THE HIGH COURT

[2012 No. 819 J.R.]

BETWEEN

R. W. B.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 10th day of March, 2017

Extension of time
A short extension of time was required for the purpose of the within proceedings which the court was satisfied to grant.

Background
1. The applicant is a national of the Democratic Republic of Congo (DRC) and he applied for asylum in this State in December, 2008. His application was refused by the Refugee Applications Commissioner, which said refusal was appealed to the Refugee Appeals Tribunal. He had an oral hearing on 28th October, 2009 and by a decision dated 9th November, 2009, the appeal was refused. In January, 2010, the respondent refused the applicant refugee status.

2. In February, 2010, the applicant's then solicitors submitted an application for subsidiary protection and leave to remain. Both of those applications were refused and a Deportation order was signed on 7th February, 2011. The consideration of file (dated 10th December, 2010), with respect to the leave to remain application had regard, *inter alia*, to the position of failed asylum seekers on return to the DRC and it was found that country of origin information indicated that "no adverse consequences would accrue to the applicant upon return to the Democratic Republic of Congo, for having sought asylum in another country."

3. In December, 2011, the applicant's new solicitors made an application for revocation of the Deportation order. They furnished the respondent with a report entitled "*Unsafe Return: Refoulement of Congolese Asylum Seekers*" which was published on 24th November, 2011. Its author was Catherine Ramos. The report will hereinafter be referred to as the Ramos report. At the time of the hearing in the within proceedings, counsel for the applicant was unaware of the status of the revocation application. In any event, it is not the subject of the within proceedings.

4. On 23rd July, 2012, the applicant's solicitors made an application on his behalf for the consent of the respondent for the applicant to re-enter the asylum process pursuant to s. 17(7) of the Refugee Act 1996 (as amended) ("the 1996 Act") The basis of the application was a stated fear as to what would befall the applicant as a returning failed asylum seeker to the DRC. The applicant's legal representatives submitted the Ramos report in addition to other documentation. The other documentation comprised:

> • An article taken from the Guardian newspaper dated Friday 11th November, 2011 – "*Congo civilians beaten for supporting opponents of president, says UN Report*";
>
> • A report from the Refugee Documentation Centre (RDC) dated 15th July, 2010, on "*Information regarding the dangers for failed asylum seekers returning to the DRC*";
>
> • A further RDC report dated 3rd June, 2010, entitled "*Information on the treatment of MLC members. Whether they continue to be persecuted.*"

5. In the course of the letter of 23rd July, 2012, it was submitted, inter alia, that:

> *"All these reports provide overwhelming evidence that the Applicant is indeed a refugee and that if he were to be returned he would be in danger. We respectfully submit that if the Applicant was to be assessed by the Commissioner or the Tribunal now they would come to a different conclusion."*

6. The primary basis for the application to re-enter was the Ramos report and significant reliance was placed on it. The principal findings in the report were set out in the letter, as follows:

> • That decisions since 2006 refusing protection to Congolese asylum seekers have been flawed and, consequently, have resulted in people being unjustly removed back to inhuman and degrading treatment.
>
> • That the UKBA hypothesis that it is safe to return people to the DRC is unsound.
>
> • That there is no effective monitoring of those refouled to DRC and unsuccessful asylum seekers do fall outside the mandate of the UNHCR.
>
> • That when inhuman and degrading treatment has been reported to NGOs this information has not been acted on nor shared and is being used as 'information' only.
>
> • That a policy exists to punish asylum seekers who are suspected of having spoken out about having been ill treated in the DRC and the lack of human rights in the DRC, thereby, betraying their country and the President.
>
> • That the travel document identifies failed asylum seekers and therefore places them at further risk on return.
>
> • That returnees are not able to resume family life nor to live in safety.
>
> • That children are at risk of imprisonment upon return.
>
> • That those refouled to the DRC on a travel document are suspected of having left on a false passport, an offence which

will be punished by imprisonment.

• That returnees who have been arrested and subjected to inhuman and degrading treatment are frightened to approach NGOs which, they believe, are being monitored by the state security services, a belief reinforced by the death of Floribert Chebeya, President of Voix des Sans Voix.

• That NGOs and UN cannot access the airport and are not able to 'witness' arrests.

• That the UKBA suggestion that returnees should report instances of inhuman and degrading treatment to the British Embassy is not realistic. The Embassy is not easily accessible to people without money for transport. At the end of the road where the Embassy is situated there is a manned military road block. Congolese G4S are on duty at the Embassy's reception windows.

• That some of the content in letters from the Home Office to MPs and MEPs is not accurate. For example, a letter from Immigration Minister, Phil Woolas, pp'd by Lin Homer, states the British Embassy is in touch with Transitional Government which ceased to exist in 2006. Also, information from Baroness Browning in reply to a Question in the House of Lords is not correct. She states the Country of Origin Information for DRC was updated in 2010. It was not updated in 2010 and has not been updated as of November 2011.

• That the issue of failed asylum seekers refouled to inhuman and degrading treatment is considered to be a 'complicated' one at European level.

• That MPs in the UK have expressed fears for the safety of refouled Congolese constituents.

7. The application to re-enter the asylum process was refused by decision dated 16th August, 2012, which issued to the applicant on 17th August, 2012. The findings of the first instance decision-maker was set out in the following terms:

> "I examined the case put forward that the applicant should be re-admitted to the asylum process under Section 17(7) of the Refugee Act, 1996 (as amended).
>
> The applicant's solicitors claim that the decision to refuse their client's asylum claim was based on outdated and inaccurate country of origin information. However, as can clearly be seen from the information under background, the decision to refuse their client's asylum case was largely due to numerous credibility issues that both O.R.A.C. and R.A.T. found in [the applicant's] claim (as outlined in the "Background" section above). No documentation has been submitted which would negate the inconsistencies and numerous issues regarding the applicant's credibility. This submission does not represent fresh new evidence which would merit a re-application to the asylum process.
>
> The applicant's [Solicitors] have submitted country of origin information regarding the treatment of returned asylum seekers to DR Congo. The applicant's Solicitors have also submitted an application under Section 3(11) of the Immigration Act 1999 (as amended) to have their client's Deportation Order revoked. All matters concerning the return of failed asylum seekers to DR Congo will be considered under this application."

It was concluded that:

> "No new convincing evidence has been supplied to indicate that a favourable view might be taken if [the applicant] was re-admitted to the process. Therefore, I recommend that his application for re-admission…be refused."

8. By letter dated 24th August, 2012, the applicant's solicitors sought a review of that decision. They advanced the following arguments:

> "We refer to a letter from Eleanor Stokes, Ministerial Decision Unit dated the 17th August 2012 in which it was decided to refuse our client's application based on a recommendation of Eleanor Stokes on 16th August, 2012, that his application be refused (hereinafter referred to as "the Refusal"). We now seek a review of that decision by you and set out hereunder various matters in support of our client's application which, we believe, support our contention that the review should be in favour of our client's request to be re-admitted.
>
> 1. Firstly, we would respectfully suggest that the "acid test" referred to in the Refusal is incorrect given the provisions of S. I. 51 of 2011 and the amendments to Section 17 of the Refugee Act 1996 thereby brought into law and we would refer in this regard specifically to new additions therein referred under section 7..
>
> 2. We would respectfully suggest that given the legal developments in this area since 2003, and its relevance, it is inappropriate to rely on the High Court decision of November, 2003, referred to in the Refusal.
>
> 3. The question of whether [the applicant] is in genuine fear of persecution if returned to DR Congo is a question that is quintessentially one for the Commissioner, or Tribunal on appeal, and not, with respect, for the Minister to decide upon, on an application to re-enter the asylum process.
>
> 4. The Minister had an obligation to consider the grounds put forward in relation to our client's s. 17.7 application. There was no lawful basis for declining to consider the harm alleged to be likely to befall our client if returned to DR Congo as a failed asylum seeker. While it would of course be necessary to consider these matters in the context of our client's 3(11) application that does not take away from the obligation to consider this important matter in the context of the section 17(7) application. He is clearly now a member of a particular social group – a failed asylum seeker from DR Congo – and that must be taken into account in this review.
>
> 5. We would be obliged if you would take into account in assessing this review the factors mentioned in the recent European Court of Human Rights decision in the case of Bakatu Bia v. Sweden.
>
> 6. You might also please note that no reliance of any kind should be placed on any other remedies that might be available to our client, particularly in circumstances where it is now clear that the constitutionality of section 3(11) of the Immigration Act, 1999 is in doubt, given recent High Court jurisprudence.

> In all the above circumstances we would respectfully suggest that the review of our client's application should result in a finding that he should be permitted to re-enter the asylum process and we await your decision. If a favourable decision is forthcoming our client undertakes to cooperate in all respects with the Commissioner and / or Tribunal.
>
> 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 any relevant submissions thereon prior to any final decision being arrived at."

9. The review application was unsuccessful and the applicant was so notified by letter dated 4th September, 2012.

10. The consideration of the application for a review set out the applicant's prior asylum and immigration history and after summarising the case put forward by the applicant, the review decision-maker went on to state:

> "I reviewed the case put forward that the applicant should be re-admitted to the asylum process.
>
> While the "*acid test*" supplied during the 17(7) consideration, I wish to make it clear that the provision set out in the amendment of section 17 of the Refugee Act 1996..were also fully considered…
>
> While the question of whether [the applicant] is in genuine fear of persecution is one for ORAC and/or the RAT, it is for the Minister to decide, under the 17(7) process, whether or not this fear amounts to new evidence. I do not believe that it does as he has already expressed this fear in the previous hearings. It appears to me that the decisions to refuse his asylum application, by both ORAC and RAT, were due to credibility issues.
>
> Reference was made to the treatment of failed asylum seekers returned to the DR Congo and the requirement for the Minister to consider same during the 17(7) process. In 2006 the UNHCR stated that while it had only limited information available, it did not have evidence that there was a systematic abuse, including detention and mistreatment, of failed asylum seekers returned to the DR Congo. Furthermore, I understand that when the Irish authorities make arrangements to repatriate persons to the DR Congo, no mention is made to them being failed asylum seekers.
>
> I also wish to refer to the judgment of Mr. Justice Cross of 20 April 2012 in *M.T.T.K. v. Refugee Appeals Tribunal and Minister for Justice and Equality* in which he refers to *F.V. v. Refugee Appeals Tribunal* [2009], in which Irvine J. expressed the view that failed asylum seekers are not, as a matter of course, members of a social group. Irvine J. recognised the possibility that this type of claim was open to abuse and, accordingly, required that particularly cogent evidence would be required. The test outlined at para. 37 of *F.V.* is as follows:-
>
> > '*..given the scope for abuse of the asylum process, the court is satisfied that cogent, authoritative and objective COI that failed asylum seekers were targeted for persecution in the person's country of origin and demonstrating a Convention nexus would have to be shown.'".*

The review decision-maker concluded that:

> "Overall, I consider that no new evidence has been provided in relation to [the applicant's] application".

11. The within proceedings were instituted in October, 2012 having a first return date of 5th November, 2012. On 16th June, 2013, the applicant was taken into custody and deported to the DRC. According to an affidavit sworn by the applicant's solicitor on 1st May, 2015, the applicant informed him that he was subjected to torture by the authorities shortly after his arrival in DRC. His solicitor was informed by the applicant that after being detained for a month, the applicant fled to Zambia and subsequently South Africa where he opened a small shop. According to the applicant's solicitor, the applicant informed him that this shop was destroyed in a xenophobic attack and that the applicant returned to this State in search of safety. He was refused leave to land and was subsequently arrested and detained. On 6th May, 2015, MacEochaidh J. granted an interlocutory injunction preventing the applicant's deportation to the DRC.

12. In aid of the challenge to the review decision, the applicant's Statement of Grounds advances some sixteen grounds the first of which, it was accepted by the applicant's counsel, was merely a factual recital. Three grounds (2, 9 and 13) were not proceeded with in the course of the within hearing.

13. At the outset of the hearing of the within proceedings, the court was advised that the respondent had conceded as arguable, to the requisite standard, grounds 4, 5 and 7.

> *"4. The Decision is ….rendered unlawful by the taking into account by the Respondent of irrelevant matters……. Without prejudice to the generality of the forgoing the fact that 'when the Irish authorities make arrangements to repatriate persons to DR Congo, no mention of them being failed asylum seekers' is not relevant to how such persons will be perceived or dealt with on their return to DR Congo. The Applicant was already the subject of a failed attempt to deport him in 2011 when he was placed on board an aircraft bound for DR Congo without any travel documents, which aircraft did not ultimately depart. It is beyond doubt that a person arriving in DR Congo from Europe without any travel document will be immediately subjected to close examination during which it would most likely become clear that such a person is indeed a failed asylum seeker with all that that entails in DR Congo.*
>
> *5. The Decision was irrational in concluding that the Applicant's fear of persecution on account of being a failed asylum seeker was not "new evidence" in circumstances where country information was furnished which was 'new' and which was relevant to the Applicant's position and which had not been previously considered. The fact of the Applicant's prior asylum claim having been rejected on credibility grounds was not relevant to the Decision when the representations made related to the treatment of failed asylum seekers in DR Congo.*
>
> *...*
>
> *7. In circumstances where new elements and findings were presented by the Applicant which significantly added to the likelihood of the Applicant qualifying as a refugee there was an obligation on the first named Respondent to grant his*

consent to the Applicant to be readmitted to the asylum process pursuant to section 17.7A(b) of the Refugee Act 1996 as amended by S.I. no. 51 of 2011."

14. In the course of his oral submissions, counsel for the applicant largely advanced grounds 6, 8, 10, 11 and 17 as a composite group (with ground 10 being the overarching ground) and which, it is submitted, address the failure of the review decision- maker to consider the evidence put forward by the applicant in aid of his application to re-enter the asylum process.

15. These grounds read as follows:

> *"6. The first Respondent was obliged to consider up to date information and reliance on UNHCR statements dating from 2006 was irrational in circumstances where cogent, authoritative and objective country information dating from November 2011 was furnished by the Applicant in support of his application. The Applicant was entitled to pursuant to natural justice and fair procedures to be at least informed of the reason or rationale behind the apparent rejection of the up to date information furnished with his application*
>
> *…*
>
> *8. No reasonable decision maker could have formed the view that the new information was such that did not warrant further investigation by the RAC and was not capable of producing a different outcome to the asylum claim notwithstanding the previous negative decision.*
>
> *…*
>
> *10. The Respondent has erred in law, acted ultra vires and or in breach of the Applicant's rights to fair procedures and natural and constitutional justice in failing to adequately consider relevant material, information and submissions before him in deciding to refuse the Applicant's application pursuant to Section 17(7) of the Refugee Act 1996.*
>
> *11. The evidence tendered to the Respondent pursuant to the said application is such that it warrants further investigation by the statutory body charged with adjudicating asylum claims and moreover, was credible, cogent and capable of producing a different outcome and in the consequences the decision of the Respondent amounted to an unlawful fettering of discretion pursuant to Section 17.*
>
> *…*
>
> *17. Inadequate consideration of the Applicant's application."*

16. Counsel for the applicant submitted that the fundamental premise underlining these grounds was the failure of the review decision-maker to consider the Ramos report. It is submitted that given the relevancy and recent nature of the report in the context of the application before him, the finding that "*no new evidence had been provided*" was fundamentally flawed.

17. It is contended that none of the information furnished by the applicant was considered; rather, reliance was placed on an outdated report from the UNHCR (2006). This was in the teeth of new information (the Ramos report) which, on its face, met the requirement of s. 17(7). Effectively, the applicant made a new claim for refugee status as compared to that which had previously been before ORAC and the RAT. In 2012, the applicant presented to the Minister as a failed asylum seeker, a status he did not have when he made his original claim for asylum. The applicant was not seeking to re-open the prior Tribunal decision – that was made clear in the letter of 23rd July, 2012, by the emphasis placed, in particular, on the findings of the Ramos report and given that the letter advised that all the reports furnished with the application for a review constituted "*overwhelming evidence*" that the applicant was a refugee.

18. Yet, the review decision-maker did not engage with this new material or with the applicant's new claim as a failed asylum seeker. The decision-maker focused on ORAC's and the Tribunal's credibility findings as made in the prior asylum application, an approach which was wrong, as acknowledged by the respondents in these proceedings by their concession particularly in respect of grounds 4, 5 and 7.

19. Insofar as it can be said that the applicant's new claim was adverted to by the decision- maker, it was in the context of a reference to the *dictum* of Irvine J. in *F.V. v Minister for Justice* [2009] IEHC 268, that "*particularly cogent, authoritative and objective evidence*" was required if failed asylum seekers were to constitute a particular social group for the purposes of the Convention.

20. Counsel for the applicant points to the letter which the applicant's solicitor wrote on 24th August, 2012, following the first instance refusal, expressly calling the review decision maker's attention to the flaws in the first instance decision and, in particular, advising that "*no reliance of any kind should be placed on any other remedies that might be available to [the applicant]*". Yet the reviewing officer ignored this entreaty and singularly failed to address any of the arguments advanced on behalf of the applicant. In the appeals submission of 24th August, 2012, the applicant's solicitor took specific issue with the first instance decision maker's opinion that the issue of the applicant as a failed asylum seeker could await the s. 3(11) process. It appears that this submission was ignored by the review decision maker, contrary to fair procedures. Alternatively, the review decision maker adopted a similar approach to that of the first instance decision maker. Either way the review decision maker erred. Accordingly, it is submitted that the applicant is entitled to leave on this basis pursuant to ground 10. It is difficult to say whether the review decision-maker adopts the approach of the first instance decider as he does not engage with the applicant's arguments on appeal. In aid of the submissions this regard, counsel for the applicant who relied on the approach of Barr J. in PBN *(DR Congo) v. Minister for Justice* [2015] IEHC 124 wherein he states at para. 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."*

21. It is submitted that the only issue for the review decision-maker is whether the applicant had presented a new claim or element not previously considered. The assessment as to whether the material put forward was cogent, authoritative or objective was an

assessment for ORAC and or the RAT and not the Minister at the s. 17(7) review stage.

22. The Ramos report was not mentioned in the decision. The respondent favoured a 2006 UNHCR report, an extract from which is quoted in the decision. This was favoured entirely over the reports submitted by the applicant without stating the reasons for such preference, contrary to the principles set out in *DVTS v. Minister for Justice* [2008] 3 IR 476.

23. Hence, the review decision-maker breached fair procedures. Furthermore, insofar as he relied on the UNHCR report, he did not say what it was in that report that he relied on. He was obliged to do so. It is thus submitted that the applicant is entitled to leave on the basis that there was no engagement with the information which he put before the review decision-maker. While the respondents, in their written submissions, purport to advance reasons as to why reliance was placed on the UNHCR report (namely that in her judgment in *PBN v. Minister for Justice* [2013] IEHC 435 Clarke J. rejected the Ramos report as not being cogent evidence and that a similar approach was adopted in the UK courts), it is contended that it was a matter for the review-decision maker to form an opinion of the Ramos report, which was not done. It is contended that the status given to the report by others is irrelevant. It was for the review decision-maker to decide, based on the country of origin information submitted, whether the applicant should be allowed re-enter the asylum process.

24. On behalf of the respondent, it is submitted that the respondent at this leave stage has effectively conceded that: it is arguable that the applicant's claim was as a failed asylum seeker; it is arguable that the Ramos report was new evidence; and that it is arguable that the review decision-maker was obliged to grant consent when new evidence or new elements were presented. That is a substantial part of the applicant's present challenge. Counsel submits that grounds 8, 10, 11 and 17 are merely repetition of the grounds upon which leave to seek judicial review has been conceded. It is further submitted that there is no merit in the applicant's complaints regarding the review decision-maker's reliance on the 2006 UNHCR report, in circumstances where that report was part of the country of origin information (the DRC 15th July, 2010 report) which the applicant himself furnished on 24th August, 2012.

25. With regard to ground 6, it is submitted that there is no merit in this ground and in this regard counsel points to the decision of Barr J. in *P.B.N. (DR Congo)* wherein he refused leave on similar grounds stating:

> *"73. Ground (iv) in the statement of grounds was in the following terms:-*
>
> > *'The respondent erred in law and in fact in apparently preferring statements made by the UNHCR in 2006 relating to treatment of returned 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".*

26. By way of preliminary observation, I am of the view that there is a degree of overlap in grounds 6, 8, 10, 11 and 17 and to some extent also between these grounds and ground 5, one of the grounds upon which the respondent has conceded at this leave stage. However, I do not agree with the respondent's submission that ground 6 is on all fours with ground (iv) as put forward in the *P.B.N.* decision of Barr J. in respect of which he declined to grant leave. I am satisfied that the underlying premise in ground 6 of the present proceedings is the review decision-maker's disregard of fair procedures by failing to inform the applicant of the reason or rationale behind the apparent rejection of the applicant's material (in particular the Ramos report). Accordingly, I am satisfied that this ground, as reformulated somewhat by this court, constitutes an arguable substantial ground in respect of which leave should be granted.

27. I find no basis for the granting of leave on the basis advanced in ground 8 since the very thrust of the applicant's case is that the review decision maker failed as a matter of first principles to have regard to the information furnished.

28. I am satisfied to grant leave on ground 10 on the basis that it is arguable to the requisite substantial grounds threshold that in addition to the failure to take account of the Ramos report, the review decision-maker breached the applicant's right to fair procedures by failing to consider the submissions which the applicant's legal representative put forward in his letter of 24th August, 2012, in particular the submission that the respondent had an obligation to consider the material furnished and that there was no lawful basis for declining to consider such information in the expectation that the position of failed asylum seekers in the DRC would fall to be considered by another decision-maker under a different process.

29. On 2nd June, 2016, subsequent to the hearing of the within proceedings, this court handed down judgment in the substantive hearing in *P.B.N. v. Minister for Justice* [2016] IEHC 316. In the course of my judgment, I stated, inter alia:

> *"79. Given the very particular submissions in the review application, it was to my mind incumbent on the reviewing officer in the Ministerial Decisions Unit to address this argument and consider the materials relied on by the applicant. Insofar as he was required to determine whether there were new elements or findings which "significantly added to the likelihood of the applicant qualifying as a refugee" this required an actual analysis of the materials upon which the applicant relied.*
>
> *80. The extent of the examination and the weight to be attached to the material is of course a matter for the decision-maker…"*

30. I am further satisfied to grant leave on ground 11. It is arguable on a substantial grounds basis that the Ramos report, on its face, was capable of meeting the threshold set by s.17 (7) of the 1996 Act as amended by the European Communities (Asylum Procedures) Regulations 2011 (S.I. 51/2011) (S.I. 51 of 2011) and that its apparent disregard by the review decision-maker amounted to an unlawful fettering of the respondent's discretion pursuant to s. 17(7). Thus, leave is granted on this ground in the manner formulated by the court.

31. I see no particular reason to grant leave on ground 17 as I find that the complaint evident in this ground is sufficiently captured in grounds 6, 10 and 11.

Grounds 3, 12 and 15

> *"The Decision is unlawful in that the incorrect test has been applied by the Respondent to the facts available to the Respondent in arriving at same. The correct test to be applied should have been whether there was "a reasonable prospect of a favourable view being taken of the new claim despite the unfavourable conclusions reached on the earlier claim having regard to the additional information available". The failure to apply the correct test renders the Decision invalid.*
>
> *…*
>
> *The Respondent failed to exercise a necessary and appropriate level of vigilance examining the application under Section 17(7) having regard to the very significant fundamental human rights issues at stake for the Applicant and/or having regard to the known and internationally condemned human rights abuse and persecutory record of the ruling regime in DR Congo.*
>
> *…*
>
> *The'acid test' referred to by the first Respondent was the incorrect test to apply to the Applicant's application."*

32. The applicant submits that the test applied by the first instance decision-maker in determining the application for re-admittance into the asylum process was that set out by Bingham M.R. in *Singh (Manvinder) v. Secretary of State for the Home Department* [1996] Imm. AR 41, namely

> *"The acid test must always be whether comparing the new claim with that earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely on the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view would be taken of the new claim despite the unfavourable conclusion reached on the earlier claim".*

In the present case, the first instance decision-maker went on to state:

> *"Is there a reasonable prospect of a favourable view being taken of a new asylum claim by the applicant despite the unfavourable conclusions reached earlier, having regard to the new information presented by his solicitors?".*

33. It is submitted that that is the wrong test. Moreover, it is contended that the decision-maker did not refer to the new test set out in EU law and transposed into Irish law by S.I. 51 of 2011.

34. Regulation 8 of S.I. 51/2011 substituted the following subsection for s.17(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."

35. The Regulation also inserted a number of further subsections 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).

36. Counsel for the applicant submits that the tenor of the new test is that it revolves around something new having arisen, which the applicant could not have relied on previously, which makes it significantly more likely that he could be declared a refugee.

37. It is submitted that in similar vein to the first instance decision-maker, the review decision -maker did not engage in the process mandated by statute. He merely found that "*no new evidence*" had been provided in relation to the claim. Counsel contends that this is not the test for the purposes of s. 17(7) as amended. Nor was the review decision-maker's harking back to the applicant's credibility issues before ORAC and the RAT in the prior asylum application the proper approach. The test is whether there was a new "*element*" or "*finding*".

38. It is further submitted that while the review decision-maker states that the provisions of s. 17(7) as amended by S.I. 51 of 2011 "*were also fully considered*", he did not in fact set out the test. It is thus contended that this omission constitutes an arguable ground to the requisite standard.

39. In answer to the submissions canvassed in aid of grounds 3, 12 and 15, counsel for the respondent argues that the review decision-maker referred to both the "*acid test*" and the s. 17(7) test. She argues that it is clear from the decision that the review decision-maker had regard to the statutory test when assessing the application. Moreover, it is submitted that the first instance

decision-maker did likewise, as evidenced by the finding that "*no new convincing evidence had been supplied to indicate that a favourable view might be taken if [the applicant] was readmitted to the [asylum] process.*"

40. Counsel for the respondent submits that that in any event, there is judicial authority for the proposition that both tests were effectively identical. In this regard, counsel relies on *K (J) Uganda v. Minister for Justice and Equality* [2011] IEHC 473. In that case, Hogan J. with reference to the acid test, stated as follows:

> *"9. This was the test which was endorsed by Clarke J. in EMS v. Minister for Justice, Equality and Law Reform [2004] IEHC 398. The statutory test now contained in s. 17(7E) is effectively identical, since it requires the Minister to consent to the re-admission of an applicant to the asylum process in circumstances where that applicant has already been declared to be ineligible for subsidiary protection where he is satisfied that:-*
>
> > *"(a) …new elements or findings have arisen or have been presented by the person concerned which makes it significantly more likely that the person will qualify for protection in the State, 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) or, as the case may be, for the purposes of his or her application for subsidiary protection under Regulation 4 of the Regulations of 2006."*

41. I am satisfied that it is arguable on a substantial grounds threshold notwithstanding that the decision records "that the provisions set out in the amendment of section 17 of the Refugee Act 1996 (S.I. 51 of 2011) were also fully considered", that in assessing the application the review decision-maker did not in fact apply the essential components of the s. 17(7) of the 1996 Act, namely whether the applicant presented a new element or finding which significantly added to the likelihood of his qualifying as a refugee. I am satisfied that grounds 12 and 15 as pleaded capture this argument and, accordingly, I will grant leave on these grounds. I am not granting leave on ground 3 as I note that counsel for the applicant did not, in his oral arguments, adopt the formula set out in ground 3 as the requisite test.

Ground 14

> *"The Decision was arrived at in breach of the general principles of European Law including the principle of Equivalence in circumstances where the decision making authority was the same in respect of the application and the review thereof."*

42. The applicant contends that the review decision is not an adequate appeal for the applicant given that the application for re-admission to the asylum process is now based on EU law and therefore must comply with the principles of fairness, effectiveness and good administrative practice. Counsel argues that the fundamental right to asylum based on Article 18 of the EU Charter of Fundamental Rights is engaged in this application. Counsel for the applicant adopts the reasoning of Barr J. in *N.M. v. Minister for Justice, Equality & Law Reform* [2014] IEHC 638. In that case, Barr J. held that that the internal review procedure provided by the Minister against adverse decisions at first instance to admit an otherwise failed asylum seeker (under s. 17(7) of the 1996 Act) back into the asylum process did not comply with the effective remedy requirements of Art. 39 of Council Directive 2005/85/EC. Barr J. stated at paras.95-97:

> *"It seems to me, therefore, that the central point of the judgment of the CJEU in H.I.D. is that it was the combination of the power of the High Court by way of judicial review, together with the particular characteristics of the Refugee Appeals Tribunal, that led the court to find that the RAT was an independent court or tribunal for the purposes of Article 39 of the Procedures Directive, and that therefore the right of appeal to the RAT constituted an effective remedy, when looked at in the context of the administrative and judicial system as a whole. I am of the view that the present case may be distinguished from the circumstances pertaining in H.I.D. In that case, having applied the relevant test, the CJEU found that the RAT was a court or tribunal for the purposes of Article 39 of the Procedures Directive and that its independence was safeguarded by the availability of judicial review. In other words, it was the combination of the right to an appeal to the RAT, and the availability of judicial review to quash the Tribunal's decision, that meant that the Tribunal was an effective remedy. In the present case, however, in the context of a s. 17(7) refusal, whether at first instance or on internal review, neither the first instance decision maker nor the internal review decision maker is a court or tribunal. Accordingly, I am of the view that the combination of remedies, even taken as a whole in respect of s. 17(7), do not at any stage provide for a remedy to a court or tribunal which is capable of reversing the first instance refusal. In the circumstances, the court is satisfied that the review procedure under the statutory instrument and the supervisory role of the High Court in exercising its judicial review jurisdiction does not constitute an "effective remedy" before a court or tribunal as required by Article 39 of the Directive."*

43. The respondent submits that the argument now being canvassed by the applicant in his written and oral submissions bears no resemblance to the vague pleading that is ground 14 of the statement of grounds. It is further submitted that the arguments canvassed by the applicant was answered by Hogan J. in *O.S. and F.O.S. (A Minor) v. Minister for Justice Equality and Law Reform* [2011] IEHC 291 where he states:

> *"18. The position with regard to the operation of s. 17 powers is, as we have seen, quite different. Section 17(7) provides that the consent of the Minister is required should an applicant who has originally been refused status wish to make a second application for asylum. It is clear from the structure of that section in general, and the provisions of s. 17(7) in particular, that the Oireachtas intended that, generally speaking, at least, applicants would have one - and only one - opportunity to apply for asylum. All of this tends to re-inforce the view that the Minister's task is simply to make a decision in view of the Tribunal's recommendations as part of a single administrative adjudication."*

44. With regard to ground 14, in the first instance, I am satisfied that as formulated in the pleadings, albeit somewhat loose, ground 14 is sufficient to capture the argument advanced by counsel for the applicant, as set out in his written and oral submissions. As to the merits of this particular ground; at the time of the hearing of the within leave application, the decision of Barr J. in N.M. was on appeal to the Court of Appeal. Subsequent to the hearing of the within proceedings, on 14th July, 2016, the Court of Appeal delivered its judgment in *N. M. (DRC) v. Minister for Justice Equality and Law Reform* [2016] IECA 217. It rejected the conclusion reached by Barr J. that judicial review was not an effective remedy. In the course of his judgment, after reviewing a considerable body of jurisprudence, at both national and EU level, the learned Hogan J. concluded:

> *"58. I am of the view that the fact that the applicant may challenge the validity of any decision of the Minister to refuse to admit her to the asylum process in accordance with s. 17 of the 1996 Act (as amended) by way of judicial review*

means that the State has provided her with an effective remedy within the meaning of Article 39 of the Procedures Directive.

59. The corollary of this conclusion, of course, is that the High Court must ensure that, in the words of the Court of Justice in Diouf, the reasons which led the Minister "to reject the application for asylum as unfounded… [must] be the subject of a thorough review by the national court." As, for the reasons I have just stated, there is no reason why this cannot be achieved by the High Court in judicial review proceedings by reference to the Meadows principles (as explained in cases such as ISOF and Efe), it is clear that contemporary judicial review does indeed provide an effective remedy for the purposes of Article 39."

45. By reason of the decision of the Court of Appeal in *N.M (DRC),* I find that there is no arguable ground established to the requisite threshold and that the argument canvassed on behalf of the applicant in both the written and oral submissions have been addressed by the Court of Appeal as against the applicant.

Ground 16

"Failing to provide reasons or adequate reasons for the refusal of the Applicant's application."

46. Counsel for the applicant argues that insofar as the review decision-maker relied on the dictum of Irvine J. in *F.V. v. Minister for Justice*, it is unclear whether by reciting the paragraph from the judgment, the review decision-maker decided anything. He asserts that on its face, the decision is simply a recitation of certain views expressed in the High Court in *F.V.* in relation to the test to be applied at the Tribunal stage in respect of failed asylum seekers. It is submitted that even if it is to be assumed the review decision-maker did come to the conclusion that the country of origin information put forward by the applicant was not "*cogent, authoritative and objective COI*", it is not clear how this view was formed. As such, counsel submits that the reasoning is inadequate. It is also submitted that insofar as the review decision-maker, by the adoption of the *dictum* of Irvine J. in *F.V.*, purported to reject the Ramos report, he was obliged to state why it was felt that the report was not cogent, authoritative or objective country of origin information. Whatever way one looked at it, the approach fell foul of *Meadows v. Minister for Justice* [2010] 2 IR 701. Counsel relies on the dictum of Barr J. in *P.B.N. (DR Congo)* where substantial arguable grounds were found for the granting of leave in similar circumstances where the decision-maker failed to provide the reason or rationale for such a conclusion.

47. On behalf of the respondent it is submitted that the analogy with *Meadows* is unwarranted in circumstances where the decision-maker expressly found the evidence presented by the applicant not to be convincing and preferred other information. Counsel submits that the rationale of *Meadows* does not require individualised expressed reasons to be provided in every decision, what is required is that an administrative decision *"[s]hould at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context."* (At para.93) The respondent submits that no hypothesis is needed, that the test set out by *F.V.* is clear and the applicant in the instant case did not demonstrate that he would be targeted for persecution as a failed asylum seeker if returned to the DRC.

48. With regard to ground 16, I am persuaded that it is arguable to the requisite substantial grounds threshold that the respondent failed to provide any adequate reasons for the rejection of the application to re-enter the asylum process and that the basis upon which the ultimate conclusion was reached is not clear.

49. While the decision-maker states that *"[r]eference was made to the treatment of failed asylum seekers returned to the DR Congo and the requirement for the Minister to consider same during s. 17(7) process*", he does not clarify what it is he is referring to. It is not clear whether this statement is confined to the COI he actually identifies in the decision or whether it is intended to cover other submissions or material upon which the applicant relied, including the Ramos report. Equally, there is no clarity as to exactly what "evidence" was considered by the reviewing officer other than the 2006 UNHCR report. In the substantive decision in *P.B.N.* delivered on 2nd June, 2016, this court considered the absence of clarity in decision-making in the following terms:

"93. Counsel for the applicant contends that it is difficult to discern from the review decision the reasons for the finding that the applicant had not provided new evidence in relation to her s. 17(7) application. There is however some rationale provided by the decision-maker in that he refers to the UNHCR as not having evidence of systematic abuse of failed asylum seekers in the DRC. Similarly, he dismisses the applicant's reliance on the UN Committee on Torture decision on the basis that its reference to human rights abuses in the DRC was not new evidence and on the basis that it did not refer to the position of failed asylum seekers.

94. However, I am persuaded that the challenge on this ground has been made out in one material respect. While the decision-maker states that "[r]eference was made to the treatment of failed asylum seekers returned to the DR Congo and the requirement for the Minister to consider same during s. 17(7) process", he does not clarify what it is he is referring to. It is not clear whether this statement is confined to the COI he actually identifies in the decision or whether it is intended to cover other submissions or material upon which the applicant relied, including the Ramos report. This becomes problematic in the context of his apparent reliance on the dictum of Irvine J. in F. V. as to the necessity for "cogent, authoritative and objective" evidence to ground a claim for asylum on the basis of being a failed asylum seeker. It is not made clear whether the applicant has failed to meet the test set by s. 17(7) by reason of there being no new evidence at all, or by reason of the quality of the material provided.

95. In Meadows Murray C. J. stated:

> *"[93] An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.*
>
> *[94] Unless that is so then the constitutional right of access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective.*
>
> *[95] In my view the decision of the Minister in the terms couched is so vague and indeed opaque that its underline rationale cannot be properly or reasonably deduced."*

On its face, the present decision falls foul of Meadows as the rationale for the decision is not patent from the decision, in the absence of any indication of whether a view was taken on whether the Ramos report constituted a new element of finding.

96. Counsel for the applicant contends that, in the words of Cooke J. in D.D.A. (Nigeria) v. Minister for Justice, Equality and Law Reform [2012] IEHC 308, the applicant should not be required "to construct a hypothesis" in order to understand the reasoning behind a decision affecting her fundamental human rights. I agree with his submission in this regard. Thus, insofar as it can be implied that the decision-maker purported to include the Ramos report in his statement that no new evidence was furnished (and it is not clear that he did so), he was obliged to state why he felt that the report was not new evidence or why it was not cogent, authoritative or objective country of origin information, if that was the considered opinion."

50. Leave is accordingly granted on ground 16.

Summary

51. In addition to grounds 4,5 and 7, as conceded by the respondent, leave is granted to seek judicial review on grounds 6, 10, 11, 12, 15 and 16, with grounds 6 and 11 to be reformulated in line with how this court has characterised these two grounds.

Postscript

52. In the substantive decision in *P.B.N.*, this court although upholding the challenge made in respect of the s.17(7) review decision did not grant *certiorari* of the review decision for the reason set out in the judgment and which were peculiar to *P.B.N.* In the present case, being a leave application and which was solely concerned with one decision (the s.17(7) review decision), the court did not consider it either necessary or appropriate to embark on any similar analysis or approach to that adopted by this court in *P.B.N.* in denying the relief sought by the applicant in *P.B.N.* in respect of the s. 17(7) decision.