in South Kivu*;
- A British Border Agency COI report (31st July, 2007) and a US Department of State report (6th March, 2007) which both referred to the repatriation of large numbers of refugees to the DRC;
- A report by the *Institute for Race Relations* (16th August, 2007) which referred to the imprisonment and torture of returned failed asylum seekers;
- A BBC News Online report (1st December, 2005) entitled *Asylum questions for DR Congo* which refers to the practice of extorting fines from returned failed asylum seekers;
- A report by *The Observer* (10th April, 2005) entitled *Return at any cost is breach of rights* which refers to the detention of returned failed asylum seekers; and
- A British Home Office *Operational Guidance Note* on DRC (30th November, 2006) at page 18.

35. All of these documents pre-date the application for asylum and could easily have been presented to the Refugee Applications Commissioner when she was first presenting her asylum application in December 2007. Equally they could have been presented at her s. 11 interview in April 2008, with her notice of appeal in May 2008, at her oral appeal hearing before the Refugee Appeals Tribunal in December 2008, or indeed at any time prior to receipt of the Tribunal decision. In this regard it is significant that at the appeal stage she was legally represented by RLS solicitors who specialise and are highly experienced in the areas of asylum and immigration.

36. The extracts have been examined by the Court. *The Guardian* extract refers to "*reports*" of the rape and torture of some of those returned to the DRC by the UK. The *Independent* extract referred to "*campaigners*" who said that failed asylum seekers returned to the DRC were "*prime targets because they are seen as traitors*" and warned that people sent back had disappeared without trace. The *Institute for Race Relations* indicates that returnees with no history of persecution "*may be branded a political dissident*" and could, as such, face imprisonment and torture on return. It says that "*All DR Congo deportees are in danger because they risk being interrogated at Kinshasa airport to see if there is a political 'charge' against them, or just to extort a 'fine'. Some don't have any means to pay a 'fine' and may be imprisoned, possibly indefinitely*". A 2005 BBC report indicates that returnees to the airport in Kinshasa were taken to an office for questioning. Some were asked for a bribe but if they had "*problems with the government*" they were detained. An *Observer* article, also from 2005, indicated that returning asylum seekers had reported being held in small cells at the airport and called in for interrogation. It reports that 13 returnees from the UK were immediately detained and one who made his way back to Britain said they were beaten daily by up to six soldiers and he was raped six times. Finally a 2006 British Home Office *OGN* referred to returned asylum seekers encountering questioning and possibly temporary detention but no systemic mistreatment.

37. The *Unsafe Return* report contains allegations of a similar nature. It is based on the testimony of 15 adults (of which five were women) and nine children removed from the UK to the DRC between 2006 and 2011. These returnees were interviewed in the DRC in 2011. Nine of the 15 adults said they were interrogated either at the airport or in detention about their activities in the UK. Six said they were arrested at the airport, two after leaving the British Embassy in Kinshasa, and three at home. Some children also reported being arrested and detained. One adult said he / she was threatened with death. Six claimed to have been severely beaten; two said they received electric shock treatment, and one said he / she was handcuffed, blindfolded and severely beaten. Two men and two

women alleged sexual abuse including rape. A number also said that their immigration documents from England were handed to the authorities in Kinshasa and there were reports of bribes being extorted from returnees at the airport to secure their release from detention.

38. Thus the allegations raised in the *Unsafe Return* report were not substantially different to the allegations raised in the nine documents which could have been presented for the original asylum application. The allegations made in those documents were fully considered by the Minister between July and September 2011 at the subsidiary protection and leave to remain stages and the Minister determined that in light of recent developments, including a judgment of the Court of Appeal, the extracts did not identify any real risk to a person in the position of the applicant. The applicant did not challenge that finding by way of judicial review. Instead, after a lapse of some nine months, she made applications under Sections 3(11) and 17(7) on the basis of updated information on the same topic. It is not correct to suggest that she put forward any "*new elements or findings*" which she was incapable of presenting during the original asylum application. In the circumstances it seems to the Court that there are no arguable grounds for the contention that the Minister acted in breach of Section 17(7).

39. The Court is further satisfied that it was reasonable for the executive officer who analysed the Section 3(11) application to question the reliability of the *Unsafe Return* report. It is beyond doubt that the author acted with a genuine sense of concern for and empathy with persons deported from the Tees Valley area where the *Justice First* charity is based.[1] However the report is confusingly presented and persistently confounds the legal concepts of *refoulement* and involuntary return. Further, it clearly is a vehicle for a particular point of view. The introductory paragraphs state that a group of ten asylum seekers and their nine children had established themselves in the Tees Valley and their removal was a matter of distress to those living in the area. After hearing from a number of the returnees, a group of concerned citizens organised for interviews to take place in the DRC in order to gather evidence of the ill-treatment of returnees. Thus the group was seeking evidence to support a particular argument rather than investigating the situation from an objective standpoint. The report itself states that it is designed to support an advocacy campaign (see p. 10, "*This report aims to demonstrate the need for …")* and several pages are dedicated to chronicling the lobbying efforts of the charity and associated grounds. The report displays neither objectivity nor neutrality. The author does not allow for the possibility of innocent explanations for any situation. As an example, the author does not allow for the possibility that the reports that three of the returnees were arrested on suspicion of assaulting a DRC government minister in London could be true. The *Unsafe Return* report was thus based on a small number of interviews with selected deportees who wished to return to England, and with persons close to them in the DRC. While it refers to selected passages from COI reports which, it says, tend to support its conclusions, it does not give any indication that its investigations were carried out in accordance with independent guidelines, terms of reference or autonomous supervision.

40. While there is nothing to prevent an advocate group from compiling documents favourable to its objectives, it is clear that the weight to be attached to documents of this nature cannot compare with that attaching to objective reports prepared under the aegis of the UNHCR which serve to inform rather than to persuade, or by other well-respected organisations such as Amnesty International, Human Rights Watch or Médecins sans Frontières which have a proven record of objectivity. In the circumstances, the Court is not persuaded that an arguable case has been made that it was irrational for the executive officer to attach greater weight to more objective reports such as the 2006 UNHCR report and the 2012 UK Border Agency *Report of a Fact Finding Mission to Kinshasa* which were referenced in the Section 3(11) decision.

41. The UNHCR report was prepared in response to a request to verify a BBC report that failed asylum seekers being returned to the DRC were subject to ill-treatment. The UNHCR was asked, "*some random harassment does occur, but all the objective evidence does not suggest that it amounts to persecution, nor that it is methodical. Is there systematic abuse of returned failed asylum seekers?"* The UNHCR at first responded that it was not systematically monitoring the return of failed asylum seekers to DRC but after press coverage in the UK in late November 2005, the UNHCR office in Kinshasa contacted various organisations and institutions in an attempt to gather more information. This included organisations such as the Congolese Immigration authorities (DGM), the National Committee for Refugees (CNR), IOM, MONUC, and national human rights NGOS. In addition, it sent staff to the airport on days of arrival of flights from Europe. It reported that according to the DGM and CNR, the usual procedure was that if persons arriving at the airport did not have proper documentation or had been absent for a long time they were interrogated at the airport and either freed within 1-3 hours or sent to a detention facility in Kinshasa but released after further verification. The Congolese human rights NGO "*Voix des Sans Voix*" informed the office that rejected asylum-seekers are received upon arrival at the airport by agents of DGM, who question them why they left and applied for asylum. The NGO maintained an office at the airport and were closely monitoring the situation. They mentioned that there were many failed asylum-seekers who are sent back by western European countries, but they are not aware of any of these persons detained and/or tortured upon return. They reported that some of the failed asylum-seekers had to pay some money to the police (5 to 10 USD). IOM Kinshasa had no information of returnees who were mistreated and/or tortured upon return. MONUC's human rights section – who monitor DRC prisons - said they did not receive concrete indications that individual failed asylum-seekers were arrested upon their return. ASADOH said no cases of detention, abuse or torture of failed asylum-seekers were known to their office. The UNHCR noted that it had not witnessed any arrests at the airport although it was difficult to monitor arrivals and UNHCR did not have a regular presence at the airport. The Kinshasa office had details of the forced return of three persons – two from African countries and one from Sweden. The person returned from Sweden was interrogated for some three hours and then released without further problems. The UNHCR noted that in general, prison conditions were "extremely dire". It concluded:

> *"With the limited information available to UNHCR, it does not have evidence that there is a systematic abuse, including detention and mistreatment, of failed asylum-seekers returned to the DRC through Kinshasa airport. It wishes to highlight, however, that it advises against the forced return to Kinshasa of persons of Banyamulenge ethnic origin."*

42. The UKBA report was prepared with the assistance of the Foreign and Commonwealth Office and was based on an investigation carried out in June 2012. Many organisations were given a questionnaire to complete, which specifically addressed the many reports that some returnees were arrested, detained or maltreated by the DRC authorities. In contrast to the *Unsafe Return* report the UKBA report is stated to have been carried out in accordance with EU guidelines on fact-finding missions and was based on interviews with a "*broad spectrum of informed sources in order to obtain accurate, relevant, balanced, impartial and up to date information*" against its published terms of reference (p. 3). The British delegation was assisted by persons at the British Embassy in Kinshasa; French and Belgian country researchers; a senior researcher with Human Rights Watch and an Amnesty International country researcher. It interviewed representatives of a large number of groups including *Human Rescue*; the Federal Office for Migration of Switzerland; two unnamed Congolese human rights organisations; *Les Amis de Nelson Mandela pour la Défense des Droits Humains; the Association de Défense des Droits de l'Homme* (ASADHO); *the Réseau National des ONGs des Droits de l'Homme* (RENADHOC); *Oeuvres sociales pour le développement* (OSD); *L'Eglise du Christ au Congo; Toges Noires; the International Organisation for Migration* (IOM); the DRC General Inspectorate of Justice; the UN Joint Human Rights Office in Kinshasa; officials with responsibility for human rights and for matters relating to migration at the British Embassy, Kinshasa; and finally an official of the Belgium Immigration Office. Thus it is based on a far wider spectrum of opinion and experience than the *Unsafe Return* report.

43. It seems to the Court that the executive officer who analysed the Section 3(11) application recognised the difficulties identified by the UKBA fact-finding mission without any element of sugar coating or minimising. The information collected from the NGOs interviewed indicated that there were some differences in the type of travel document used by returnees. Sometimes returnees are escorted by foreign police who give their documents to the Congolese authorities upon arrival. Some return with passports, some with an emergency travel document or *laissez-passer* and others without documents. Those without documents are taken aside for their nationality to be ascertained and this may involve a search of their belongings and pockets. Persons travelling on a false passport may be detained and face penalties including imprisonment but are mostly released after a short period in detention. A Congolese human rights organisation said:

> *"2.12 Usually those coming back without documents (sans papiers) are not detained. They are interviewed and identified but not detained or mistreated. The treatment depends on what the person has done. If [the person] has caused some trouble in DRC or used forged documents, or is perceived to be against the government [he or she] may experience problems."*

44. A similar view was independently expressed by an official at the French Embassy:

> *"2.70 DGM do not detain people for immigration matters. This happens if you have committed crimes here or for example if a returnee has committed a crime [the example given was murder] in the country the person has been returned from. In which case, the DGM will be looking out for their arrival. Therefore people are not detained for being returned but for the crimes."*

45. A Congolese human rights organisation further said that some returnees were sent to detention places; they were mostly those who were 'black-listed' such as political militants who were abroad and had disturbed the Congolese authorities while in the UK. A person's origin may also play a role; thus, a person originally from Equateur province may have problems. Other interviewees also stated that returnees were subject to checks at the airport and were taken for questioning and depending on what the questioning yielded they were either released (possibly – unlawfully – without some of their belongings) or taken to the detention centre in Kinshasa. Those who were believed to be 'combatants' were detained. Members of *Human Rescue* said that "*The treatment of returnees is related to political activity*" and if a person's responses are not clear, it is assumed the person is a political activist and they are detained. In addition, "*People with criminal records or outstanding arrest warrants who return are arrested*" [para. 4.01]. There are no longer any dedicated detention facilities at the airport but returnees could be put in a room or office before being transferred by police to Kinshasa detention centre. If they do not pay bribes sought by rogue officers they may have difficulties. Prison conditions are poor, overcrowding is common and the food is "*disgusting*".

46. Thus the UKBA fact finding mission report dispels the generalised conclusion drawn in the *Unsafe Return* report that failed asylum seekers *per se* are at risk of arrest and detention. In contrast the UKBA report states that "*Each returnee is a specific case*" [para. 4.03]. It is noteworthy that all of the adults interviewed for the *Unsafe Return* report were stated to be "*perceived or actual political opponents of the current DRC regime*" (p. 17) which may account for the high rate of detention reported. Eight of the 15 returnees interviewed were said to be members of the UDPS; one of the MNC; one of the MLC; one of an unregistered opposition party; another of the RDC-Goma; two of APARECO and three had unknown political affiliations (p. 18).

47. The applicant in this case, in contrast, never claimed any actual political affiliation apart from being a member of the *Mouvement Populaire de la Révolution* (MPR) in Mobutu's time. If, for the sake of argument, the credibility findings were ignored and everything she asserted in her asylum claim were to be taken at face value one would be assessing the position of a returnee who worked as secretary to an Admiral who was powerful under Mobutu. After the 2006 elections she was contacted by the Minister of the Interior, who was an army general from the east, allied with President Kabila. He asked her to come and work for him and wanted her to poison her employer the Admiral who, like Mobutu, was from Equateur province.[2] She said there was a dispute between those Generals from Equateur and those from the east. When she refused to poison her former employer, the General / Minister had her arrested and interrogated on suspicion of causing trouble for the army and of leading the conflict and disorder. She was eventually released on the order of another General from the east who told her father she was not the person sought. Thus a General from the east – and therefore, one must assume, allied with the Kabila régime – accepted that she posed no threat and suggested her arrest was a case of mistaken identity. That the other General / Minister who ordered her arrest did not intervene to prevent her release indicates that even on her own account, it is fanciful to say that she is a risk of being identified as a political dissident upon her return.

48. At the leave to remain stage and in her subsidiary protection application it was simply stated that she feared persecution and had been detained and tortured because of her political opinion. Her political affiliation / opinion – perceived or actual – was not specified.[3] This lack of specificity as to her political opinion is also true of her personal letter to the Minister dated September 2009. She has not suggested that she has been 'blacklisted' by the DRC authorities, or that she has an outstanding warrant of arrest or is wanted for any 'ordinary' criminal activity. The testimonials furnished on her behalf show that she lived a peaceful existence in Ireland and while she was associated with the Congolese community here there is nothing to suggest she has been active in politics or has partaken in any demonstrations or activities which would attract the attention of the DRC authorities.

49. The UKBA report records Renadhoc, the Coalition for Congolese human rights NGOs, as saying, "*The way you are treated does not depend on where you return from but rather on your profile, especially political allegiance and on the province from which you originate in DRC*" [para. 4.06]. This seems to the Court to be generally representative of the information collected by the UKBA. As the applicant has no particular political or ethnic profile which would arouse suspicion, it was reasonable for the executive officer to find that she is not at a particular risk of arrest or detention.

50. Depending on the travel documents on which she will travel the applicant may well face questioning upon return to the DRC in order to establish her identity. This is common across the world and is part of a functioning system of immigration control. Foreign nationals arriving in Ireland face similar treatment if they are not EU citizens. The Minister's agents noted in the Section 3(11) and Section 17(7) decisions that when the Irish authorities make arrangements to repatriate persons to the DRC, no mention is made of their failed asylum status. This is consistent with the information provided by various embassies to the UKBA fact-finding mission and is not displaced by suppositions made in the *Unsafe Return* report. The COI undoubtedly suggests that there is a risk of any returnee being bribed by rogue airport officials but there is nothing in the COI to suggest that this is officially sanctioned or condoned and while it is reprehensible, such a risk does not fall within the high threshold set by Article 3 ECHR (see e.g. *N. v. United Kingdom* [2008] 47 EHRR 39; *S.H.H. v. United Kingdom* [2013] 57 EHRR 18) such as would outweigh the public interest in the orderly implementation of a lawful deportation order.

51. The Court is not satisfied that the applicant has established any fair issue to be tried on any of the remaining grounds. It is true that the applicant sought an opportunity to comment on any COI sourced by the Minister and that the Minister did not comply with this request. However, the applicant has not shown any prejudice arising from this omission. The situation might have been different if

she had been able to demonstrate that she could have discredited or undermined the COI sourced by the Minister by placing more recent contradictory COI or judgments of the courts before him. However, no such information was advanced at the hearing of this motion.

52. The Court finds no substance to the applicant's complaint that the Minister's agents relied on the negative credibility findings made by the Commissioner and the Tribunal. In the particular circumstances of this case where the negative credibility findings made during the asylum process were unchallenged by way of judicial review and were not disputed at the leave to remain / subsidiary protection stage, the argument is without validity. The applicant put forward no reason why the Minister should not rely on those findings.

53. Finally the Court is not satisfied that the applicant's right of access to the court has been prejudiced by the system of deportations which is in place in Ireland. She has had every opportunity to challenge the decisions made in respect of her and once she became aware that the Minister would not give an undertaking not to deport her, she came to court to seek an interim and later an interlocutory injunction restraining her deportation. Her right of access to the courts has been safeguarded at all stages.

Conclusion

54. For the foregoing reasons the applicant has not established to the Court's satisfaction that there is a fair issue to be tried. The Court is also satisfied that there are no countervailing circumstances of the nature outlined in *Okunade* which favour the grant of an injunction. There is, it should be noted, no suggestion of any risk of serious criminality or activities contrary to the public interest which would weigh in favour of the execution of the deportation order. Nonetheless nothing in her personal circumstances shifts the balance towards the grant of an injunction. The information before this Court is that her family is in the DRC. She is a widow whose three children who are in the DRC and she also had a partner in Kinshasa before she came to Ireland but there is nothing to suggest she has established family life in Ireland. She has of course enjoyed private life in Ireland – the testimonials furnished to the Minister show that she done courses and voluntary work and been active in church and Congolese community activities – but there is no particular feature of her private life which has been highlighted which would weigh in favour of granting an injunction. She has not suggested that her presence is necessary for her case to be presented at a later stage or that her legal representatives' ability to present the case on her behalf will be in any way prejudiced by her absence. The apparent weakness of her case is also a matter to which this Court is bound to have regard. In that regard it seems to the Court that in circumstances where the facts and law relating to the grounds advanced for the relief sought in both sets of proceedings were very fully argued, there is no utility in listing the case for further argument. However, the Court will hear counsel on this issue. Further, the Minister's conclusion that she is not at risk of treatment contrary to Article 3 ECHR has been found to be reasonable and rational and grounded in objective COI. She has not, therefore, established a credible basis for the contention that her life or freedom would be under threat upon her return, or that she would suffer irremediable harm. The Court is therefore satisfied that her deportation would cause no more than the ordinary disruption in being removed from a country in which she wishes to live. There is nothing before the Court to unsettle the default position that she is not entitled to an injunction.

55. As a postscript the Court notes that the applicant's statements of grounds both contravene Order 84, rule 20(3) RSC as amended by S.I No. 691 of 2011, which provides that "*It shall not be sufficient for an applicant to give as any of his grounds … an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground.*" The Court is aware of the time constraints facing applicants but it is important to recall that applicants, counsel and indeed the Court are much better served when pleadings are drafted and particularised in a concise manner, avoiding generalities and superfluities. This issue was also dealt with at length and clarity by the Supreme Court in *Babington v. The Minister* [2012] IESC 65 where MacMenamin J. held that it is "*entirely counterproductive and unnecessary*" to include in one's grounds as many different, varying and wearying reformulations of the same point as can be conceived. As he pointed out, a good point does not gain force by repetition and a point actually reaching the requisite standard for a grant of leave can be lost in a fog of reformulations. She is described on the charity's website as "*a language teacher and interpreter, with a special interest in the Democratic Republic of the Congo*".

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1. She is described on the charity's website as "*a language teacher and interpreter, with a special interest in the Democratic Republic of the Congo*".

2. The poisoning aspect of the story did not emerge until her s. 11 interview and was not mentioned at her s.8 interview or on her asylum questionnaire albeit that the latter contained a lengthy recitation of her situation.

3. Somewhat inexplicably, her solicitors furnished a Refugee Documentation Centre report on MLC members.