Neutral Citation: [2015] IEHC 124

THE HIGH COURT

JUDICIAL REVIEW

[No. 2012/957 J.R.]

[No. 2013/292 J.R.]

BETWEEN

P.B.N. (DR CONGO)

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered on the 25th day of February, 2015

Background

1. The applicant is a citizen of the Democratic Republic of Congo (DRC) and was born in 1962. She is from Kinshasa, is of the Luba tribe and has three children. She is divorced from her husband. Her story related to her work as secretary to an admiral in the Congolese armed forces.

2. The applicant worked for an admiral who, like the former leader Mr. Mobutu, came from Equateur province. In 2006, differences arose between her employer and the generals from the east of the country who were supported by President Kabila. The applicant 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.

3. 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.

4. The applicant was subsequently refused subsidiary protection in June 2011 and was refused leave to remain on humanitarian grounds. A deportation order was made in respect of the applicant on 27th September, 2011.

5. Subsequently, in November 2011, a report entitled *"Unsafe Return-Refoulement of Congolese Asylum Seekers"* was published. The applicant submitted that this report was *prima facie* new material relevant to the safety of returnees to the DRC.

6. In July 2012, applications were made by the applicant's present solicitors for consent to re-enter the asylum process pursuant to s. 17(7) of the Refugee Act 1996, as amended, and for the revocation of the deportation order, pursuant to s. 3(11) of the Immigration Act 1999. These applications were largely based on the then recent findings of the *"Unsafe Return"* report. Both applications were refused and the refusals were each challenged in the two sets of proceedings which are now before the court.

7. It should also be noted that an application for an interlocutory injunction restraining the deportation of the applicant pending the determination of these proceedings, was refused in a judgment of the High Court of 16th September, 2013. An appeal to the Supreme Court in respect of the refusal of interlocutory relief by the High Court was allowed and judgment was delivered by the Supreme Court on 21st February, 2014.

The Present Proceedings

8. On 23rd July, 2012, the applicant made two applications. The first was a request pursuant to s. 17(7) of the Refugee Act 1996 (as amended) (Record No. 2012/5957 J.R.) for readmission to the asylum process. The second set of proceedings concerned an application pursuant to s. 3(11) of the Immigration Act 1999 (Record No. 213/292 J.R.) for revocation of the deportation order.

9. In the letter submitting the application for readmission to the asylum process, the applicant's solicitors maintained that the determination to refuse the applicant refugee status was fundamentally flawed in that it was based on outdated and inaccurate country of origin information (COI). The applicant's solicitors enclosed further *"new"* documentation as follows:-

> *"Unsafe Return Refoulement of Congolese Asylum Seekers by Catherine Ramos.*
>
> *Article taken from the Guardian newspaper dated Friday, 11th November, 2011 – Congo Civilians Beaten for Supporting Opponents of President, says UN Report."*

10. The applicant also submitted two reports from the Refugee Documentation Centre of Ireland as follows:-

> *"1. Refugee Documentations Centre (Ireland) 15th July, 2010 – information regarding the dangers for failed asylum seekers returning to the DRC.*
>
> *2. Refugee Documentation Centre (Ireland) 3rd June, 2010 – information on the treatment of MLC Members. Whether they continue to be persecuted."*

11. It was submitted that these reports provided evidence that the applicant was indeed a refugee and that if she were returned to

the DRC she would be in danger. It was submitted that if the applicant were to be assessed by the Commissioner or the Tribunal at that time, they would come to a different conclusion to that already reached by them.

12. The application pursuant to s. 3(11) of the Immigration Act 1999, was an application to revoke the deportation order based on changed circumstances. In a letter dated 23rd July, 2012, the applicant submitted that there had been a deterioration in the DRC and a deterioration in the treatment faced by failed asylum seekers. The applicant's solicitors advised that the DRC was extremely dangerous especially in relation to refoulement of Congolese asylum seekers. They enclosed the following up to date COI:-

> • *Report entitled Unsafe Return Refoulement of Congolese Asylum Seekers*
>
> • *Article taken from the Guardian newspaper dated Friday, 11th November, 2011 – Congo Civilians Beaten for Supporting Opponents of President, says UN Report.*
>
> • *Access to healthcare, mortality and violence in Democratic Republic of Congo – results of five epidemiological surveys: Kilwa, Inonogo, Basankusu, Lubutu, Bunkeya March to May 2005.*
>
> • *Article from BBC News – DR Congo's Child Minor Shame.*
>
> • *Article from the Guardian newspaper dated Monday 29th September, 2008 – Congo Child's Soldiers Re-enlisted*
>
> • *Refugee Documentation Centre (Ireland) 15/7/2010 – information regarding the dangers for failed asylum seekers returning to the DRC.*
>
> • *Refugee Documentation Centre (Ireland) 3/6/2010 – information on the treatment of MLC members; whether they continued to be persecuted.*

13. The letter set out the conclusions and recommendations from the Unsafe Return report. They also quoted from a US State Department Human Rights Report headed US Department of State 2009 Human Rights Report – Democratic Republic of Congo dated 11th March, 2010 and they referred to a report from Human Rights Watch entitled *"Human Rights Watch – Country Summary – Democratic Republic of Congo"* dated 2010. The solicitors also cited the duration of residence in the State of the applicant as being a relevant factor to be taken into consideration by the Minister.

14. The s. 17(7) application was initially considered by Ms. Martina Ennis of the Ministerial Decisions Unit on 17th August, 2012. She formed the opinion that the submissions and documentation submitted by the applicant did not represent new evidence which would merit her readmission to the asylum process. The applicant's claims in relation to mistreatment of returned failed asylum seekers to the Congo, would be considered in the context of the s. 3(11) application.

15. By letter dated 25th October, 2012, the applicant through her solicitor sought a review of that decision. That review was carried out by Mr. Dennis Byrne of the Ministerial Decisions Unit on 8th November, 2012. Having reviewed the background to the applicant's application, he came to the conclusion that no new evidence had been furnished and that her application for readmission under s. 17(7) of the Refugee Act 1996 (as amended) should be refused.

16. In the s. 3(11) application, an examination of the file was carried out by Mr. Mark Dunne, Executive Officer in the Repatriation Unit on 5th February, 2013. He had the following to say in relation to the Unsafe Return report:-

> *"The Catherine Ramos Report appears to be concerned with failed asylum seekers mainly from the Tees Valley area of the UK but otherwise its provenance appears uncertain. The report relies almost exclusively on one type of source, that is the testimony collected from failed asylum seekers who have been returned to the DRC, such interviewees are referred to by letters and numbers. I would note that in the Acknowledgments section it is stated that the report was 'made possible by a growing number of citizens who were willing to give up their time, money and talents…' (Ramos at p. 35) but that no reference is made to the contribution by acknowledged experts in the area. The Catherine Ramos report appears to have issued without any input from international human rights organisations, MONUSCO and/or any NGOs on the ground in Kinshasa, while the report does mention Amnesty International, it is careful to clarify that Amnesty International is not expressing any 'views' in the report. It appears, therefore, to be a report compiled by activists with a particular standpoint, but without input from experts knowledgeable in the field."*

17. The examiner then looked at the factors which must be considered when analysing the reliability of a source in a specific context. The Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD) provided guidance in this area, in particular in relation to the reliability of source material. They emphasised the importance of researchers and users of country of origin information being aware of sources. They pointed out that no one source could provide a totally reliable account and that therefore researchers should consult a number of different types of sources, so as to get a broad overview of the situation. They also stated that corroboration of information is a recognised method of testing country of origin information for accuracy. In this regard, Mr. Dunne noted that the applicant's solicitors had also submitted a report prepared by the Refugee Documentation Centre (Ireland) containing information regarding the dangers for failed asylum seekers returning to DRC, dated 15th June, 2010. This report relied on reports from other reputable sources. However, the report itself was from 2010 and some of its sources were quite a bit older.

18. The examiner noted that since the submissions had been received from the applicant in July 2012, a report of relevance had been released by the United Kingdom Border Agency being a *"Report of a fact finding mission to Kinshasa conducted between 18th – 24th June, 2012."* It contained information about the procedure for and treatment of Congolese nationals returning to the Democratic Republic of Congo from the United Kingdom and western Europe, and was dated November 2012. Mr. Dunne noted that this report was available on the internet.

19. The examiner was satisfied that the information producer had established knowledge in the area of country of origin research; the information was provided in an objective manner, the methodology of the research was clearly and transparently set out. In addition, he was satisfied that the information provided was current. Overall, he was satisfied that the UKBA report met the principles set out by the UNCHR as quoted by ACCORD.

20. Mr. Dunne looked at the findings of the report in some detail. He noted that on the whole, the majority of the agencies considered that, at least in the normal course, there would not be a serious threat of mistreatment to returnees beyond some incidents of extortion and/or theft by corrupt airport officials.

21. The examiner noted that the report indicated that in certain circumstances, returnees may be detained, such detention following on from the returnees having been identified in some way as being liable for detention. The reason for such detentions fell into three broad categories. Firstly, if the returnee had a contagious disease, they would be likely to be detained. Secondly, if the returnee had a criminal record or outstanding arrest warrants, they would likely be detained. Thirdly, if the returnee was perceived to be against the government. The examiner came to the following conclusion in relation to the likelihood of the applicant being detained:-

> *"As such, whereas in general a returnee will not be liable to be detained for certain classes of returnee the danger of being detained and/or mistreated is higher. Returnees in danger of being detained and mistreated are those identified as having a contagious disease, being involved in criminality, who are perceived to be against the government, who are 'blacklisted' or whose ethnicity or origin somehow gives rise to suspicion. In this respect, I note that Ms. N. is not suffering from a contagious disease and nor is she wanted in connection with some crime committed in, or criminal investigation ongoing in, the DRC. In addition, Ms. N. has failed to establish a profile that would identify her as an enemy of the government. In addition, she is not from either the Equateur or Kasai provinces, a factor that was identified as possibly giving rise to suspicion."*

22. The examiner then turned to consider the question whether the mere fact that a person was a failed asylum seeker would expose such person to mistreatment arising from the suspicion that a person who claimed asylum was in some way opposed to the government of the DRC. He stated that a number of embassies and organisations had stated that returnees, including failed asylum seekers, did not face mistreatment. However, a number of NGOs did state that failed asylum seekers could be viewed with suspicion by the authorities and could be detained on that account.

23. He came to the conclusion that although some organisations suggest that being identified as a failed asylum seeker may give rise to some suspicion in the minds of airport officials, other organisations suggest that there was an understanding of the complexities of irregular migration. The examiner also noted that Ireland does not identify failed asylum seekers when they are returned to their country of origin.

24. It was noted that there was assistance available to returnees who encountered difficulties. There were a number of NGOs who would provide the assistance required. The examiner concluded this part of the examination of the file in the following manner:-

> *"Byrne Kelly Corrigan Solicitors submitted that there had been 'deterioration of conditions in the DRC and the treatment returned asylum seekers faced'. I have read and considered all of the documentation submitted on behalf of Ms. N. Having considered the Catherine Ramos report in conjunction with the RDC report of 15th June, 2010, which are documents submitted by Byrne Kelly Corrigan Solicitors, and having read those documents in the light of current country of origin information available from the United Kingdom Border Agency – information which is in the public domain – I am satisfied that Ms. N's life or freedom would not be threatened were she to be expelled from the State and returned to the DRC. Therefore, I am of opinion that repatriating PBN to DR Congo, is not contrary to s. 5 of the Refugee Act, as amended, in this instance."*

25. The examiner concluded his report with a recommendation that the Minister should affirm the deportation order already made in respect of the applicant.

The Applicable Legal Threshold

26. The question of the applicable legal threshold has been raised in these proceedings. In the application relating to the s. 17(7) decision, the applicant must establish *"substantial grounds"* for contending that the decision is invalid or ought to be quashed. This requires that the application must not be trivial or tenuous, it must stand some chance of being sustained (i.e. not a matter determined in a previous decision) and it should be reasonable, arguable and weighty.

27. The question arises as to what is the correct threshold for the application to quash the decision not to revoke the deportation order since that application has been put on notice to the respondent. The applicant submits that the issue is governed by the decision of the Supreme Court in *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374, where Finlay C.J. stated at p. 377-378:-

> *"An applicant must satisfy the court in a prima facie manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:—*
>
> *(a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20 (4).*
>
> *(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.*
>
> *(c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.*
>
> *(d) That the application has been made promptly and in any event within the three months or six months time limits provided for in O. 84, r. 21 (1), or that the Court is satisfied that there is a good reason for extending the time limit.*
>
> *(e) That the only effective remedy, on the facts established by the applicant, which the applicant could obtain would be an order by way of judicial review or, if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure."*

28. It was submitted that this test was re-affirmed by Fennelly J. in *Gordon v. Director of Public Prosecutions* [2002] 2 I.R. 369, where he stated at p. 372 that:

> *"leave to apply for judicial review can be obtained by demonstrating that, if the facts alleged are proved, the applicant has an arguable case in law to obtain the relief he seeks; this has been frequently described as a 'low threshold' and by Denham J. as a 'light burden' in G. v. Director of Public Prosecutions…"*

29. The respondent submitted that the test was set out in *C.R.A. v. Minister for Justice* [2007] 3 I.R. 603, where MacMenamin J. stated as follows:-

> *"61. Insofar as the issue arises herein, this court considers itself bound by the recent statement of principle set out in the Supreme Court decision of D.C. v. Director of Public Prosecutions [2005] IESC 77, [2005] 4 I.R. 281 Denham J. where, on appeal from a decision of Ó Caoimh J. (where the High Court had refused leave to bring judicial proceedings*

and where argument had been heard on the applicable standard in an inter partes application), the Supreme Court nonetheless held that for the purposes of that appeal the test was a standard set out in G. v. Director of Public Prosecutions [1994] 1 I.R. 374, Denham J., speaking on behalf of the court, stated at p. 289:-

> *"Reference was made in the High Court to a different standard of proof in cases where the respondent is on notice of the application. However, I do not apply such an approach in this appeal. It appears to me that there is a real danger of developing a multiplicity of different approaches, that of G. v. Director of Public Prosecutions , the test applied in specific statutory schemes, and that governing the position where a respondent is on notice in a particular area of litigation. Not only may there be legal difficulties in identifying and applying each different standard, but such an approach would take up further valuable court time. In voicing this opinion I note that in Gorman v. Minister for the Environment [2001] 1 I.R. 306 and other cases cited reliance was placed on English caselaw. However, it appears to me that the appropriate law is that which has been well established in this jurisdiction based on G. v. Director of Public Prosecutions . It is that law which I apply to this application."*

62. The application of the G. v. Director of Public Prosecutions [1994] 1 I.R. 374 standard in cases such as the present gives rise to the following observations:-

(a) it is self evidently a lower standard than the substantial grounds test;

(b) it is to be applied in circumstances where it has been suggested elsewhere the standard applicable should be that of substantial grounds;

(c) it arises in circumstances where the discretion of the court has been exercised, to direct the application should be heard on notice;

(d) the facts and legal issues herein may demonstrate that whereas, ex parte , arguable grounds might have been established, inter partes they may not have been;

(e) it arises where the position of the applicant is weaker than in a review of a decision under s. 5 of the Act of 2000.

63. These observations beg the question as to the circumstances, save under a statutory regime, as to when an application of this kind should be heard on notice. Unless the court is to adopt a different standard from simple arguability it may be suggested, the exercise is otiose. In an application on notice, should a court engage in weighing or analysis of all the evidence, or should it accept the applicant's case on arguability? By implication, also, the issue arises as to the test to be applied in an application to set aside leave.

64. An application ex parte herein would necessarily have been heard without notice on the basis of evidence established by affidavit, but would not have been on all the relevant facts or those within the procurement of the applicant. It would certainly be open to being set aside on the basis of the evidence and legal submissions which have now been made available to the court in this inter partes hearing. But this process is hardly the "quick perusal" identified in R. v. Inland Rev Commissioners, ex parte, National Federation of Self-Employed and Small Businesses Limited [1982] A.C. 617.

65. It may be said the respondent not on notice may of course apply to have a grant of leave to seek judicial review subsequently set aside. But this in turn still may raise questions as to the standard applicable, the purpose of the court's discretion to direct notice be served on an intended respondent, the effect thereof, and the fact that, in certain circumstances, an applicant might achieve an unwarranted advantage, such as critical delay, by a grant of leave and a consequent interim injunction when there may be no such entitlement at law.

66. These observations are necessarily obiter. On the basis of the decision and authority of D.C. v. Director of Public Prosecutions [2005] IESC 77, [2005] 4 I.R. 281 this court concludes that it should apply the lower test of "arguable grounds", but in any case should exercise its discretion to grant or refuse leave having taken into account relevant matters which include:-

> *"(b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review.*
>
> *(c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks." (per Finlay C.J. in G. v. Director of Public Prosecutions [1994] 1 I.R. 374 - emphasis added).*

In an application for leave on notice, however having heard both sides, a court must be in a better position to establish whether in law on the facts by then established, an applicant has made out arguable grounds.

30. I am satisfied that this statement of the law correctly sets out the threshold which the applicant must meet in relation the application to revoke the deportation order.

The United Kingdom Border Agency Report of a Fact Finding Mission to Kinshasa, 18-24 June, 2012

31. The applicant has made a number of criticisms of this report. These can be summarised as follows. Firstly, the applicant alleges that the report does not arrive at any conclusions. It is alleged that it consists merely of records of interviews/results of inquiries with various groups and parties, some of which have been identified and some not. The applicant complains that it contains no commentary evidencing the conclusions (if any) reached by the compilers of the report. It contains no recommendations regarding what weight ought to be put on one aspect of the research, or source, as opposed to another. Secondly, the report fails to put allegations to the Direction Generale de Migration (DGM) who are solely responsible for dealing with returnees and who should be asked for information. Yet, without proper comment, it is stated at p. 4 of the UKBA report, that amongst others, DGM was *"unable or declined"* to provide publicly disclosable information on this issue. The applicant complains that they are not told whether the DGM was unable to assist the fact-finding mission or simply refused to cooperate with them at all.

32. Thirdly, the applicant submitted that the views of the UNHCR had been misrepresented in the UKBA report and Policy Bulletin when read together. The applicant maintains that it was necessary to draw a distinction between failed asylum seekers returning from the

UK and Europe generally on the one hand, and the mass movement of asylum seekers throughout various countries in Africa on the other hand. Paragraph 6.2.3 of the Policy Bulletin refers to what is in effect such a comparison and the conclusion as *"a clear indication that they (the UNHCR/UN) have no concerns about the general treatment of refugees"* is on the face of it a highly consequential conclusion that appears to be misapplied to the situation regarding returned failed asylum seekers from Europe and perhaps imputing knowledge to the UNHCR which it never claimed to have relating to such failed asylum seekers returning from Europe.

33. The applicant submitted that the failure to directly obtain the views of the UNHCR in the context of the inquiries being undertaken was notable. There appeared to be a willingness to treat the absence of evidence of an asserted fear (which is unlikely ever to be forthcoming) as evidence that such fear was not well founded. The applicant was of the view that there was no real suggestion that it would be expected that the bodies or groups to whom queries were raised for the UKBA report, would in fact have, or would come into possession of, the evidence required to confirm or refute the conclusions of the *"Unsafe Return"* report.

34. Fourthly, the applicant complained that perhaps the most important shortcoming of the UKBA report was the fact that almost all of the people consulted by the researchers in the report, acknowledged that they did not monitor failed asylum seekers after return to Kinshasa. The applicant pointed out that this was in stark contrast to the efforts of Justice First who had commissioned the Catherine Ramos report. The applicant submitted that it was fundamentally flawed in the UKBA report to address a core question such as *"are returned asylum seekers from Europe likely to be ill-treated at Kinshasa airport or elsewhere after arrival, on account of their status?"* to persons who have no means of knowledge of the answer. The applicant noted that the answer provided by the Policy Bulletin, purportedly relying on the findings in the FFM report, rely almost entirely on those bodies/organisations that were questioned *"not having any evidence of ill treatment of such persons"* in circumstances where there would appear to be very little opportunity for such bodies or organisations (in the complete absence of any monitoring) to ever have such evidence, when no monitoring is taking place. The applicant submitted that the only way that those bodies/organisations might acquire such "evidence" would be based on the pure happenstance of any victim of such treatment being ready, able, and willing to make a complaint to that body in the aftermath of such mistreatment. It was submitted that it is an entirely unsatisfactory basis to effectively unseat the findings of the *"Unsafe Return"* report. Unsafe Returns should in any event have (and did) place countries intending to deport failed asylum seekers to DR Congo *"on inquiry"* in relation to its contents and their non-refoulement obligations and the necessary inquiry has simply not been adequately undertaken – at least not in the applicant's view by the UK documentation, giving rise to the possibility of a very real danger of unlawful refoulement taking place.

35. The applicant pointed out that at para. 11.7 of the Policy Bulletin is contained the *"Conclusion"* which merely refers to a *"consensus within the FFM"* that returnees per se do not face a risk of detention (subject to stated exceptions) – the difficulty is there is no such *"consensus"* evident from the FFM itself. The applicant submitted that the FFM report is a lengthy document and it would be extremely difficult to say that there is a consensus of any sort contained therein and certainly no direct evidence countering the content of the *"Unsafe Return"* report.

The Applicant's Supplemental Submissions

36. The applicant in the course of supplemental written submissions, submitted that in the light of the Supreme Court judgments in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 IR 701 some of the judgments referred to by the respondent in relation to the obligation to give reasons, or more precisely the lack of an obligation to do so, would be decided differently subsequent to *Meadows*.

37. The applicant referred to the following passage from the judgment of Hogan J. in *T.K. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 99, which it was submitted sets out the conclusions which clearly reflect the post-*Meadows* position:-

> *"Against this background, we now proceed to apply the Meadows reasoning to the present case. To start with, it is irrelevant that both the Commissioner and the Tribunal rejected the applicant's account on credibility grounds, since this was also true of the applicant in Meadows. Next, it is relevant that the applicant's account of what happened to him in Togo engages or potentially engages the prohibition in s. 5 of the 1996 Act, since if it were otherwise, then the applicant's submissions on the s. 3 issue could be treated as largely humanitarian in character and the Minister would not be required to give any detailed reasons for his decision for the reasons given by both Hardiman J. in FP and by Keane C.J. in Baby O."*

38. It was submitted that the Meadows case confirmed the relevance of proportionality in judicial review in Ireland. It was also submitted that the decision in *Meadows* clarified the role of the Minister, where Murray C.J. stated as follows, at para. 80 (p. 729):-

> *"Views or conclusions on such issues may have already been arrived at by officers who considered a proposed deportee's application for asylum, at the initial or appeal stages, and their conclusions or views may be before the Minister but it remains at this stage for the Minister and the Minister alone in the light of all the material before him to form an opinion in accordance with s. 5 as to the nature or extent of the risk, if any, to which a proposed deportee might be exposed."*

39. The applicant further submitted that the present case is not a "reasons case" in as much as it is not contended that the Minister failed to give reasons for the refusal; on this basis the *Kouaype* line of authority relied upon by the respondent has no great relevance. However, the applicant submitted that it was a *"reasons case"* in as much as what is sought to be challenged is the reasonableness, rationality, and proportionality of the refusal itself. It is desired to contend at the substantive hearing that the *"weighing exercise"* carried out by the Minister came to the wrong conclusion, and placed too much weight on selected elements of the UKBA report and too little weight on the Unsafe Return report. The applicant contended that there exists major flaws in the UKBA report, as set out earlier in this judgment. The applicant contended that she has a constitutional right to have the decision made, affecting her right to freedom from torture, inhumane or degrading treatment, examined for proportionality and reasonableness by an independent court or Tribunal, and that, accordingly, she is entitled to leave to apply for judicial review in these proceedings.

40. The applicant submitted that at the leave stage, it would be wholly inappropriate to delve into the findings of the UK Court in the *P&R v. Secretary of State for the Home Department case* [2013] EWHC 3879, whatever about what regard should be had to it at the substantive stage. It was submitted that its only relevance at the leave stage was that it illustrated that a similarly situated applicant as the applicant herein apparently had no difficulty in our neighbouring jurisdiction of having a similar decision examined and weighed by an independent Tribunal – that is all that a grant of leave will entitle the applicant to in this case.

41. The applicant also submitted that concern must arise as to the delays already had in the consideration of the applicant's need for international protection. Leave was sought on all grounds. As the Supreme Court stated in this case, *"it is obviously in the interest of both parties that the leave applications be expedited"*. It was submitted that the Supreme Court dealt in their judgment in the

interlocutory matter with points concerning *"an arguable case"* in the context of injunctive relief, and it was misleading of the respondent to characterise any findings in that case as intended to become the grounds/reliefs that ought to be granted in these applications. The opposite was emphasised by the Supreme Court. It was submitted that it is crucial that the fullest consideration be given to the Minister's refusal to revoke, not only from a reasonableness/rationality/proportionality standpoint but also from a procedural and fairness aspect.

42. The applicant submitted that in a matter such as this, involving, *prima facie*, a possibility of serious harm, it would be better that the court hearing the substantive application was not deprived of jurisdiction in any way by unnecessary confinement of the leave grounds.

43. The applicant pointed out that at para. 1.10 of the respondent's submissions, case law was mentioned which supported the view that failed asylum seekers were not per se members of a particular social group. That is not something that the applicant ever asserted. What is not mentioned however, is that in the *F.V.* case put forward by the respondent, Irvine J. at para. 7 of the judgment states:-

> *"It seems to this Court, however, that where a clear Convention nexus is shown, a person's fear of persecution by virtue of his or her status as a failed asylum seeker might be capable of bringing him or her within the s. 2 definition."*

44. As to whether the evidence put forward was *"cogent, authoritative and objective"* that must surely be for the substantive hearing and at least, a prima facie case is apparent that should be sufficient for the purposes of leave. Leave was granted in *Meadows* by the Supreme Court in circumstances not dissimilar to here – evidence was put forward of fear of serious harm which was alleged not to have been properly considered. It was submitted that the *Meadows* decision should be followed in this case.

45. The applicant submitted that the present case was almost indistinguishable from the previous decisions in *Meadows* and in *T.K. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 99. It was submitted that in all three cases, previous applications for asylum had been rejected by the equivalent of the Refugee Applications Commissioner and the Refugee Appeals Tribunal on, *inter alia*, credibility grounds. In all three cases, a similar form of wording had been used in rejecting the notion that the return of the applicants to their countries of origin would not breach the State's non-refoulement obligations.

46. It was submitted that the judgments of the Supreme Court in Meadows and the High Court in *T.K.* obliged this Court to grant leave in the instant case. Reference was made to the decision of *K.I. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 66 where the law in this regard was summarised and quoted by the High Court (Hogan J.) as follows:-

> *"36. For my part, I consider that the present case is indistinguishable in principle from cases such as Alli and Ofobuike. While it is true that the decisions of one High Court judge cannot strictly bind another, the established practice of this Court is that, generally speaking, previous decisions should be followed: see, e.g., the comments of Parke J. in Irish Trust Bank Ltd. v. Central Bank of Ireland [1976] I.L.R.M. 50 at 53 and those of Clarke J. in Re Worldport Ltd. [2005] IEHC 189 and PH v. Ireland [2006] IEHC 40, [2006] 2 I.R. 540. As Clarke J. put it in Re Worldport Ltd.:-*
>
> > *'It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. …Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered.'*
>
> *37. None of the special considerations identified by Clarke J. are present here. Quite the contrary, the decisions which I consider that I am bound to follow are all recent decisions where the issues were fully argued and the authorities fully considered. In these circumstances, I would not be justified in departing from the formidable weight of authority and I consider that I ought to apply the principles so forcefully adumbrated by Clark J. and Cooke J. in these cases."*

47. It was submitted by the applicant that the above citation when considered in the light of the Supreme Court having allowed the appeal in *Meadows* and granted leave to apply for judicial review and the comments of Hogan J. in *T.K.* entitles the applicant in the instant case to leave as of right. Firstly, the applicant emphasised that these two applications are applications for leave only. As Irvine J. stated at para. 33 of her judgment in *J.M.*:-

> *"As this is a decision on leave only, it is unnecessary and indeed inappropriate to consider the matter in great depth."*

48. It was submitted that the only question before the court was whether substantial/arguable grounds exist to argue that the decision should be quashed. It is not whether it should be quashed, when, indeed other considerations might arise.

49. Secondly, the applicant submitted that the quality of the representations/country information should not be considered in depth at the leave stage, all that is necessary is to establish that they were sufficient to engage s. 5 which is clearly the position in these two cases.

50. Lastly, it was submitted that as Hogan J. made clear at paras. 26–30 of his judgment in *T.K.,* he was constrained by *Meadows* to quash the decision and it was not in fact a matter for the discretion of the court, *a fortiori* leave should be granted in this case.

The Respondent's Submissions

51. The respondent submitted that in relation to the s. 17(7) application, this was normally challenged on an *ex parte* basis when an applicant sought leave to proceed by way of judicial review. However, in this case, the court had stated that the leave application was to be made on notice to the respondent. In these circumstances, it was argued that the test is not the usual "arguable grounds" test, but is a hybrid test as set out in *C.R.A. v. Minister for Justice* [2007] 3 I.R. 603.

52. The respondent further argued that there were different standards applicable depending on whether the applicant was seeking an injunctive procedure or was proceeding at the leave stage of a judicial review application. In this case, it was submitted that the Supreme Court decision in the interlocutory injunction proceedings did not mean that the applicant should be give leave to proceed by way of judicial review. It was submitted that when one was looking at the interlocutory injunction proceedings, one was dealing with a very low threshold. In this regard, the applicant was allowed to proceed on two grounds which were sufficient to amount to an "arguable case" which would allow the applicant to seek an interlocutory injunction. It was submitted that the mere fact that the applicant had been granted an interlocutory injunction, did not mean that the applicant was therefore entitled to obtain leave to proceed by way of judicial review. The respondent submitted that there were two different tests and that the fact that the applicant succeeded at the interlocutory application stage, did not mean that *ipso facto* the applicant was entitled to leave to proceed by way of judicial review.

53. The respondent relied on the decision in *Re Worldport Limited* [2005] IEHC 189, which sets out the circumstances in which a High Court decision might not be followed. These were set out at p. 5 of the judgment. However, in the absence of any of these criteria, it was submitted that the court should follow the earlier High Court judgment at the interlocutory application stage as given by Clark J. In that judgment, Clark J. had held that the applicant had submitted nothing new in the course of her application. She may have had a new report, but the risk to failed asylum seekers returning to the DRC, was already before the Minister at the time of review of the deportation order. It was submitted that the court should take the same approach as had been adopted by Clark J. in her judgment and should hold that the applicant had, in fact, not submitted any new evidence sufficient to bring her within the provisions of s. 17(7A) and (7D).

54. It was submitted that where the applicant had gone through the whole panoply of immigration procedure, she had all the relevant issues looked at in depth by the various decision makers. It was submitted that the applicant had to clear the test as set out in s. 17(7A) and (7D), which set out the level of the new evidence which an applicant must adduce in order to comply with the provisions of section 17(7). It was submitted that the case law established that the country of origin information must be "cogent, authoritative and objective". In this case, the only COI relied upon was the Unsafe Return report of November 2011. It was submitted that the Unsafe Return report did not meet this standard, especially when looked at the in the light of other known COI at the time. It was submitted that under s. 17(7) the new evidence must be likely to lead to a different outcome on the decision. The respondent submitted that the Unsafe Return report was not sufficient to lead to a different outcome on the decision.

55. In relation to the application to revoke the deportation order, it was submitted that the examination of the file which was carried out under s. 3(11) of the 1999 Act, was very detailed in this case. The decision maker considered the Unsafe Return report and was guided by the guidelines of ACCORD. The Unsafe Return report was looked at closely. The decision maker did not dismiss this report out of hand, but looked at other documentation submitted by the applicant. The decision maker looked for corroboration of the content of the report from other known COI. The decision maker considered the documentation submitted by the applicant. On balance, the decision maker preferred one set of documentation which had been submitted by the applicant. He considered all the documentation which had been submitted by the applicant. The decision maker set out clearly why he came to the decision that he did. It was submitted that this was in accordance with the ACCORD guidelines. It was further submitted that this was sufficient to deny the applicant leave in this case. All the documentation had been considered by the decision maker who made his decision and said why he came to the conclusion that he did.

56. The decision maker held that at the time he came to make his decision that the documentation submitted by the applicant was not up to date, so he looked at the Fact Finding Mission report from 2012. This report was drawn up by the UK Border Agency and was available on the internet. The document satisfied the criteria of ACCORD. The decision maker decided that the preponderance of the documentation established that after interview, returnees to DRC are free to go. The decision maker goes on to deal with the low level mistreatment of such returnees at the airport.

57. It was submitted that the decision maker had looked at the documentation fairly, had looked at both the positive and negative aspects, and on the whole came to the view that the majority of agencies held that there was no serious threat of mistreatment to failed asylum seekers.

58. It was submitted that the Unsafe Return report was significantly at variance with other COI that was before the decision maker at that time. Many NGOs were not aware of serious mistreatment of returned failed asylum seekers. The decision maker looked at all the available documentation and came to the view that the preponderance thereof established that there was no serious mistreatment of returnees at the airport other than low level extortion and theft. He noted that the persons detained fell into one of three categories: (i) if they had a contagious disease; (ii) if they had a criminal record; and (iii) if they were suspected of being against the government or have come to government attention previously. This was set out in reputable COI. The decision maker had looked at all the documentation and had complied with all the legal requirements set out in the case law.

59. It was submitted that the applicant wanted to focus exclusively on the Unsafe Return report. However, the decision maker had looked at the applicant's circumstances and came to the conclusion that she has not shown that she was at a higher risk of mistreatment than other returnees to DRC. The decision maker found that the applicant was in the category of failed asylum seeker, but that the authorities in Ireland do not tell the DRC authorities that the person was a failed asylum seeker. The Frontex flights repatriate people who have a deportation order made against them, but this does not mean that the person is a failed asylum seeker. When the asylum process comes to an end then a deportation process begins. The respondent submitted that deportation is not confined to failed asylum seekers.

60. The decision maker looked at the UK Border Agency Fact Finding Mission report and concluded that returnees, including failed asylum seekers do not face mistreatment on return to the DRC.

61. It was conceded that some NGOs said that failed asylum seekers face mistreatment on return to the DRC. It was submitted that the applicant must show why she would be identified as a failed asylum seeker on return. The applicant says that being on a Frontex flight would establish this, but such a person could be a returned economic migrant and not a failed asylum seeker.

62. It was submitted that the decision maker had considered objective COI and then applied the applicant's subjective circumstances to that background. The decision maker looked at all the representations and COI and applied it to the applicant's particular circumstances. In these circumstances, it was submitted that there was no valid criticism to be made of the decision reached in the applicant's case.

63. The respondent submitted that in *F.N.*, Charleton J. held that the decision maker was not obliged to go through multiple stages in considering COI. It was alleged that there should be seven stages. The judge held that this procedure assumed a complete lack of trust and it was not necessary for the decision maker to go through all these stages. In this case, the Supreme Court had held that it

was not an *audi alteram partem* type case.

64. The respondent submitted that in this case, the decision maker found that there was no breach of s. 5 in returning the applicant to the DRC. It was submitted that the decision maker was very thorough in his consideration of all the relevant matters.

The Section 17(7) Application
65. The applicant has sought the quashing of the decision of the respondent dated 8th November, 2012, on a number of grounds. The first of these was set out at ground (ii) in the statement of grounds in the following manner:-

> *"The respondent erred in law and/or in fact in concluding that the information and documentation furnished by the applicant to the respondent in his application to be readmitted to the asylum process did not amount to 'new evidence'."*

66. The applicant submitted that there was no rational basis to conclude that it was not arguable for the purposes of leave that the evidence furnished was not *"new evidence"*. As noted by Clark J. in the course of her judgment, the Unsafe Return Report was based on the testimony of fifteen adults (of whom 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 fifteen adults said they were interrogated either at the airport or in detention about their activities in the UK. Six said that 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 that 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 the United Kingdom 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.

67. The provisions of s. 17 of the Refugee Act 1996 (as amended) are relevant to this ground of challenge. Regulation 8 of the European Communities (Asylum Procedures) Regulations 2011 (S.I. 51/2011) substituted the following subsection for subs. 7 in the 1996 Act:-

> *"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."*

68. The Regulation also inserted a number of further subsections which are relevant to the application. They state as follows:-

> *"(7A) The consent of the Minister referred to in subsection (7) –*
>
> *(a) 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*
>
> *(b) 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.*
>
> *[...]*
>
> *(7D) Pursuant to an application under subsection (7B), and subject to subsection (7E), the Minister shall consent to a subsequent application for a declaration being made where he or she is satisfied that –*
>
> *(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)."*

69. I am satisfied that it is arguable that the Unsafe Return Report was a significant piece of *"new evidence"* which should have been taken into account when considering the readmission of the applicant into the asylum process, and that the applicant was not in a position to present this evidence at the time of her original application. In the circumstances, the applicant has raised substantial grounds for arguing that in considering her application for readmission to the asylum process, the Minister misapplied the law in determining whether there was compliance in the applicant's case with the requirements of s. 17(7), (7A) and (7D) of the Refugee Act 1996, as amended.

70. Ground (iii) was in the following terms:-

> *"The respondent erred in law and in fact by relying on findings of lack of credibility on the part of the applicant in her asylum claim by the Refugee Applications Commissioner and the Refugee Appeals Tribunal in circumstances where those findings were largely irrelevant to the subject matter of the application to be readmitted to the asylum process."*

71. The applicant submitted that irrelevant facts should not have been taken into account. She argues that the application was not considered on the basis on which it was made. However, the respondent argued that case law supports the view that the decision maker can have regard to the history of the asylum application procedure when considering whether to allow the applicant to re-enter the asylum process. In *F.N. v. Minister for Justice, Equality and Law Reform* [2009] 1 I.R. 88, Charleton J. held that the Minister was entitled to have regard to the findings of the RAC and the RAT. He dealt with this issue as follows:-

> *"Where, as a matter of substance, however, a contention as to the factual basis for such rights is the same as that which is already being processed under the Refugee Act 1996, then the case law clearly establishes that the respondent is entitled to place some degree of weight on the failure of the applicant to succeed in persuading the Refugee Applications Commissioner and the Refugee Appeals Tribunal as to their entitlement to refugee status and as to their credibility."*

72. In the circumstances, I am not satisfied that this is an arguable ground of challenge to the Minister's decision.

73. Ground (iv) in the statement of grounds was in the following terms:-

"The respondent erred in law and/or in fact in apparently preferring statements made by the UNHCR in 2006 relating to treatment of returned failed asylum seekers to DR Congo (despite that information reciting that it was based on only limited information) over the more up to date information furnished by the applicant. The respondent further erred in law in failing to provide any reason or rationale for such apparent preference and further erred by utilising information that was not up to date at the time of the making of the decision."

74. Under this ground, the applicant has invited the court to engage in an evaluative exercise of the representations being advocated on behalf of the applicant as against COI. It is well established that this is not the function of the court in judicial review, but is a function of the primary decision maker. In her submissions, the applicant has invited the court to become involved in a *"balancing of the various pieces of country of origin information presented and before the decision maker (and perhaps other evidence)"*. It is not the function of this Court to engage in such a balancing exercise. In the circumstances, this ground is not an arguable ground.

75. Ground (v) was in the following terms;-

"The respondent erred in law and/or in fact in relying on the understanding that 'when the Irish authorities make arrangements to repatriate persons to DR Congo, no mention is made of them being failed asylum seekers' in circumstances where it would be obvious to those authorities that such persons were probably failed asylum seekers given (a) that they normally would be travelling on a 'travel document' issued by the Irish authorities; and (b) would normally arrive on a "Frontex Flight", making it obvious that they were indeed failed asylum seekers arriving from Europe'."

76. The applicant referred to Article 6 of decision 2004/573/EC and submitted that it was insufficient for the respondent to rely on an "understanding" in this regard. Further inquiries should have been made to ascertain the true position. It was submitted that it appears that failed asylum seekers were, as a matter of course, put on *"Frontex"* planes destined for DRC without any travel documents, which was in breach of the terms of decision 2004/573/EC. The applicant submitted that only the respondent has the knowledge of the practices that were relevant at the date of these proceedings and thereafter, and it is crucial that the court be informed in a timely manner of the full facts and practices of the respondent. I am of opinion that it is appropriate that the applicant should be entitled to seek judicial review on this ground.

77. Ground (vi) was in the following terms:-

"The respondent erred in law and/or in fact in apparently concluding that failed asylum seekers per se could not comprise a 'particular social group' for the purposes of refugee law. Inter alia, it is clear that this is not so given the definition of 'particular social group' contained in Article 10(d) of Council Directive 2004/83/EC and refugee law in general."

78. The applicant submitted that in European law, a failed asylum seeker in the position of the applicant and in light of the new evidence submitted, must be a member of *"a particular social group"* for the purposes of applying minimum standards mandated by the Qualification Directive. It was submitted that this was clear from the terms of Article 10(d) of that directive.

79. Article 10(d) provides:-

"1. Member States shall take the following elements into account when assessing the reasons for persecution:-

…

(d) a group shall be considered to form a particular social group where in particular:

— members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

— that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society."

80. The applicant has not submitted any cogent grounds for arguing that the applicant was a member of a *"particular social group"* as described in the Directive. The applicant has not established substantial grounds for challenging the decision under this heading.

81. Ground (vii) was in the following terms:-

"The impugned decision was arrived at in breach of the principle of audi alteram partem and of the applicant's right to be heard. In particular and without prejudice to the generality of the forgoing it was specifically requested by the applicant in her application for review as follows: 'lastly, if it is proposed to examine any other country information or evidence not already referred to in this application or in the refusal we should be obliged if you would let us have copies thereof to enable us to consider same and make relevant submissions thereon prior to any final decision being arrived at.

Despite this reasonable request further and other country information was relied upon against the applicant's interests in breach of natural justice and fair procedures and the applicant's right to be heard."

82. The applicant submitted that she should have been given the opportunity to comment on any new evidence on which the decision maker intended to rely. The respondent relied upon the decisions in *Kouaype v. Minister for Justice, Equality and Law Reform* [2005] IEHC 380, *Fr. N (A Minor) v. Minister for Justice, Equality and Law Reform* [2009] 1 I.R. 88*, Baby O*. [2002] 2 IR 169, and *EAI v. Minister for Justice, Equality and Law Reform* [2009] IEHC 334, in support of the proposition that the Minister is not obliged to enter into correspondence with the applicant before reaching his decision. The respondent referred to the following dicta of Charleton J. in *F.N. v. Minister for Justice (supra)* where it was stated as follows:-

"58. I am fortified in this conclusion by the decision by Clarke J. in Kouaype v. Minister for Justice [2005] IEHC 380, (Unreported, High Court, Clarke J., 9th November, 2005). There, a similar claim was made that the respondent should enter into correspondence regarding the prohibition on refoulement under s. 5 of the Refugee Act 1996. Clarke J. rejected that proposition in the following terms:-

> *'[4.9] In Baby O. v. Minister for Justice [2002] 2 I.R. 169, the Supreme Court again had to consider the statutory regime in respect of deportation orders. While many of the issues which were relevant in that case do not arise here, the court did consider grounds raised by the applicant in Baby O. based upon s. 5 of the Act of 1996. The decision of the Minister in that case (insofar as it was concerned with s. 5) was the same as in this case i.e. ('the Minister has satisfied himself that the provisions of s. 5 (Prohibition on Refoulement) of the Refugee Act 1996 are complied with in your case'. In respect of that decision of the Minister, Keane C.J. said the following at p. 183:-*
>
> > *'I am satisfied that there is no obligation on the first respondent to enter into correspondence with a person in the position of the second applicant setting out detailed reasons as to why refoulement does not arise. The first respondent's obligation was to consider the representations made on her behalf and notify her of the decision; that was done and, accordingly, this ground was not made out.'*
>
> *[4.10] It is clear, therefore, that the Supreme Court in Baby O. v. Minister for Justice [2002] 2 I.R. 169 was also of the view that the obligations upon the Minister when considering making a deportation order are different from those which arise in the case of the statutory bodies charged with the task of determining whether to recommend that a person be granted refugee status….'*

[59] Similarly, and based on similar reasoning, Feeney J. rejected the same proposition in E.P.I. v. Minister for Justice, [2008] IEHC 23, (Unreported, High Court, Feeney J., 30th January, 2008). Feeney J. stated as follows:-

> *'[4.7] The narrow view as to the scope of review available in respect of a decision by the Minister to make a deportation order subsequent to a failed asylum application, recognises that the decision making process carried out by the Minister is not an inquisitorial process. An inquisitorial body has obligations in relation to fair procedures and a requirement to bring to the attention of a party, whose rights may be affected, matters of substance and importance which the inquisitorial body may regard as having the potential to affect its judgment. However, the Minister is not carrying out an inquisitorial process. In this case his decision does take place subsequent to a failed asylum application. The claim that there was reliance on undisclosed materials in breach of fair procedures does not arise herein. The requirement to disclose relevant documentation to asylum seekers and their legal representatives extends to bodies such as the Office of the Refugee Applications Commissioner and the Refugee Appeals Tribunal but does not extend to the exercise of a ministerial discretion. There is no requirement for the Minister to enter into correspondence based on country of origin information and this is clear from the judgment of Keane C.J. in Baby O. (see p. 183). The court is satisfied that there was no obligation on the Minister either in a general way or in any way to identify any reasons giving rise to his decision to deport. The claim that the Minister had such obligation is rejected.'"*

83. The respondent made further reference to the decision of Charleton J. in *F.N. v. Minister for Justice (Supra)* where the learned judge rejected the argument that the Minister had to return to the applicant every time new or updated country of origin information was obtained. He stated at paras. 55-56 of his judgment:-

> *"[55] The procedure argued for presupposes a complete lack of trust being properly exercised by the respondent through his officials. The relevant directives, and the case law which I have cited in this judgment, emphasise the necessity for the decision maker to obtain up to date country of origin information. That process may be assisted by submissions on behalf of the applicant. Neither under European or national law do they control the process. Once a submission is made, it is not necessary either under European or national law, to return to an applicant with queries or questions unless, in the opinion of the respondent, such query or question may be of assistance to him in discharging his function in determining the true state of the applicant's country of origin.*
>
> *[56] It was further argued on behalf of the applicants that to fail to engage in the seven stage process contended for, would leave an applicant for judicial review without a reasoned decision and in circumstances where the respondent might unreasonably decide an application on the basis of one piece of country of origin information, or set of reports, in contra-distinction to another. In my view, the respondent is under a duty to act carefully and honestly in considering an applicant's entitlement to subsidiary protection. An applicant will, no doubt, make the best possible case that is available on the basis of country of origin information. That case may assist the respondent, it may be real in terms of what it puts forward, or it may be exaggerated. Any submission may be checked against what the respondent already has available to him and supplemented by any reliable additional reports. The receipt of submissions may assist in the process, but it does not relieve the respondent of his responsibility to make a fair decision."*

84. The respondent also referred to the following dictum of Cooke J. in *J.E. v. Minister for Justice* [2011] 1 I.R. 574, where it was stated as follows:-

> *"…the obligation of the Minister was to consider whether the prohibition on refoulement under s. 5 (and/or a possible infringement of the protection accorded by article 3 of the Convention) arose both generally by reference to information available to him as to conditions at the deportation destination, and, particularly, in the light of the information put before him when that protection was invoked."*

85. It is clear on the authorities cited by the respondent that the Minister is not obliged to engage in correspondence with the applicant, once his submissions have been submitted to the Minister. In the circumstances, the applicant has not established substantial grounds to challenge the Minister's decision on this ground.

86. Ground (viii) was in the following terms:-

> *"The respondent further erred in law and/or in fact in apparently concluding that the information provided by the applicant was not 'cogent, authoritative and objective COI that failed asylum seekers were targeted for persecution in the person's country of origin' such that would demonstrate a Convention nexus. Insofar as those were the conclusions in fact reached, which is somewhat unclear then the respondent erred in law in failing to provide a reason or rationale for such conclusions."*

87. The applicant submitted that this aspect would be challenged on the basis of the decision in *Meadows v. Minister fir Justice, Equality and Law Reform* [2010] 2 IR 701, and that there was a failure on the part of the respondent to give reasons for his finding in this regard. The applicant submitted that the question as to whether the evidence put forward was "cogent, authoritative, and objective" was a matter for argument at the substantive hearing. She submitted that at the least a *prima facie* case was apparent, which should be sufficient for the purposes of leave. The applicant pointed out that the Supreme Court granted leave in *Meadows* in

circumstances not dissimilar to this case: evidence was put forward of fear of serious harm which was alleged not to have been properly considered. The applicant submitted that the decision in *Meadows* should be followed. I am satisfied that it is appropriate that the applicant be given liberty to seek judicial review on this ground as well.

88. Ground (ix) was in the following terms:-

> *"The respondent erred in law in concluding that the UN Committee against Torture case of Bakatu-Bia could not be considered as evidence and further erred in failing to have regard to the matters set out in the decision."*

89. The decision maker in his decision stated as follows in relation to the *Bakatu-Bia* case:-

> *"The solicitors mentioned a case in the European Court of Human Rights – Bakatu Bia v. Sweden. I could find no reference to such a case in this Court. However, I found reference to such a case in the UN Committee Against Torture. I note that the committee in considering country of origin information, made reference to serious human rights violation in the DR Congo. This is not new evidence. Furthermore, it did not make any reference to the position of failed asylum seekers."*

90. I do not think that the applicant has made out any arguable grounds for challenging this aspect of the decision.

91. Ground (x) was in the following terms:-

> *"The respondent erred in law in that he was put on inquiry by virtue of the information submitted by the applicant in his application yet unlawfully failed to carry out any inquiry."*

92. The applicant submitted that the decision maker was put on inquiry as to the fate which would befall the applicant on her return to the DRC as a failed asylum seeker from Europe. It was submitted that the respondent was put on inquiry but that the documentation and information sourced did not properly address the matters on which the respondent was put on inquiry. The applicant referred to *Msengi v. RAT* [2006] IEHC 241. In the course of his decision in that case, MacMenamin J. stated as follows:-

> *"The essential question for determination at this stage is whether the applicant has established arguable and substantial grounds. The essence of the case made by the applicant is that there were materials before the Tribunal that placed the Tribunal itself on inquiry as to whether the applicant would be the victim of discrimination as a HIV positive woman in South Africa which the South African authorities would not only be unwilling to counteract, but be instrumental in perpetuating. I go no further than to say it is arguable that there were such materials before the Tribunal and that an onus devolved on the Tribunal itself to investigate and consider these issues as a consequence. In the circumstances, I am of the view that for the purposes of this leave application the applicant has crossed the necessary threshold in establishing grounds for seeking leave though I wish to reiterate that the finding of this Court goes no further."*

93. I am of opinion that the applicant has raised substantial grounds for challenging the review decision on this basis.

94. Ground (xi) was in the following terms:-

> *"The respondent erred in law in apparently adopting the conclusions of the initial rejection of the applicant's claim. In particular and without prejudice to the generality of the foregoing the fact that the information submitted by the applicant was also to be considered in her application under s. 3(11) of the Immigration Act 1999, as amended, was not a valid reason to apparently, not consider same in the context of her application under s. 17(7) of the Refugee Act 1996 (as amended)."*

95. The applicant submitted that as in *MM v. Minister for Justice, Equality and Law Reform* (Case C-277/11) where applications are dealt with separately, the right to be heard must be respected in each application. She submitted that there was no basis entitling the respondent, in dealing with a readmission application, such as one under s. 17(7), based on European law, to defer to a view (not yet taken) that might be arrived at in a s. 3(11) application. It was submitted that the applicant was entitled to a separate and complete assessment of her separate applications. I think that this is a substantial ground and one which the applicant should be allowed to pursue at the substantive hearing.

96. Grounds (xii), (xiii) and (xiv) were taken together by the applicant in her submissions. These are in the following terms:-

> *"(xii) The respondent erred in law in failing to consider the substance of the information furnished which had not been previously considered by the asylum authorities. It was irrational to conclude that new elements had not been presented which significantly added to the likelihood of the applicant qualifying as a refugee and/or that those new elements could have been presented at an earlier stage. In the circumstances, the respondent was bound by virtue of s. 7A(b) of s. 17 of the Refugee Act 1996 (as amended) (as inserted by Article 8 of SI 51 of 2011) to consent to the applicant's re-admittance to the asylum process.*
>
> *(xiii) The respondent erred in law in failing to exercise his discretion in a manner consistent with the objective of the Refugee Act 1996, as amended, and the Procedures Directive and in a manner consistent with constitutional justice.*
>
> *(xiv) The respondent erred in law and/or in fact in failing to apply the provisions of the Procedures Directive (Directive 2005/85/EU) and statutory instrument 51 of 2011 properly to the decision."*

97. The applicant submitted that the decision was carried out in breach of s. 17, 7A(b) of the Refugee Act 1996, as amended. The applicant submitted that the respondent misapplied the law in determining whether there was compliance with the requirements of s. 17(7), 7A and 7D of the 1996 Act, as amended. The objections made in respect of ground (xii) are reasonably well defined and constitute substantial grounds. Accordingly, I will allow the applicant to challenge the decision on this ground. However, grounds (xiii) and (xiv) are vague. I will not allow a challenge on these grounds.

The Section 3(11) Challenge

98. Ground 1 was in the following terms:-

> *"The impugned decision was arrived at in breach of the principle of audi alteram partem and/or the applicant's right to be heard. The application to revoke was made by solicitor's letter dated 23rd July, 2012. In the application it was stated*

'…we request that in the event of you intending to consider any other information not included herein, that you would let us have sight of same in advance of any decision to enable us to comment thereon if appropriate'. Despite this request, information published in November 2012 which did not exist at the date of the application was utilised by the first named respondent and had an appreciable influence upon the decision. No opportunity was provided to the applicant to comment thereon and the decision is invalid on account thereof."

99. The applicant submitted that she was entitled to be told of the up to date country of origin information on which the respondent intended to rely. She submitted that she should have been given an opportunity to comment on this COI. The respondent submitted that a line of cases have clearly set out that there was no obligation on a decision maker at the post-deportation order stage, to engage in any sort of debate or conversation with the applicant. The respondent stated that such proposition started with the decision in *Kouaype v. Minister for Justice, Equality and Law Reform* [2005] IEHC 380 and was followed by the judgment of Charleton J. in *F. N. v. Minister for Justice* [2009] 1 I.R. 88, as referred to earlier in this judgment.

100. The respondent also referred to the judgment in *EAI v. Minister for Justice* [2009] IEHC 334, where the post-deportation order phase in relation to a s. 3(11) decision was specifically under consideration. Cooke J. in describing the limited scope for judicial review stated:-

"7. As Clarke J. pointed out in the case of Kouaype v. Minister for Justice, Equality and Law Reform [2005] I.E.H.C. 380, the circumstances in which a person refused refugee status can challenge the making of a deportation order are necessarily limited and require the special circumstances which he describes in that judgment. It follows, obviously, that in a case where a valid deportation order exists, as here, the circumstances in which a refusal under section 3(11) of the 1999 Act to revoke such an order may be challenged are even more restricted.

8. No conditions or criteria are stipulated in the section for the exercise of the Minister's power. Clearly however, it follows from first principles that the Minister must consider fairly the reasons put forward by an applicant for the request to revoke and he must also satisfy himself that no new circumstances are shown to have arisen since the making of the deportation order which would bring into play any of the statutory impediments to the execution of a deportation order at that point such as, for example, a change of conditions in the country of origin which would attract the application of the prohibition against refoulement in section 5 of the 1996 Act.

9. The Minister is not however obliged to embark on any new investigation or to engage in any debate with the applicant or even to provide any extensive statement of reasons for a refusal to revoke. Once it is clear to the Court that the Minister has considered the representations made to him and has otherwise exercised his power to decide under section 3(11) in accordance with all applicable law, the Minister's decision is not amenable to judicial review by this Court."

101. In the circumstances, it was submitted by the respondent that it was clear that there was no obligation whatsoever on the Minister to make *"further inquiries"* as submitted by the applicant. The respondent submitted that the applicant's understanding of the process occurring in respect of her applications under s. 17 of the 1996 Act or s. 3(11) of the 1999 Act – both post-deportation order applications – was misconceived, particularly so when the applicant, as here, had been afforded every opportunity to advance her case, but had failed in all such applications and the valid extant deportation order was enforced against her.

102. As already noted, it is clear on the authorities cited by the respondent that the Minister is not obliged to engage in correspondence with the applicant once his submissions have been submitted to the Minister. In the circumstances, the applicant has not established arguable grounds to challenge the Minister's decision on this ground.

103. Ground 2 is in the following terms:-

"Without prejudice to the generality of the previous ground there was no rational basis upon which it could have been rationally concluded that the applicant's 'life or freedom would not be threatened were she to be expelled from the State and returned to the DRC'. Such a conclusion did not flow from the premise upon which it was purportedly based. Without prejudice to the generality of the foregoing the following from the decision (being an excerpt from other information therein referred to) is illustrative by way of example only of the irrationality in this regard: 'it is also assumed that because they left in the way they did they are looking to side with the opposition so they are going to be ill treated. If people come and go to the DRC up to a year even, that is not a problem, it is those people who have been gone for a long time that will be ill-treated' – (UKBA, 2012 at p. 34)."

104. The applicant submitted that she would rely on the alleged shortcomings of the UKBA report as referred to earlier in this judgment in support of this ground. I am satisfied that she has raised an arguable ground under this heading.

105. The applicant grouped grounds 3, 4 and 5 together as follows:-

"3. In circumstances where the first respondent chose to examine country information published after the date of the application and where that information confirmed, at least in some circumstances, a deportee such as the applicant might, be if deported, imprisoned for however long, it was incumbent upon the first respondent to examine independent, up to date and precise information regarding prison conditions in DRC in order to ascertain whether those conditions would be in breach of Article 3. The failure to do this renders the decision invalid.

4. The weight placed upon the UKBA report as compared to that placed upon the information furnished by the applicant was irrational. The UKBA is no more independent than the organisation responsible for the compilation of the information furnished by the applicant.

5. No regard was had to the fact that Article 3 is absolute in nature and permits of no exceptions. Article 4 of the Charter of Fundamental Rights of the European Union is similar in this regard. It appears that the first respondent considered the risks on a 'reasonable likelihood' basis which is incorrect in law. A higher standard of proof must apply than that which might be applicable to the rights, for example family or private life rights which are not absolute in nature. Such higher standard was not applied thus rendering the decision invalid."

106. The applicant submitted that, regardless of any ultimate result, the *"weighing of the pieces of COI by the court"* in order to arrive at conclusions as to the correctness/legality/proportionality of the impugned decisions must constitute an arguable case on the lower threshold. It was submitted that the applicant had put forward information which at least tended towards the view that serious harm might await her in the DRC if she was deported there and this, it was submitted, entitled the applicant to leave to apply for

judicial review. It was submitted that by virtue of Article 21 of the Qualification Directive and Article 19 of the Charter of Fundamental Rights of the EU, the principle of non-refoulement is part of European law also. The applicant further submitted that she is not a person of means and does not have the resources of the State available to her for researching what is likely to happen to her if she is returned to the DRC. The applicant submitted that this was an unsatisfactory position. She further submitted that in a similar situation, the European Court of Human Rights sourced its own information (*N. v. Finland*) and stated:-

> *"In the light of all the material that was placed before it, and if necessary, material obtained of its own motion. The assessment of the existence of the risk must be made on the basis of information concerning the conditions prevailing at the time of the court's consideration of the case, the historical position being of interest insofar as it may shed light in the present situation and its likely evolution."*

107. The applicant also submitted that this was part of our domestic law given the judgment of the Supreme Court in *Minister for Justice, Equality and Law Reform v. Rettinger* [2010] IEHC 45. Where it was held that in the context of a European Arrest Warrant, when considering whether a person would be exposed to a risk of treatment contrary to Article 3 of the European Convention on Human Rights if returned to the requesting country, the court should consider all the material before it and, if necessary, material obtained of its own motion.

108. The applicant submitted that it would appear to be unnecessary and inappropriate for this court on this leave application to concern itself with further and more up to date information. She stated that the position may well be different in respect of the substantive hearing should leave be granted. I am satisfied that the applicant has made out an arguable case for the grounds set out at No's 3, 4 and 5 of the statement of grounds herein.

109. The applicant did not proceed with the matters set out at Ground 6 in the Statement of Grounds.

110. Ground 7 was in the following terms:-

> *"The first respondent cannot be considered to be impartial in view of his other responsibilities relating to immigration and asylum matters and the fact that he has already decided that the applicant is not a refugee. In these circumstances, the refusal to revoke the deportation order is tainted by objective bias and thereby invalid."*

111. The applicant referred to *J.C.M. [DRC] & Anor. v. Minister for Justice and Equality & Ors.* [2012] IEHC 485, where the High Court granted leave to challenge a refusal of subsidiary protection, *inter alia*, on the following ground:-

> *"The applicant cannot bring a claim unless he has been informed by the Minister that he is a failed asylum seeker. The decision to refuse a declaration of refugee status implies that the Minister has already given some consideration to the case and has made a negative determination in relation to the applicant's case. This creates an impression of partiality on the part of the Minister whose officials will also consider the subsidiary protection application."*

112. The applicant submitted that, by analogy, there was an even stronger case to grant leave on this ground in relation to the challenge to the refusal to revoke the deportation order, especially where the decision maker is also the person responsible for the State's policy on immigration. The decision maker being the Minister, has already at the stage of considering an application for revocation, reached the following decisions: that the applicant should not be granted refugee status, that the applicant should be issued with a proposal to deport; that the applicant is not entitled to subsidiary protection; and that the applicant should not be granted leave to remain. In support of the argument, the applicant referred to the decision of Denham J. in *Bula Limited v. Tara Mines Limited* [2000] 4 IR 412 where the judge set out the test for objective bias in the following terms:-

> *"…it is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test - it invokes the apprehension of the reasonable person."*

113. The applicant has raised an arguable ground that the Minister could be perceived as being biased having regard to her role earlier in the proceedings. Accordingly, the applicant will be allowed to seek *certiorari* on this ground.

Conclusions

114. For the reasons set out herein, I am satisfied that in the proceedings bearing record No. 2012/957 J.R., being the application to quash the decision of the respondent not to readmit the applicant to the asylum process, which decision was dated 8th November, 2012, the applicant has demonstrated substantial grounds for contending that the decision is invalid or ought to be quashed.

115. I will allow the applicant to seek *certiorari* of the said decision by means of judicial review on grounds (ii), (v), (viii), (x), (xi), and (xii) in the applicant's statement of grounds.

116. For the reasons set out in this judgment, in proceedings bearing record No. 2013/292 J.R., being the decision not to revoke the deportation order, which decision was taken on 5th February, 2013, I am satisfied that the applicant has made out arguable grounds for contending that the impugned decision is invalid or ought to be quashed.

117. Accordingly, I will allow the applicant to seek *certiorari* of the said decision by means of judicial review on grounds 2, 3, 4, 5 and 7 in the statement of grounds.