

THE HIGH COURT

[2012 No. 69 J.R.]

BETWEEN

M.S.M. (DEMOCRATIC REPUBLIC OF CONGO)

APPLICANT

AND

CONOR GALLAGHER, SITTING AS THE REFUGEE APPEALS TRIBUNAL,

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Robert Eagar delivered on the 21st day of May 2015

1. This is an application for judicial review of the Refugee Appeals Tribunal's affirmation of the recommendation of the Refugee Applications Commissioner refusing refugee status.

2. The relief sought in this case was an order of *certiorari* quashing the decision of the first named Respondent dated the 4th day of January 2012 which affirms the previous recommendation of the Refugee Applications Commissioner that the Applicant should not be granted refugee status pursuant to s. 16(2)(a) of the Refugee Act 1996 (as amended) (hereinafter referred to as "the Act of 1996").

3. The grounds on which the relief was sought were limited to the following:-

1) The first named Respondent erred in law and in fact and breached the principles of fair procedures and natural and constitutional justice in reaching a conclusion that the Applicant's claim and credibility were undermined arising out of the fact that the Tribunal Member was of the view that she should/would have left more provisions for her children before she left them. This is speculation and was unrelated to the nexus of the Applicant's claim for refugee status. There was no legal basis for the said consideration and the decision as it relies on an assessment of credibility to form its basis, is invalid.

2) In its assessment of the Applicant's application for asylum, the first named Respondent failed to adhere to the principle of "shared burden of proof" pursuant to paragraph 196 of the UNHCR Handbook.

3) No forward looking test regarding the Applicant's application had been applied by the Refugee Appeals Tribunal.

4) The Tribunal makes specific reference to his having observed the demeanour of the Applicant and the assessment of her credibility. There is no reasoning given for the proposition that the presentation of her evidence by the Applicant was in some fashion lacking invisibly or audibly ascertainable features indicating credibility that the decision that there was no basis for the determination of the Applicant's credibility was in some way impacted upon by her demeanour at hearing before the Refugee Appeals Tribunal. The Refugee Appeals Tribunal further acted as an expert through an interpreter in circumstances where he was not so qualified to act as the Refugee Appeals Tribunal is not an expert in discerning the credibility of Applicants who communicate through interpreters.

5) The Refugee Appeals Tribunal consistently failed to examine the Applicants credibility in terms of her cultural background. The Refugee Appeals Tribunal insists that the Applicant's credibility mentioned through the optic of a European person with no regard/adequate regard to the cultural differences at play between the Applicant and the Tribunal Member.

4. The Applicant was born on the 5th day of September, 1972 in the Democratic Republic of Congo. She was married but her husband died in December, 2003. She had children, both daughters and sons, aged between 16 years and 3 years all of whom were born in the Democratic Republic of Congo. The youngest child was the son of the Applicant and Daniel Boteti. Daniel Boteti died on the 7th July, 2008. The Applicant was interviewed on the 3rd March, 2011. The interview under s. 11 of the Act of 1996 was conducted in Lingala.

5. The report pursuant to s. 13(1) of the Act of 1996 contained the recommendation of the Refugee Applications Commissioner which was that the Applicant had not established a well-founded fear of persecution. A notice of appeal was lodged and in the notice of appeal it was indicated that the language that the interpreter required for the first named Respondent was French. Subsequently on the 7th September, 2011 a SPIRASI Medical Legal Report together with photographs was forwarded to the first named Respondent by the solicitor's on behalf of the Applicant. An appeal before the first named Respondent was heard on the 6th October, 2011 and in a long analysis of the claim affirmed the recommendation of the Refugee Applications Commissioner.

Evidence before the first named respondent

6. The second named Respondent noted the following: the Applicant indicated that she was 38 years of age and had arrived in the State in 2010, she travelled via Congo Brazzaville and France. She applied for asylum immediately after arriving in the State.

7. She was asked why she left the Congo and she stated she feared rape, torture, aggression and inhuman treatment. She was asked when her problems began and she said 2008 upon the murder of Daniel Boteti. She was his mistress and the first time they met in 2005 was at a burial. The second time she met him she asked him if she could join his party. Daniel Boteti was murdered by the Democratic Republic of Congo's Republican Guard. She was asked what his role was in the Movement for the Liberation of the Congo (MLC) and she said he was a member and deputy for Kinshasa City. She said she was given a position in the women's organisation to mobilise and organise women through meeting people and telling them to come over. She was asked who she resided with when she met him and she said she was married at the time she met him but that her husband had died in 2003. She has 6 children, one of whom was with Daniel Boteti. She was asked if she lived with him and she said initially no before saying yes, that they lived together in the same house in 2006. She clarified that they did not live together all of the time as he was married with 2 children and that she was scared of his wife but had not met her. She stated that he stayed with her three days a week and it was openly known that they were in a relationship. She stated "In Africa this does not cause a problem many politicians have more than one women". The

youngest child was born on the 28th November, 2006 and Daniel Boteti was named as the father on the birth certificate. She was asked if there was a way to get the birth certificate and she said that in Africa you had to ask a friend and that she could ask a friend to obtain it from the hospital. She stated that she left the place in which she lived with Daniel Boteti in 2008. In that year she went to a march and was arrested by the military on the 8th July, 2008. The military suggested to her that Daniel Boteti had given her a document which she denied. She stated that he had left some documents with her and said that she was not to give them to anyone, they would kill all of them if they got them. After she insisted that she did not have them, she was beaten and threatened with a knife. She stated she was beaten and raped and she was threatened not to go to the march. This was after the murder of Daniel Boteti by the Republican Guards. She was then released and was then met by an MLC Representative who brought her for medical treatment.

8. When asked about her children and family, she said they were told to leave the house and they stayed with a friend of the Applicants. Asked if she had any other problems after this, she said on the 10th April, 2010 that she went on another march after a big meeting in preparation of the trial of Bemba (who is a leader in opposition to President Kabila). At the end of the meeting, the military cars arrived and they were beaten. She collapsed and fell down and found herself in the military car with nose broken and a pain in her forehead. She was taken to jail and was raped again by guards. She was then taken to prison. She was beaten in the morning and afternoon and told that if she did not accept sleeping with them she would be beaten again. She spent three and half months in prison. Asked what happened to enable her to leave she stated that one night she saw a guard. She thought he was going to sleep with her but he brought her a uniform and asked her to follow him and there were three people in the jeep. In her mind they were killing people. They took her to a house, there was no light there and they told her to get into a car. She thought "this was the place where they kill people". She met a woman who prepared a place for her to sleep, she said that she had to be careful and the President had power over blood. In the morning her brother came to see her. She was at that time making arrangements to return. He turned to her and said "you must leave the country" and said they had \$6,000. The Colonel said that she had to leave the country or she would be dead but she said she could not go to Congo Brazzaville. Her father brought her clothes to make it look like that she was a fisherwoman. She was brought to a small boat where her cousin was waiting. She was asked about documents of identity and she said she didn't have anything except a voting card. She was in Congo Brazzaville for 22 days before travelling to France. She was given a false passport from Italy with her photograph thereon. She states that she did not open the passport. She had no problems in the airport in Paris where she changed plane and was there for an hour. She had no problems in Dublin Airport, she was asked no questions, security just checked her passport. She was asked what happened to the passport after that and she said nothing happened. At the time she left by taxi with the trafficker and he took the passport. When asked why she left her children, she said "You must know this I'm an African woman; my girls and young are there". She stated that she could not make arrangements for her to stay in contact. Asked why she did not do this after the arrest she said "I never thought that I would leave the country, I thought I would be killed". Asked if she had any contact with her husband she said "my brother is a great businessman in the east who is not easy to find, my cousin is in Congo Brazzaville, I don't know his name or number. She was asked what she thought of them (her children) before leaving them, she said "I didn't know. Travel was not on my mind". She was asked if she thought of going to Congo Brazzaville and she replied "We have to know someday. The Colonel told my brother I had to leave and I can't risk my life". She was asked if she knew she was to leave Congo Brazzaville without making arrangements for her children, she said "No - I didn't have arrangements for the kids because I didn't know I had to leave". Asked about the second arrest if there was any mention of documents of Daniel Boteti she replied "Yes, always. They were talking about the documents, this brought me to prison". She said the documents were in the ceiling at the top of her house. She never went back to the house after the arrest and has stated that she will never return there. It was put to her that if the house was searched it could be found, she said she did not know if the house was searched, she stated "I never went back". She was asked if the MLC party people inquired about the documents she said "Daniel Boteti told nobody". It was put to her that surely they had a purpose or otherwise they would be destroyed and she replied "Yes".

9. She was then questioned by the presenting officer. She confirmed her relationship with Daniel Boteti began in 2005. She confirmed that for three years she lived with him for three days a week and was well known that they were in a relationship. It was put to her that it was difficult to understand why he gave documents to her and put them in the ceiling of her house where he resided, what was the point and she replied "He trusted me". It was put to her that to store documents in a house where she lived was not like giving them away at all and she replied "he told me that his wife was very cold and I was very gracious". It was put to her that if the relationship was well known the authorities would be likely to call. She replied "that was his choice." It was put to her at the first interview at p.13 that she gave Daniel Boteti's date of birth as 2nd July, 1972 and he was therefore 36 years when he died but the Independent Commission gave his date of birth as being the 1st November, 1978 and if she was in a relationship with him she would be expected to know his age. She replied "he told me he was born 2nd day of July, 1972, I did not know any other date. I was told he was 36".

10. She confirmed that she had 11 years of education but yet spelt Boteti as Botethi and she replied "that in Africa, my language it is not spelt that way". She was asked if she knew where her children were and she replied "for the moment no". It was put to her at interview whether she had contacted either the Red Cross, NGO or a church to assist in the location of her children. It appeared to the Tribunal that she had made no effort to find the children. She replied "Oh yes, I was advised that way by a psychiatrist in Baleskin. I got all this advice.

11. She was asked why she did not speak to the Red Cross and she replied "At the time R. was seen with young children, she was my best friend". She was asked when she went to Congo Brazzaville the Colonel said "that she could not stay there" she replied "I never spoke to the Colonel I spoke to my brother". She was asked why she didn't make arrangements with the children and she replied "I never had time to speak with my brother". When asked how long it was since she spoke to her brother she replied "One year now". She was asked how long it was she spoke with him after the escape and she replied "The only time I spoke was at the escape". She was asked how long the conversation was and she replied "He didn't stay long he just said what the Colonel said, he went back to the fisherman for 10-15 minutes". She was asked what arrangements she had made for the children and she replied "Yes, I asked him where they are and he said don't worry we want you to leave the country and after that you can worry about it". Asked why she had no contact details for her brother she stated that "He was changing number and I can't get him". It was put to her that when people change mobile phones they change the handsets but keep the number and she replied "if I call it it doesn't go through". She was asked if the materials were damaging to the authorities she replied "Yes. He told me. He said this document is about the authorities, don't talk to your brother, sister or friend". She was asked after his death did it occur to her that no-one could use it as no-one was told, why not give it to the MLC and she replied "he told me it was a private document". The issue of the date of birth arose and the Refugee Applications Commissioner had indicated in their report that available and reliable country of origin information sourced "by this office that states Daniel Boteti was 29 years of age when he died and his date of birth was the 1st day of November, 1978". These references are given in the report of the Refugee Applications Commissioner but are not on this file as it had not been put before this Court.

12. The Refugee Applications Commissioner had stated that it was not credible that the authorities would release her if they wanted to kill her or keep her detained for the reasons she stated. The Commissioner said that this served to undermine the well-foundedness of her alleged fear. However, the Applicant's solicitor said he could not accept that the regime was not brutal and there was

systematic persecution. The solicitor made reference to the SPIRASI report and the country of origin information and in particular the US State Department where it is noted that in all areas the State acts with impunity and the Democratic Republic of Congo and there were many arbitrary killings. The picture in the DRC was dismal and very poor on the scale of human rights abuses.

13. The presenting officer stated the spelling point on Boteti was accepted. He had submitted that the date of birth issue was a reasonable credibility point (this Court's emphasis). In relation the fear of torture, rape and killing it is difficult to understand her lack of effort to contact her children particularly when the Red Cross were available to assist. He also questioned the credibility of storing documents in a house where it was known that Daniel Boteti resided.

The analysis of the first named Respondent

14. The first named Respondent indicated that the term "well-founded fear" contains a subjective and objective element and in determining whether a well-founded fear exists both elements must be taken into consideration. He then mentioned the decision of Clarke J. in the case of *Imafu v. Minister for Justice Equality and Law Reform* [2005] IEHC 182, delivered on the 27th May, 2005 in relation to the assessment of credibility of an Applicant and in particular he quoted from Clarke J.'s judgment:-

"(ii) Where the assessment of the credibility of an appellant places reliance upon a significant error of fact in a manner adverse to the Applicant such error renders the decision invalid.

(iii) While the assessment of credibility is a difficult and unenviable task it is not permissible to place reliance "on what one firmly believes is a correct instinct or gut feeling that the truth is not being told". Such a process is an insufficient tool for use by an administrative body such as the Refugee Appeals Tribunal. Conclusions must be based on correct findings of fact.

Da Silveria v. The Refugee Appeals Tribunal and Others (Unreported, High Court, 9th July, 2004, Peart J.)

(iv) A specific adverse finding as to the appellant's credibility must be based upon reasons which bear a legitimate nexus to the adverse finding. Kramarenko v. Refugee Appeals Tribunal and Anor. (Unreported, High Court, 2nd April 2004, Finlay Geoghegan J.) placing reliance on the decision of the United States Court of Appeals for the Ninth Circuit in Aguilera-Cota v. INS 914 F. 2d 1375, (9th Cir. 1990).

(v) A finding of lack of credibility must be based on a rational analysis which explains why, in the view of the deciding officer, the truth has not been told."

15. The first named Respondent then summarised the Applicant's claim as a fear of return to a country on the basis of the persecution claimed by the Applicant are unlawful detention without trial and inhuman treatment including rape.

16. The first named Respondent indicated that the Applicant had stated that she was given a position in the women's organisation. Her job encompassed mobilising and organise women and meeting people, telling them to come over (in addition to her claim that she was a leader's mistress). Such a position is at a low political level and does not necessarily result in a finding that the Convention nexus has been satisfied. Such findings are also contingent on the Applicant presenting evidence worthy of credit. The first named Respondent said:

1) The Applicant lacked the precise knowledge which one would expect from a person who is in a relationship with a politically well placed person as she had claimed – (this must relate to the date and age of Daniel Boteti). Accordingly some doubts are raised as to the Applicants credibility.

2) The SPIRASI Medical Report notes scars on her legs which were highly consistent with her account of it being due to some sharp object which could include injury from a bayonet. She also noted other scars on her body (including her forehead) and she is suffering from a depressive disorder of moderate severity. In assessing the causation issue in relation to this medical evidence the Tribunal has had the benefits of the provisions of the Istanbul Protocol on the Effective Investigation and Documentation of Torture submitted to the High Commissioner for Human Rights on the 9th August, 1999. The first named Respondent said that such medical evidence is based on a physical and mental assessment set against the account provided by the Applicant and which it is accepted are too incredible. He continued that the reports assisted him greatly in assessing the Applicant's case and while they must be weighed heavily they are not determinative on their own and must be considered in the context of the Applicants overall account and credibility.

3) He noted that a great deal of time was used in questioning the Applicant in relation to her children. He also said that he had observed the Applicant give her evidence in a cool and composed manner throughout the hearing and summarised about the children. At the end of reviewing the evidence the first named Respondent said that this evidence lacked credibility and that it ran contrary to common sense that a mother would abandon her children to their fate or leave them behind without knowing how to find them. This is clearly because she was advised to do so by her brother on the advice of a Colonel and he was also dissuaded from this general view by the demeanour of the Applicant. Although apart from stating that she was composed, the first named Respondent gave no other indication of what persuaded him to find that she was not credible. He stated that he found the Applicant either did not have children or that she had not been truthful as to their whereabouts and wellbeing. The first named Respondent then indicated that he accepted the point of the Applicant's solicitor that their whereabouts are not a court matter. But he did say that it raised significant question marks as to her credibility. He noted that the Applicant did supply a copy of her daughter's birth certificate on the 19th December 2011. That raised issues as to the contents of it. He said that none of the factors could provide a lawful basis for finding that the document is a forgery. He made no finding on the authenticity of the document and attached no weight to it.

17. He then dealt with the issue of the hiding of documents and reviewed her evidence. He noted that the presenting officer's style of questioning of witnesses was highly effective in many cases and was such in this case. The first named Respondent said the answers which the Applicant provided clearly demonstrated that she had not considered it from that specific point of view. They are illuminating but do not advance her case.

18. He then summarised in relation to the documents: "Is it credible that a political leader would leave important documents in a place where he resides part-time, where that place was known to the authorities, without instructions as to what was to occur in the event of his death and that these documents were not passed to anyone that could use them?" While an element of conjecture is employed (and therefore the finding could not be determinative on its own) he thought that the issue of the documents is either a red herring entirely or is fabricated/embellished. He found that the issue did not assist the Applicant in establishing to the requisite

standard and burden of proof as set out that she has a Convention nexus based on being the mistress of Mr. Boteti.

19. Another point of this aspect of the claim is that between 2008-2010 she was able to reside safely in the Democratic Republic of Congo notwithstanding that Mr. Boteti had been killed.

20. He also summarised her evidence in relation to communications with her brother and with her cousin. He said he did not find it credible on the specifics that is the location of her children and contact details with her family. He said that these matters did not go to the core of her claim and are not so weighty as to determine the manner, objective criteria and statutory matters which must be considered when considering the Applicant's case as a whole. Again he mentioned the Country of Origin Information some of which was helpfully summarised in the document prepared by the Refugee Documentation Centre and submitted by the Applicant's solicitor on the 19th December, 2011. He noted that none of the authors could be cross-examined as to their contents.

21. The first named Respondent said in relation to the differences in the ages between the Applicant and Mr. Boteti is that it was not credible that a public figure could succeed in the rules of reducing its age by 6 years to a woman with whom he was having a relationship and had a child together. He referred then to s. 11B of the Act of 1996 in relation to assessing the Applicant's credibility by virtue of whether the Applicant possessed identity documents and if not whether or not she had provided a reasonable explanation for the absence of such documents. She had submitted evidence from the Democratic Republic of Congo of an electoral card, card of identity and membership of the MLC. The first named Applicant said he examined these documents and was not in a position to verify or disprove the authenticity of same and cannot treat it as substantive evidence. He then makes the point that it would be considered that a truthful and credible Applicant would submit genuine documents. He then applied s. 11B of the Act of 1996 in relation to whether the Applicant had provided a reasonable explanation to substantiate his or her claim that the State is the first safe country which he/she has arrived since departing his/her country of origin or habitual residence and whether the Applicant had provided a full and true explanation of how he/she travelled to and arrived in the State. She said that she was in Congo Brazzaville for 22 days before travelling to France. She was given a false passport from Italy, she did not open the passport, she had no problems at the airport in Paris where she changed plane and was there for an hour and she had no problems in Dublin Airport. She was asked no questions they just checked her passport.

22. The first named Respondent then indicated he was taking notice of the fact that immigration officers in Dublin Airport and other international airports operate very rigorous examinations of passports and other entry documentation and that every adult is required to present their own documentation. He said that the evidence raised doubts but could not be considered determinative.

23. He then suggested that one of the indicia of a flight which would normally be associated with a refugee seeking asylum is that a refugee would seek refuge in the first available safe country. This seemed to me to be an extraordinary suggestion on the part of the first named Respondent, in particular because the Applicant had not claimed that the State was the first safe country. He then quoted Professor Hathaway in relation to her travel by saying: - "Upon genuinely fleeing persecution and delays in seeking international protection such conduct can go to credibility" and he found the Applicant evidence was not credible in this regard.

Conclusion

24. In conclusion the first named Respondent said that the cumulative affect of the foregoing findings relating to the Applicant's credibility materially and detrimentally affects the veracity of what she claimed. There are aspects of her claim which left the first named Respondent with significant doubts and accordingly he could not afford the Applicant the benefit of the doubt in assessing her evidence from an objective point of view. He said that in making this assessment he had considered Regulation 5.3 of the European Community (Eligibility for Protection) Regulations of the UNHCR Handbook in relation to the Applicant's general credibility.

25. He said that in the light of the foregoing and after due consideration of the principle of the benefit of the doubt and having all matters including a finding of highly consistent injuries in a SPIRASI report and the matter of discredit outlined above he did not find the Applicant had a subjective and credible fear such as he could find a well-founded fear of persecution.

26. He then stated that while there was no requirement in Refugee Law as past experience of persecution is a relevant factor the absence of past persecution does not act against an Applicant for asylum nor is the fact of past persecution conclusive. Finally he said that the Applicant did not have a subjective and credible fear and that the decision to expel any person from this jurisdiction lies primary with the Minister for Justice and Equality. He did not find that the Applicants stated fear would be realised if "she" returned to her country of nationality now.

27. The first named Respondent then said there must be a nexus between persecution and the convention ground. This nexus can be provided either by the serious harm limb or the failure of state protection limb. If the persecution is for a non-Convention reason and the failure of state protection is for a reason for a Convention ground the nexus requirement would be satisfied. He quoted paragraph 80 of the UNHCR Handbook. He then says the Applicant's difficulty bearing in mind the burden of proof is that she has not put forward credible evidence which has satisfied the Tribunal was that she had been the victim of persecution for the Convention reason of political opinion or membership of a particular social group, if she returned to the Democratic Republic of Congo. Nor has she satisfied that as a matter of reasonable likelihood that the reason why she is in the State is because of a well founded fear of persecution for a Convention reason.

28. He said that the core issue in the appeal is whether the Applicant has provided evidence worthy of credit to discharge the burden that she in fact comes under the Convention ground which she states. The points of discredit constitute direct and material links to the Applicant's narrative. The fact that the Applicant has made repeated statements which could be consistent with objective country of origin material would tend to support a recommendation for refugee status unless there were reasons to the contrary. A substantial reason to the contrary is that the first named Respondent had not found her to be credible and therefore she had failed to establish to the lowest standard of proof that she has a subjective fear of persecution for a Convention reason, and he found that the Applicant had not discharged the legal burden.

Submissions of counsel

29. Counsel for the Applicant raised the issue of the medical evidence before the Tribunal and the issue of past persecution. The first named Respondent had substantively considered the medical evidence and said that the medical evidence was particularly strong and that the first named Respondent had failed to analyse the medical evidence in anyway by simply discounting it as the Applicant's credibility was deemed to be undermined on the primary basis that she left her children behind in the Democratic Republic of Congo. Counsel quoted from *Khazadi v Minister of Justice* a decision by Gilligan J. dated the 19th April, 2007. Gilligan J. in that case stated that:-

"The Tribunal Member in considering any assessment of the Applicant's credibility was required to consider as part of his deliberations the medical evidence in total that was before him and was obliged as part of a rational analysis to explain

having considered the medical evidence along with the other evidence that was before him why in the view of Tribunal Member that Applicant was not telling the truth and his credibility was undermined...My overall conclusion is that the medical evidence that was before the Tribunal Member should have been considered, weighed in the balanced and a rational explanation given as to why it was being rejected in circumstances where the Tribunal Member was making a findings that the Applicant was not credible."

30. Counsel for the Applicant also submitted that the SPIRASI report was relevant in terms of an assessment by the Tribunal Member of Regulation 5(2) of the European Communities (Eligibility for Protection) Regulations 2006 which states:-

"The fact that a protection Applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, shall be regarded as a serious indication of the Applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated."

31. Counsel submitted that the tribunal member had failed not only to deal with the content of the medical report but also to apply the said Regulation.

32. In respect of credibility, counsel submitted that the first named Respondent had failed to adhere to the standards contained in the decision of *I.R. v. Minister for Justice & Equality and Law Reform* [2009] IEHC 353, a decision of Cooke J. and also failed to adhere to the standards expressed by MacEochaidh J in *Omidiran (an infant) v. the Minister for Justice & Equality* (Unreported, High Court, 20th December, 2012).

33. Counsel submitted that the Tribunal Member had sought to substitute his own views on what he, a white European male might do in a particular circumstance as opposed to looking at matters through the optics of an African woman who had clearly expressed significant trauma. He submitted that the finding that the Applicant would have made more provision for her children and/or would not have left her children behind in the Democratic Republic of Congo and/or was lacking attention in the manner which you may contact your family were speculative and based on gut feeling and were invalid in the context of a refugee claim. Families are frequently separated in situations of persecution. These findings were peripheral to the claim advanced. He further submitted that the credibility finding regarding the manner in which the documents were stored was based on conjecture and was invalid.

34. The credibility finding regarding the manner in which the Applicant's partner lied about his age is based upon the conjecture and is invalid and was also a peripheral matter. The findings regarding travel were peripheral to the claim made and excessive weight was placed upon them. He quoted from *Keagne v. Minister of Justice and Equality and Law Reform* a decision of Herbert J. dated 31st July, 2007 in relation to the cumulation of credibility findings.

35. Finally, counsel for the Applicant said that the first named Respondent made specific references on two occasions to his having observed the demeanour in the assessment of her credibility and he submitted that the decision disclosed no basis for the determination that the Applicant's credibility was in some way impacted upon by her demeanour/presentation at the hearing before the first named Respondent and it was notable that the Applicant was assisted throughout the hearing before the first named Respondent by an interpreter therefore the answers that she gave to the first named Respondent were conveyed to the first named Respondent through the third party. In doing so the first named Respondent had breached the principles of fair procedure and acted in a manner which was unreasonable and irrational in determining that the Applicant's demeanour was somehow unsatisfactory as by doing so he did not disclose any reason or rational basis for so doing and furthermore he acted as an expert in circumstances where he was not so qualified to act.

36. Counsel for the Respondent outlined the factual background of the Applicant. She pointed to the nine point test as outlined in *I.R. v Minister for Justice & Equality & Law Reform* [2009] IEHC 353 and submitted that the adverse credibility findings outlined therein were all probably referable to specific issues of fact. These facts were central to the issues under review - that is the Applicant's involvement with Daniel Boeti and the MLC, her imprisonment, her flight from the Democratic Republic of Congo and the particulars of her transportation as well as those particulars of her personal circumstances which would immediately and directly follow from her flight in terms of her contact with her immediate family. These matters are not peripheral, they are central to the Applicant's asserted history of persecution.

37. Counsel for the Respondent submitted that internal concern for the mother's children is not a cultural variant or a European perspective as the Applicant appears to argue but a universal phenomenon to which the member was entitled to have regard when assessing the credibility counsel presented.

38. Counsel for the Respondent also submitted that the credibility findings which justified scepticism relating to the particulars of the Applicant's travel into the State and her account of how she passed through immigration and quoted from Hedigan J. in *O.U. v. Minister for Justice, Equality & Law Reform* [2008] IEHC 10.

39. Counsel for the Respondent further submitted that the reasons why the first named Respondent arrived at the conclusions which it did were explicitly set out in the body of the detailed report and interview. In that respect the rationale of the findings was wholly transparent. In respect of the medical evidence, counsel submitted that a SPIRASI report can be invaluable in determining whether injuries occurred and how they occurred. But it can rarely be determinative as to who has inflicted the injuries. She also submitted that "past persecution" referred to in Regulation 5.2 must have been for a Convention reason. If the credibility of the Applicant has been rejected there is no past persecution under Section 5.2 as to the nexus has been rejected. Counsel quoted from the Istanbul Protocol-Manual on the Effective Investigation and Documentation of Torture and other Cruel Inhuman or Degrading Treatment or Punishment published by the United Nations in 2004 in relation to the levels of approach, levels of categories. Category 3 is that of highly consistent and suggests that a lesion could have been caused by the trauma described and there are a few other possible causes and this is the matter for the first named Respondent. Counsel quoted from *R.M.K (DRC) v. Refugee Appeals Tribunal, he Minister for Justice, Equality & Law Reform* [2010] IEHD 367 where Clark J. stated:-

"A report which is general in terms has obviously little weight requires no great explanation for its rejection. However while medical reports are rarely capable of providing clear corroboration of a claim, it is well recognised that there are occasions when examining physicians report on objective findings and use phrases which attach a higher probative value to those findings. Such reports are capable in an objective way of supporting the claim."

This was also proved out by MacEochaidh J. in *I.B. v. Refugee Appeals Tribunal & Ors* [2013] IEHC 467.

40. Counsel for the Respondent said that the first named Respondent had given specific consideration to the documented injuries, the

process by which they were assessed in the context, and he was making specific reference to the Istanbul Protocol.

41. With regard to demeanour, counsel for the Respondent said that while little weight would be attached to the general demeanour witnessed in terms of the underpinning of the decision, the first named Respondent did not accept as a matter of fact that any adverse conclusions were drawn from the Applicant's demeanour or that he determined that the Applicant's demeanour was somehow unsatisfactory.

Country of Origin Information

42. It is the view of this Court that all country of origin information that is used by either the Refugee Applications Commissioner, by the Applicant and by the Refugee Appeals Tribunal should be before the Court as there is a duty on the Refugee Appeals Tribunal to consider country of origin information where it is relevant and clearly in this case it was relevant and the country of origin information which was before the Refugee Applications Commissioner is not before the Court.

Findings in respect of credibility by the second named Respondent

43. In relation to the credibility of the Applicant the Applicant stated that she was given a position in the woman's organisation. Her position entailed mobilising and organising women and meeting people, telling them to come over. However this position was a low level position.

44. Because the Applicant lacked the precise knowledge which one would expect from a person who was in a relationship with a politically well placed person such as she had claimed (presumably in relation to his date of birth and age) some doubts are raised as to the Applicant's credibility. The second issue of credibility related to the manner in which the Applicant gave her evidence in a cool and composed manner throughout the hearing. The first named Respondent said that the evidence of having abandoned her children lacked credibility and it ran contrary to common sense that a mother would abandon her children to their fate or leave them behind without knowing how to find them.

45. The third item of credibility related to the documents. "Is it credible that a political leader would leave important documents in a place where he resided part-time where that place was known to the authorities?" and the first named Respondent further held that a finding would not be determinative on its own but he thought that the issue of the documents is either a red-herring entirely or was fabricated or embellished and did not assist the Applicant. Again in relation to credibility he said the first named Respondent did not find it credible on the specifics, that is the location of her children and contact details with her family. He said these matters did not go to the core of the claim but must be considered when analysing the Applicant's case as a whole.

46. He repeated the issue with regard to the difference in age.

47. The first named Respondent then discussed the issue of documents which had been produced by the Applicant and said that a truthful and credible Applicant would submit genuine documents. He said the evidence in relation to the travel of the Applicant raised doubts but this could not be considered determinative.

48. He also then made a general statement as follows: "The fact that the Applicant has made repeated statements which would be consistent with objective Country of Origin material would tend to support a recommendation for refugee status unless there were reasons to the contrary". The first named Respondent said that a substantial reason to the contrary is that he had found her not to be credible and therefore she had failed to establish the lowest standard of proof that she had subjective fear of persecution for a Convention reason.

Decision

49. It is notable that the first named Respondent quoted the judgment of Clarke J. in the case of *Imafu* and in particular:-

"While the assessment of credibility is a difficult and unenviable task it is not permissible to place reliance 'on what one firmly believes is a correct instinct or gut feeling that the truth is not being told'. Such a process is an insufficient tool for use by an administrative body such as the Refugee Appeals Tribunal. Conclusions must be based on correct findings of fact."

50. In this Court's view the first named Respondent has fallen into this trap. He has also fallen into the trap of not really dealing with the core claim of this Applicant. The core claim of the Applicant was that she was the mistress of Daniel Boteti who was involved in the MLC and who was murdered. Further she had been arrested by the military on the 8th July, 2008. She was beaten and threatened with a knife and raped. On the 10th April, 2010 she was arrested by the military, she was beaten, taken to jail and again raped by the guards of Kimanziere prison.

Travel into the State

51. It has often been expressed by members of the Refugee Appeals Tribunal that they take notice of the fact that immigration officers in Dublin Airport and other international airports operate very rigorous examination of passports and other entry documentation and every adult is required to present their own documentation. It is the experience of this Court that it is inappropriate to take such judicial notice. Certainly since 2006 arising out of the British authorities identification of a plot to use liquids in drink bottles to combine into explosive cocktails aboard flights that there has been a very rigorous scrutiny of a persons' baggage at security checks in airports.

52. Immigration officers in Dublin and other European international airports tend to have a quick note of the photograph and document of anyone purporting to travel under a European Union passport. Anyone who does not hold a European Union passport is subject to examination by immigration officers and likely to be stopped. The experience of the Refugee Appeals Tribunal, the Refugee Applications Commissioner and the Courts is that Applicants for asylum often travel through international airports particularly European airports with the help of traffickers who presumably are using European Union passports which they retrieve from the trafficked person in Dublin Airport. Clearly these passports are valuable to the traffickers for use again with a different photograph. In those circumstances it appears to me that the credibility finding of the first named Respondent is unreasonable. In this case the Applicant travelled on an Italian passport.

53. In the same circumstances he has also held as follows:-

"Whether the Applicant has provided a reasonable explanation to substantiate his or her claim that the State is the first safe country in which he or she has arrived since departing from his or her country of origin or habitual residence."

54. There is no suggestion that the Applicant had stated that Ireland was the first safe country in which she had arrived. She said

that she passed through Congo Brazzaville and Paris and that the reason why she passed through Paris was that she was following the lead of the trafficker. Therefore s. 11B(b) of the Act of 1996 does not apply in this case.

The SPIRASI report

55. He had considered the SPIRASI medical report and had the benefit of the provisions of the Istanbul Protocol on the Effective Investigation and Documentation of Torture and noted that such medical evidence is based on a physical and mental assessment. He said that the reports assist him greatly in assessing the Applicant's case and while they must be weighed heavily they are not determinative on their own and must be considered in the context of the Applicant's overall account and credibility.

56. The medical report was completed by Dr Mona Sayegh of the Centre for Care of Survivors of Torture. This centre has achieved accreditation by the International Rehabilitation Centre for Torture Victims in 2003. The medical legal reports prepared by SPIRASI customarily recount the history of torture claimed by an Applicant and set out the physical and psychological findings noted upon assessment and offer a view as to the level of consistency of those findings with the Applicant's stated history using the terminology of the Istanbul Protocol.

57. The findings of Dr Mona Sayegh showed:-

- a) Evidence of a laparotomy which was due to a previous caesarean section.
- b) The Applicant exhibited a deviated nasal septum to the right, a 2cm laceration on her forehead consistent with direct trauma to that area.
- c) She had an 8cm laceration in the medial aspect of her right shin consistent with the history of an injury with a sharp object.
- d) She had a 5mm hyper-pigmented patch on the medial aspect of her right ankle consistent with a history of direct trauma such as kicking.
- e) She had a 4cm irregular wound on the left calf consistent with a deep wound that had healed with secondary intention due to a sharp object.
- f) She had two round irregular hyper-pigmented lesions on the lateral aspect of her left leg consistent with a history of direct trauma and injury from a sharp object.

58. The conclusion of her mental health assessment was that the Applicant was suffering from depressive symptoms of moderate severity by virtue of presenting with the following features:-

- a) She described a definite change in her personality since her abuse
- b) She has lost interest in her daily routine and social activities and spends most of her time in bed.
- c) She said she felt sad and blamed herself for the things that had happened to her.
- d) She had interrupted sleep and would feel un-refreshed in the morning.
- e) She worried about her safety and feared deportation.
- f) These symptoms are exacerbated by her cultural displacement.

59. In the opinion of Dr Sayegh the Applicant exhibited scarring on her legs which was highly consistent with a history of trauma due to some sharp object including injury from a bayonet as she alleges. In her opinion the Applicant was suffering from a depressive disorder of moderate severity under the international classification of diseases. This depressive disorder is exacerbated and maintained by her current position in social and cultural isolation as well as her worry about the safety of her children. (this Court's emphasis). She referred the Applicant for counselling to help her deal with her experiences of cultural displacement and moderate depression. In the Istanbul Protocol the words "highly consistent" suggest that the lesion could have been caused by the trauma described and there are few other possible causes.

60. In *Kazadi v. Minister for Justice Equality and Law Reform*, Gilligan J. giving judgment on the 19th April 2007 held:-

"I take the view in the circumstances that arise that the Tribunal Member in consenting to any assessment of the Applicant's credibility who is required to consider as part of his deliberations the medical evidence in total that was before him and oblige as part of a rational analysis to explain having considered the medical evidence along with the other evidence that was before him why in the view of the Tribunal Member the Applicant was not telling the truth and his credibility was undermined..My overall conclusion is the medical evidence that was before the Tribunal should have been considered, weighed in the balance and a rational explanation given as to why it was being rejected in circumstances where the Tribunal Member was making a finding that the Applicant was not credible."

61. The first named Applicant, while stating that he considered the report does not seem to have given any weight to the findings of Dr Sayegh.

62. The first named Respondent held that the Applicant's involvement in the MLC party was at a low political level and could not and did not necessarily result in a finding that the Convention nexus had been satisfied. This finding was made without reference to country of origin information and appears to be pure speculation on the part of the first named Respondent in that the Applicant's job was to mobilise and organise women and meeting people telling them to come over to the MLC.

The main findings of the first named Respondent

63. The main findings of the first named Respondent was that the Applicant's evidence was not credible because :-

- a) She did not breakdown in speaking about her children.
- b) She was not truthful as to their whereabouts and wellbeing. In fact at one stage the first named respondent

suggested that he was considering that the Applicant did not have any children, although it seems clear from Dr Sayegh's report that she clearly had a caesarean section and also that she was worried about her children.

c) The first named Respondent stated that the evidence of the Applicant in relation to "abandoning" her children was not credible. This did not take in account the circumstances of her departure from Congo and does not take into account part of the contents of the SPIRASI report about her depression.

64. The first named Respondent also found it incredible that the Applicant lacked precise knowledge of the age of her lover who was murdered. This may be a reasonable finding but it appears to me to be a peripheral one. The issue of credibility relating to documents is harder to determine as a reasonable finding as nobody knows what the documents relate to and whether they are political, personal or otherwise.

Decision of this Court

65. The finding of the first named Respondent that the Applicant was an organiser in the women's organisation of the MLC certainly demeans the role of women in politics in Africa and is an unfair and unwarranted description.

66. In view of the above issues of credibility, which are in my view unlawful and that the first named Respondent has acted unreasonably. In addition to the Applicant not being afforded fair procedures I am granting of *certiorari* and I make an order directing that the Applicant's appeal be determined by another member of the Refugee Appeals Tribunal.