Neutral Citation: [2016] IEHC 316

THE HIGH COURT

[2012 No. 957 I.R.]

[2013 No. 292 J.R.]

BETWEEN

P. B. N.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

DEFENDANT

JUDGMENT of Ms. Justice Faherty delivered on the 2nd day of June, 2016

1. The applicant is a citizen of the Democratic Republic of Congo (DRC). She arrived in the state in 2007 and sought asylum.

2. Her claimed circumstances related to her work as secretary to an Admiral in the Congolese Armed Forces. She stated that in 2006 differences arose between her employer and the Generals from the east of the country. She was then asked by a Government Minister, also a General from the east, to come and work for him and to administer poison to the Admiral, her then employer. She claimed that when she refused she was arrested detained and ill-treated. She was ultimately released and fled to Congo Brazzaville. After a couple of months there she arrived in Ireland and applied for asylum in December, 2007. Both the Refugee Applications Commissioner (RAC) and the Refugee Appeals Tribunal made negative credibility findings in relation to her claim and in June 2009 she was informed by the respondent that she was not to be granted refugee status. She did not challenge the Tribunal decision by way of judicial review.

3. On 7th July, 2009, the applicant's then solicitors applied for leave to remain on her behalf and on 17th July, 2009 they submitted a subsidiary protection application. Both applications referred to extracts from country of origin information reports which were dated between 2005 and 2007 and which addressed the treatment of failed asylum seekers on their return to the DRC. In March 2010, several personal testimonials were forwarded on the applicant's behalf by a different firm of solicitors who had come on record for her together with a letter from the applicant dated September, 2009 stating that her life would be in danger in the DRC as a failed asylum seeker. Further testimonials were furnished in May and August 2010, together with additional country of origin information relating to general human rights violations in the DRC. In June, 2011 the Minister determined that the applicant was not eligible for subsidiary protection. That decision noted that the claimed risk faced by returned failed asylum seekers to the DRC had been the subject of debate in the U.K. but in December, 2008 the UK Court of Appeal upheld a determination of the Asylum and Immigration Tribunal (AIT) dated 18th December, 2007 which found that failed asylum seekers did not per se face a risk of prosecution or serious harm on return to the DRC. It also noted a letter from the British Embassy in Kinshasa dated 23rd June 2009 which stated that while all passengers entering the DRC were liable to be questioned by immigration authorities the Embassy had no evidence that returning failed asylum seekers either from the U.K. or any other country were specifically targeted by the DRC authorities. The subsidiary decision-maker's reasoning also relied on the credibility findings which had been made by the Tribunal. The applicant did not challenge the subsidiary protection decision by way of judicial review.

4. Shortly after the subsidiary protection decision was notified, further country of origin information relating to the general situation in the DRC was furnished to the Minister in support of the leave to remain application.

5. The applicant's file was examined by the Minister's officials in August 2011. It included a consideration at to whether the return of the applicant to the DRC would attract the prohibition on refoulement or the entitlement to Art.3 ECHR protections. It was ultimately determined that although some categories of people were likely to face torture, inhuman or degrading treatment upon return to the DRC the applicant did not come within those categories. Thus, following the refusal for leave to remain on humanitarian grounds the Minister made a deportation order in respect of the applicant on 27th September, 2011. No challenge was brought against the deportation order.

6. In November 2011, a report entitled (Unsafe Return – refoulement of Congolese asylum seekers) was published by Justice First, a UK charity. Its author was Catherine Ramos. The report sought effectively "to test the UKBA hypothesis of safety of return [to the DRC] for rejected asylum seekers"

The report's conclusions were:

• 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 DRV 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.

It was recommended, inter alia, that Country of Origin information be updated to reflect the findings in the report and that until a review of policy had taken place, there should be no further removals of people to the DRC.

7. On 23rd 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 and for the revocation of the deportation order, pursuant to s. 3 (11) the Immigration Act 1999. In large part, the applications were based on the then recent findings of the "Unsafe Return" report (herein after referred to as "Ramos report").

8. The s. 17 (7) application was based on the asserted fear of the applicant being subjected to persecution if returned to the DRC as a failed asylum seeker. It was submitted on her behalf that the decision to refuse her refugee status was fundamentally flawed and based on outdated and inaccurate country of origin information. In support of her claim as a failed asylum seeker the following documents were furnished:

• the Ramos Report;

• An article taken from the Guardian Newspaper dated Friday 11th November 2011 – "Congo civilians beaten for supporting opponents of President, says U.N. report";

• A document prepared by the Refugee Documentation Centre (RDC) dated 15th July, 2010 which compiled extracts from various reports on the treatment of failed asylum seekers returned to the DRC; and

• Further information complied by the RDC on the treatment of MLC members.

9. The letter 23rd July, 2012 stated, inter alia, "all these reports provide overwhelming evidence that the applicant is indeed a refugee and that if she were to be returned she 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."

10. The letter recited the conclusions and recommendations set out in the Ramos report.

11. The application to revoke the deportation order advised that there had been a significant change in the applicant's circumstances since the making of the deportation order namely "that there has been a deterioration in conditions in the DRC and the treatment returned asylum seekers face". The same country of origin information as was submitted with the s. 17 application was enclosed together with additional information, as follows:-

Access to healthcare, mortality and violence Democratic Republic of Congo;

Article from BBC news – DR Congo's child miner shame;

Article from the Guardian newspaper dated Monday 29th September 2008 – Congo's child soldiers re-enlisted;

The applicant also attached an RDC report dated 15th June, 2010 relating to asylum seekers returning to the DRC, another RDC document relating to the treatment of MLC members, a 2009 US State Department report on the DRC and a 2010 Human Rights Watch report.

12. The s. 17 (7) application was initially considered by an official of the Ministerial Decisions Unit in August, 2012. She formed the opinion that the submissions and documentation submitted by the applicant did not represent new evidence such as would merit her re-admission to the asylum process. She further determined that the applicant's claims in relation to mistreatment of failed asylum seekers in the DRC would be considered in the context of the s. 3 (11) revocation application. Accordingly, by decision 20th August, 2012 the respondent refused the necessary consent under s. 17 (7) of the 1996 Act, as amended.

13. By letter 25th October, 2012, the applicant sought a review of that decision. That review was carried out by another official of the Ministerial Decisions Unit on 8th November, 2012. Having reviewed the background to the applicant's application, the conclusion

was that there was no new evidence furnished and it was recommended that her application for re-admission under s. 17 (7) of the Refugee Act 1996, (as amended) be refused. The refusal was communicated to the applicant on 8th November, 2012.

14. On 22nd November, 2012, the applicant initiated judicial review proceedings. (Record No. 2012/ 957/ J.R.) The relief sought is an order of certiorari quashing the decision of 8th November, 2012, hereinafter referred to as the "Review Decision".

15. On 25th January, 2013 the applicant brought a motion on foot of the judicial review application seeking an interlocutory injunction restraining the respondent from deporting her.

16. The s. 3(11) revocation application was determined in February, 2013. The applicant was informed by letter dated 20th February, 2013 that the respondent had declined to revoke the deportation order.

17. On 22nd April, 2013, the applicant initiated judicial review proceedings (Record No. 2013/292 / JR) of that decision, hereinafter referred to as the Revocation decision. The primary relief sought is in order of certiorari.

18. The application for an interlocutory injunction restraining the deportation of the applicant pending the determination of both sets of proceedings was refused by Clarke J. on 16th September, 2013. An appeal to the Supreme Court in respect of the refusal of the interlocutory relief was allowed and judgment was delivered by the Supreme Court on 21st February, 2014.

19. With regard to the respective challenges to the Review decision and the Revocation decision, on 12th March, 2015 leave was granted by Barr J. to seek judicial review of both decisions.

The Review decision
20. The decision, after reference to the applicant's background, the application made under s. 17 (7) of the Act , the first instance refusal and the grounds put forward for a review of that decision, recited as follows:

> "Review of application
>
> I reviewed the case put forward that the applicant should be re-admitted to the
>
> asylum process.
>
> While the "acid test" was applied during the s. 17 (7)
>
> consideration, I wish to make it clear that the provisions set out in the amendment of s. 17 of the Refugee Act 1996 (S.I. 51 of 2011) 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 s. 17(7) process, whether or not this fear amounts to new evidence. I don't believe that it does as she has already expressed this fear in the previous hearings. It appears to me that the decisions to refuse her 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 s. 17(7) process. In 2006 the UNHCR stated that, while it had only limited information available, it did not have evidence that there is 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. J. Cross of 20th April 2012 in *M.T.T.K.. v. Refugee Appeals Tribunal and Minister for Justice, Equality and Law Reform* 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 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 violations in the DR Congo. This is not new evidence. Furthermore, it did not make any reference to the position of failed asylum seekers.
>
> Finally, reference is made to the constitutionality of s. 3(11) of the Immigration Act 1999. I understand that this issue was dealt with comprehensively in the judgment of Kearns J. dated 21 June 2012 which left no doubt as to the constitutionality of s. 3(1) and s. 3(11) of the Immigration Act 1999.
>
> Overall, I consider that no new evidence has been provided in relation to [the applicant's] application.
>
> Conclusion
>
> I recommend that her application for re-admission under Section 17(7) of the Refugee Act 1996 be refused."

The applicant's submissions
Grounds (ii) and (xii)

21. Grounds (ii) states:

> "The Respondent erred in law and/or in fact concluding that the information and documentation furnished by the Applicant to the Respondent in his (sic) application to be readmitted to the asylum process did not amount to "new evidence"".

Ground (xii) asserts:

> "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. 7 A(b) of s. 17 of the Refugee Act 1996 (as amended) (as inserted by Article 8 of S.I. 51 of 2011) to consent to the applicant's re-admittance to the asylum process".

22. In the first instance, counsel for the applicant submits that the wrong legal issue was addressed by the decision-maker. The question for the Minister was not whether any fear amounted to new evidence but rather whether new elements or findings had arisen or been presented which made it significantly more likely that the applicant should be declared a refugee. Insofar as the decision-maker made reference to the applicant having already expressed her fear as a failed asylum seeker "in the previous hearings", it is unclear as to what was meant by this i.e. whether it was a reference to the ORAC/RAT procedure and the subsidiary protection application, or simply a reference to the ORAC/ RAT. However, it is submitted that the thrust of the review decision suggests that comparator which was used was the subsidiary protection application. However, it is submitted that the proper comparison for the purposes of a s. 17(7) application is with the previous asylum application.

23. It is submitted that it is noteworthy that the first instance decision maker (i.e. the decision of 17th August, 2012) properly identified the comparative decision as that made in the asylum application. Thus, insofar as the review decision maker identified the subsidiary protection decision as the process against which the s. 17(7) application had to be compared that was not in accordance with the Procedures Directive or s. 17(7) of the 1996 Act, as amended. A proper construction of s. 17(7) shows that the requisite comparison with regard to the new element or findings that is presented is to be with the original application for asylum. It is submitted that must be the position in circumstances where Ireland operates a bifurcated system.

24. In the course of the s. 17(7) application, the applicant submitted a substantial piece of new evidence for the purposes of the review application. This was the Ramos report of 24th November, 2011, to which the respondent had been specifically referred in the letter of 23rd July, 2012. Yet, this substantial report was not engaged with by the decision-maker and effectively he failed to have regard to it in any sense. As a failed asylum seeker the applicant fell into the category of persons in respect of which it was reported that failed asylum seekers returning to the DRC were subject to persecution.

25. Insofar as the review decision-maker made reference to country of origin information, it was to a 2006 UNHCR report which was not relevant in terms of any implied discounting of the Ramos report furnished by the applicant. The UNHCR document had only limited information on the fate of failed asylum seekers in DRC. Furthermore, the Ramos report stated that the UNHCR did not have responsibility for failed asylum seekers as such. Given that the trigger for the application for re-entry into the asylum system was the Ramos report, it was "stunning" that the review decision-maker made no reference to it whatsoever. The conclusions and recommendations of the Ramos report had been specifically quoted in the letter of 23rd July 2012.

26. Furthermore, it was noteworthy that the first decision-maker (i.e. the decision of 17th August, 2012) declined to consider country of origin information (including the Ramos report) which had been submitted in connection with the s. 17(7) application and adopted the position that all matters concerning the fate of returned asylum seekers to DR Congo would be considered in the context of the application to revoke the deportation order. It is submitted that that particular finding was not overturned by the review decision-maker albeit that he made some reference to country of origin information on failed asylum seekers, namely the 2006 UNHCR report. Significantly however, he failed to have any regard to the Ramos report.

27. It is submitted that the process provided for by s. 17(7) is by its nature a filtering process. Thus, the threshold which the applicant has to overcome in order to gain re-entry is necessarily low. Furthermore, the s. 17(7) process was not the appropriate time in the procedure for a weighing exercise to be embarked on in terms of preferring one piece of country of origin information over another.

28. As to the requisite threshold for a s. 17(7) application, counsel cited *A.A. v. Minister for Justice, Equality and Law Reform* [2012] IEHC 63.

29. It is submitted that the approach of Irvine J. in *F.V. v. RAT* [2009] IEHC 268 (a decision incidentally quoted by the review decision-maker) is authority for the proposition that in the s. 17(7) process the decision-maker should have regard to the issue of refoulement under s. 5 of 1996 Act. Counsel advances this submission notwithstanding the contrary view adopted by Cooke J. in *L.H. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 406.

30. Counsel also cites *Okito v. RAT & Ors* (High Court unreported 16th July 2010) and he relies on the dictum of Cross J. in M.T.T.K. v. RAT [2012]IEHC 155 in aid of his argument that the Ramos report should have been considered as it met the test set by Cross J. in M.T.T.K., namely "a minimum level of materiality and credibility".

31. It is also submitted that the s. 17(7) application ought to in any event be subject to a lower threshold given that the process is a filtering process only. Counsel argues that it was not for the decision-maker in such a process to come to a determination on whether or not the applicant was a refugee.

32. Ground (v) asserts as follows:

> "The respondent erred in law and/or in fact in relying on the understanding that when the Irish authorities make arrangements to repatriate person 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 properly 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".

33. It is submitted that while the decision-maker appeared to take comfort from his "understanding" that returnees to DRC are not identified by the Irish authorities as failed asylum seekers it was nevertheless insufficient for the decision-maker to rely on such an understanding in the absence of making enquiries to ascertain the true position. It is submitted that failed asylum seekers as a matter of fact are put on "Frontex" planes destined for DR Congo without any travel documents. This is in breach of the terms of Decision

2004/573/EC which requires that returnees be provided with travel documentation.

Ground (viii) asserts:

> "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 that 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."

34. Counsel submits that insofar as the review decision-maker referred to the judgment of Cross J. and Irvine J. in *M.T.T.K.* and *F.V.* respectively, it is unclear whether in fact the decision-maker reached any conclusion on the material supplied by the applicant. On its face, the decision simply recites certain views expressed in the aforementioned case law in relation to the test to be applied at the Tribunal stage in respect of failed asylum seekers. Even if is to be assumed that the decision-maker concluded that the material submitted by the applicant was not cogent, authoritative or objective, the basis of that reasoning is not clear. As such, the approach was irrational and falls foul of the requirements to give reasons (*Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2I.R. 701).

35. Ground (x) states:

> "The Respondent erred in law in that he was put on inquiry by virtue of the information submitted by the Applicant in his [sic] application yet unlawfully failed to carry out any inquiry."

It is submitted that insofar as the information and evidence put forward by the applicant did not establish that she would be at risk of serious harm if returned to the DRC (which is denied), then, at least, that information was sufficient to put the decision-maker on enquiry as to the matters therein raised, particularly as to the fate that might await failed asylum seekers returning from Europe. Counsel refers to Msengi v. RAT & Ors. [2006] IEHC 241 where McMenamin J. addressed this issue, admittedly in relation to an RAT decision, in the following terms:

> "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 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."

Ground (xi)

36. This ground asserts that:

> "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 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)."

37. Counsel submits that if that was in fact the approach which the decision-maker adopted was unlawful and unfair having regard, in particular, to the circumscribed nature of the s. 3(11) revocation process as opposed to the process in which an application for refugee status is determined.

The respondent's submissions

38. By way of preliminary observation, it is submitted on behalf of the respondent that by the time the applicant came to make the application for re-entry to the asylum process in 2012, she had been through the gamut of both the asylum and immigration process. In particular, it was noteworthy that when she applied for subsidiary protection and leave to remain in July, 2009 she had access to country of origin information pertaining to failing asylum seekers in the DRC which in fact predated her original application for asylum in December, 2007. Her claim for subsidiary protection on the basis of her being a failed asylum seeker was rejected in June 2011 on the basis of country of origin information from 2007, 2008 and especially 2009. The subsidiary protection maker concluded that "there are certain categories of people who are likely to face torture, inhumane or degrading treatment upon return to the DRC (the UNHCR "advises against the forced return to Kinshasa of persons of Banyamulange ethnic origin") however the applicant does not come into this category being from the Luba ethnic group." This decision was not challenged by the applicant.

39. Furthermore, it was open to the applicant when she was before the Tribunal to make a case on the basis of her fear of being a returned asylum seeker as she was by then a failed asylum seeker having been refused refugee status by the Commissioner. It is submitted that every applicant for asylum must anticipate that they may well fail.

40. It is submitted that s. 17(7) requires a new element or finding that has arisen relating to the examination of whether a person qualifies as a refugee. The new element does not necessarily have to be documentation per se; rather there must be a new situation which was not present at the time of the original asylum application. In the applicant's case, the situation which she sought to present in aid of her s. 17(7) application could have been presented in the original asylum process given that she had later averted to it in the subsidiary protection application and had relied on country of origin information which was available to her prior to the original asylum application. While it is accepted that the Ramos report was new in the sense that it issued in November, 2011 that did not mean that it was a new element or finding for the purpose of s. 17(7). The potential hazards of failed asylum seekers in the DRC was the subject of country of origin information issued prior to the applicant's asylum application. In those circumstances it was not open to the applicant to hold back something that could have been relied on in the original asylum application. The applicant cannot now seek to re-enter that same process on a ground that was capable of being advanced in the original application. The perceived risk to failed asylum seekers in the DRC was known to the applicant from the outset of her original asylum application and she had not asserted it at any stage during that process.

41. It is submitted that in any event, if such a preliminary examination had revealed "new elements or findings" (which the review

decision-maker found it did not), such new elements or findings would have to have been of sufficient weight or standing to significantly add to the likelihood of the applicant qualifying as a refugee. However, in circumstances where the very same issues had been considered by the Minister at an earlier stage and had not persuaded him to determine either a subsidiary protection application or a leave to remain application in the applicant's favour, it is difficult to see how identical issues as revealed in the Ramos report would amount to issues of sufficient weight or standing to significantly add to the likelihood of the applicant qualifying as a refugee. The onus of establishing such significant weight or standing was on the applicant. It is submitted that the reliability of the Ramos report was properly questioned by the s. 3(11) revocation decision-maker and the criticisms of the report as expressed in that decision were upheld by Clarke J. in her judgment on the interlocutory injunction application.

42. In any event even if the Ramos report was new evidence, the applicant did not establish that the contents of that report could "significantly add to the likelihood" of qualifying as a refugee, a central requirement of s. 17(7).

43. With regard to the review decision, it is clear that the decision-maker was aware, inter alia, of the subsidiary protection application and the leave to remain application, both of which dealt with the risk to failed asylum seekers in the DRC. Furthermore, the review decision-maker was fully apprised of the requisite test as set out in s. 17(7) as specific reference was made to that provision. It was found that the applicant's fear did not amount to new evidence as she had already expressed that fear in "the previous hearings". Counsel submits that the reference is a reference to the subsidiary protection and leave to remain applications. The review decision-maker adopted the correct approach in relying on *F.V. v. RAT* [2009] IEHC 268, which states that for failed asylum seekers to constitute membership of a particular social group, particularly cogent evidence was required.

44. Furthermore, the applicant's reliance on *Meadows v. Minister for Justice, Equality and Law Reform* is misconceived. In *Meadows*, there was no full review of the applicant's case, unlike the present case were a review was conducted in two stages i.e. on 17th August, 2012 and 8th November, 2012. In the present case the rationale is disclosed, the decision-maker did not find the evidence presented by the applicant to be convincing and preferred other information. The review decision complied with Meadows in that it disclosed "the essential rationale on foot of which the decision is taken". The applicant was not obliged to construct a hypothesis; the test set out in F.V. (as referred to in the review decision) was clear, the applicant did not demonstrate by cogent, authoritative or objective evidence that she would be targeted for persecution as a failed asylum seeker returned in the DRC.

45. The review decision maker duly noted the UN Committee against Torture decision which made reference to serious human rights violations in the DRC. However it was noted that this was not new evidence. Moreover, it did not refer to the position of failed asylum seekers.

46. While, counsel acknowledges, the Ramos report was before the review decision-maker in the context of the s. 17(7) review application, the issue still remains that in the context of what the review decision-maker knew of the subsidiary protection and leave to remain applications and the respective decisions on those applications, and from the applicant's solicitor's submissions on the issue of membership of a particular social group, there was in the view of the decision- maker no new element or finding upon which the applicant could be allowed to re-enter the asylum process. It is submitted that that was a judgment call solely for the review decision-maker. It was for him to weigh the information provided in order to see if there was a quality of newness such as to satisfy the requirements of s. 17(7).

47. It is submitted that the applicant's reliance on *A.A. v. Minister for Justice, Equality and Law Reform* is misconceived as in that case there was a new element, namely an assertion in relation to HIV which had not been canvassed in the original asylum application. Thus, for the applicant in A.A. the threshold was low as she has asserted something new.

48. Counsel relies on the approach adopted in *L.H. v. Minister for Justice, Equality and Law Reform* (para.32) as authority for the proposition that applicants who seeks to come back into the asylum process after an already prolonged asylum and immigration process have a high threshold to overcome.

49. Counsel submits that insofar as the Ramos report is concerned, the review decision-maker had to have formed some view on the report as he makes specific reference to the requirement to the cogent, authoritative and objective evidence. Clearly, he was reviewing the same file as had been before the first instance s.17(7) decision-maker. The absence of a specific reference to the Ramos report in the review decision does not indicate that it was not considered. The decision-maker addressed the issues which the applicant's solicitors had raised in their letter of 23rd July, 2012. He also addressed the question of the safety of returning asylum seekers to the DRC, which is the point raised in the Ramas report. Furthermore, he was entitled to give weight to a report from an agency of the standing of the UNHCR. It was quintessentially a matter for the review decision-maker to exercise his discretion and in doing so to give weight to the different sources of information before him. The applicant's complaint about the decision-maker's "understanding" that returned asylum seekers to the DRC are not so described by the Irish authorities is without merit. No submissions were made to the review decision-maker about this issue. In any event, the fact of the matter is that no one will know from the type of travel document with which the applicant will be provided on her return that she is a failed asylum seeker.

50. Counsel for the respondent requested the court that his arguments regarding the substantive content of the Ramos report as set out in his submissions to the s. 3(11) challenge be taken also in the context of s. 17(7) submissions advanced by counsel for the respondent.

Considerations on the s.17(7) challenge

51. It is apposite to set out the relevant provisions of s. 17 of the Refugee Act 1996 (as amended).

52. 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."

53. The Regulation also inserted a number of further subsections which are relevant to the present 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)."

54. The first thing to be observed is that it is not the function of the Minister to determine the applicant's claim for refugee status on the ground of particular social group (the ground upon which the applicant sought to be re-admitted to the asylum process and which formed the context of her s. 17(7) review application); that function is reserved to ORAC and, on appeal, the RAT. That remains the position even in circumstances where the applicant has to seek the consent of the Minister under s. 17(7) in order to be re- admitted to the process.

55. The provisions of S. 17(7) are clear. The Minister's remit is to determine whether the salient criteria, namely new elements or findings, for re-admittance to the asylum process have been presented or have arisen which "significantly add to the likelihood" of the applicant being declared a refugee.

56. In *L.H. v Minister for Justice, Equality and Law Reform* [2011] IEHC 406 Cooke J. described the ministerial remit in the following terms:

> *"…when the Minister is asked to consider an application under the subsection the essential issue to be addressed is whether the material he is asked to examine as the basis for a further application contains potentially the ingredients required to establish that the applicant comes within the definition of 'refugee'. Does the material point to the possible existence of a well-founded fear of persecution: does that relate to the country he has fled; is its source a state authority or some source tolerated by state authorities; and does the reason for the persecution have a Convention nexus? While there is an obvious overlap between the ingredients of a claim to refugee status and the circumstances that may attract the prohibition on refoulement, the Minister is not, in the view of the Court, considering the possible application of that prohibition but only whether, if remitted to the Commissioner for investigation, the further application may establish that the applicant is a refugee.""*

57. At para.32 of his judgment, he summarized the revised s. 17(7) procedures, as follows:

> *"Accordingly, under s.17 as thus amended the Minister is only compellable to grant his consent to a new asylum application being entertained and determined when two conditions are fulfilled namely, that new elements or findings have arisen making it significantly more likely that the new application will be successful; and that these new elements or findings could not have been presented for the earlier application through no fault of the asylum seeker. In the judgment of the Court, save for the distinction between "new claim" and "new elements or findings", there does not appear to be any practical difference between these criteria and those of the "acid test" of the Onibiyo case approved by Clarke J. in the E.M.S. case, and particularly the test as to whether a "realistic prospect of a favourable view could be taken". If anything, the introduction of the requirement that the new elements or findings should "significantly add to the likelihood" of the application being successful raises the threshold the application for consent must overcome. More importantly, contrary to the submission made on behalf of the applicant in the present case in reliance upon the approach adopted by Clark J. in the A.A. case, as the section now stands, the Minister is not only entitled to have regard to whether those new matters could have been relied upon at an earlier stage, he must be satisfied that it was through no fault of the applicant that they were not in fact presented during the course of the processing of the earlier application including any appeal to the RAT."*

58. In *A.A. v. Minister for Justice, Equality and Law Reform* [2012] IEHC 63, Cross J., with reference to L.H, states:

> *"22. I accept and apply the reasoning of Cooke J . in L.H. (as cited above) I agree with Mr. Woolfson that in order for the applicant to succeed in his s.17(7) application to the Minister - providing he has satisfied the requirements of new information [……]what must be established is not very onerous."*

It is submitted by counsel for the applicant that the words "not very onerous" underscore the "filtering" mechanism that is the s. 17(7) process. I will return to this in due course.

59. From the submissions advanced, I am of the view that the issues which arise for determination are:

(i) The appropriate comparator for the purpose of the s.17(7) application;

(ii) the failure of the applicant to avail of the failed asylum seeker ground in her original asylum application;

(iii) the manner in which the materials relied on by the applicant are addressed by the review decision-maker;

(iv) the alleged lack of clarity in the review decision; and

(v) the alleged error in the decision-maker's reliance on the arrangements made by the Irish authorities to repatriate failed asylum seekers.

60. Counsel for the respondent submits that the appropriate comparator for the s. 17(7) preliminary examination was the subsidiary protection decision and it is asserted that that both the subsidiary protection process itself and the country of origin material on which the applicant relied in making the claim for subsidiary protection is the appropriate comparator for the purposes of the s. 17(7) application.

61. I do not agree with the submission that the subsidiary protection process or the subsidiary protection decision is the comparator envisaged by s. 17(7). It seems to me that the requisite comparator has to be the process in which the earlier claim for refugee status was made. This is clear from the provisions of Council Directive 2005/85/EC, Article 32 of which provides:

> "1. Where a person who has applied for asylum in a Member State makes further representations or a subsequent application in the same Member State, that Member State may examine these further representations or the elements of the subsequent application in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework
>
> ….
>
> 3. A subsequent application for asylum shall be subject first to a preliminary examination as to whether, after the withdrawal of the previous application or after the decision referred to in paragraph 2(b) of this Article on this application has been reached, new elements or findings relating to the examination of whether he/she qualifies as a refugee by virtue of Directive 2004/83/EC have arisen or have been presented by the applicant.
>
> 4. If, following the preliminary examination referred to in paragraph 3 of this Article, new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee by virtue of Directive 2004/83/EC, the application shall be further examined in conformity with Chapter II."

62. That is not to say however that in conducting the preliminary examination of the application for re-entry into the asylum process that the Minister could not have regard to material which was furnished in the course of the subsidiary protection or indeed the leave to remain application in order to assess whether the material being relied on by the applicant as a new element or finding for the purpose of the s. 17(7) application is truly a new element.

63. I should add that even if the decision-maker erred in finding that the requisite comparator was the subsidiary protection process, I do not believe that much turns on this as the salient issue in these proceedings is whether the finding that there was no new evidence was correctly arrived at.

64. One of the arguments canvassed on behalf of the respondent in these proceedings is that the very claim the applicant sought to advance in the s. 17(7) application should have been made by her in her original asylum application. The basis of this argument appears to be twofold. It is submitted the applicant could have made her claim for refugee status as a failed asylum seeker in her original proceedings before the Tribunal as by that stage she had achieved the status of a failed asylum seeker by dint of the negative recommendation she received from the Commissioner. Moreover, in her later subsidiary protection and leave to remain applications she had relied on country of origin information which related to the situation of failed asylum seekers in the DRC, some of which predated her original asylum application. This, the respondent asserts, begged the question as to why she had not advanced her claim for asylum in 2007 based on that country of origin information.

65. *F.V. v RAT* is authority for the proposition "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"

66. In that case, ORAC had processed the claim of fear of persecution by reason of political opinion. After a negative recommendation by ORAC, the applicant's appeal submissions to the RAT included that the "fear of persecution arises also by reason if refouled to Togo as a failed asylum seeker and/or a failed asylum seeker who sought asylum abroad on grounds of his political opinion.." The learned Judge found the RAT to be in error in declining jurisdiction to consider the applicant's fear of being returned to Togo as a failed asylum seeker. I note in passing that in F.V. the respondents had resisted the applicant's argument that the prohibition on refoulement fell within the jurisdiction of the RAT inter alia on the basis that the claim of a fear of persecution on grounds of being a failed asylum seeker was made prematurely insofar as the applicant was not yet a failed asylum seeker.

67. I allude to the background to that case by way of context for the respondent's argument that the present applicant's fear cannot be regarded as a new element or finding because there was country of origin information (consisting of some nine reports dating from October, 2005 and August, 2007) on the issue of failed asylum seekers in the DRC which she could have brought to the ORAC or the RAT at any time between December, 2007 and the receipt of the RAT decision in May, 2009. This was material which the applicant duly submitted to the Minister in 2009 in support of her applications for subsidiary protection and leave to remain.

68. That was undoubtedly the case but even if the applicant should have raised the refoulement issue before the RAT, the very fact of not having done so or the fact that she subsequently raised the issue at the subsidiary protection and leave to remain stages would not debar her from seeking re-entry into the asylum process if there was new material on the fate of failed asylum seekers in the DRC (such as country of origin information that departed from the views expressed in earlier information and which pointed to a threat to failed asylum seekers). In any event, I note that the officer who conducted the review does not reject the application on the basis that the material relied on by the applicant was available to her prior to her original asylum application or that she could have presented it in that process. Rather, the refusal appears to be based on a finding that "no new evidence" was provided.

69. It goes without saying that as someone who was the subject of a negative decision for a declaration of refugee status the applicant was, in the first instance, required to establish that the element or finding upon which she relied was "new" and would "significantly add to the likelihood" of her qualifying as a refugee. This is the issue which the review decision-maker was required to address pursuant to s. 17(7) of the 1996 Act, as amended.

70. In her review application, the applicant presented country of origin reports in aid of her application which, it is argued, pointed to the applicant being a refugee on the basis of a fear of persecution as a failed asylum seeker. This was of course against the backdrop where the applicant's erstwhile claim for refugee status based on a fear of persecution on the ground of political opinion was roundly rejected on credibility grounds.

71. On the face of the review decision, at least, the reviewing officer does not mention or analyse the country of origin information (including the Ramos report) upon which the applicant relied in aid of her application to re-enter the asylum process save to refer to one extract from an RDC report dated 15th July, 2010. This to my mind is the nub of the present challenge. I will return to this issue.

72. The approach adopted by the officer was to look, in particular, at how the courts have addressed claims of persecution on the particular social group ground in the context of failed asylum seekers. He opines that failed asylum seekers are not as a matter of course members of a particular group for the purpose of the Convention and quotes the dictum of Irvine J. in *F.V. v RAT* [2009] IEHC

268.

This is undoubtedly a correct distillation of the relevant jurisprudence on the question of failed asylum seekers in the context of the Convention.

73. Counsel for the respondent submits that it is not the case, contrary to the applicant's submissions, that when the reviewing officer adopted the wording of Irvine J. F.V. v. RAT that his reasoning was unclear or inadequate. It is argued by the respondent that by referring to the said judgment, he was adopting the requirements in the judgment as his reasons for his finding that "no new evidence" had been provided in relation to the application to re-enter the asylum process: The respondent submits that the information presented by the applicant was not cogent, it was not authoritative and it was not objective. It is further contended that the decision-maker was not obliged to embark upon a discursive explanation for his rejection of the application.

74. Counsel for the applicant contends that the reviewing officer adopted the wrong legal test in querying whether the applicant's asserted fear amounted to new evidence when the question to be asked was whether new elements or findings had arisen or been presented such as to satisfy s.17(7).

75. While I am of the view that the applicant's counsel places too much emphasis on the actual language in the decision, I am in agreement with him that on the face of the decision the Ramos report appears not to have been engaged with by the reviewing officer in deciding that the applicant should not be re-admitted to the asylum process.

76. The report was put forward essentially as "a new element" or "finding" in the sense envisaged by s. 17(7) as corroborative of the applicant's claim for re-admission to the asylum process as a failed asylum seeker. Of course it required analysis in the preliminary examination as to whether it was in fact a new element or finding. At the very least it was "new" in the sense that it was published subsequent to the applicant's earlier asylum application and the subsidiary protection and leave to remain applications (where materials on the fate of returned asylum seekers to the DRC did receive consideration). The report had as its subject matter a study of a discrete number of returned asylum seekers to the DRC. Whether it met the more substantive threshold of a "new element" or "finding" to add "significantly" to the applicant's chances of being declared a refugee would depend on an analysis of the report itself.

77. In the application for a review of the first instance s. 17(7) decision on 23rd July, 2012, attention was drawn by the applicant's solicitor to "[t]he Minister's obligation to consider the grounds put forward in relation to [the applicant's] s.17(7) application."

78. While the respondent's counsel argues that the failure of the first instance decision-maker to deal with it in the s. 17(7) context was not expressly alluded to by the applicant's solicitor in the review application, I am satisfied that the individual who conducted the review could be under no illusion but that what was being sought was a review of the grounds and materials which the applicant had furnished, particularly when the applicant's solicitor stated that "if it is proposed to examine any other country information or evidence not already referred to in this application or in the refusal we would be obliged if you would let us have copies thereof to enable us to consider same..". It is the case that the review application was made in the context of the first instance decision-maker having expressly declined to review the applicant's country of origin information (including the Ramos report) on failed asylum seekers on the basis that "[a]ll matters concerning the return of failed asylum seekers to DR Congo will be considered under [the applicant's s. 3(11) revocation application". In the review application of 23rd July, 2012 the applicant's legal representative took issue with this approach, as follows:

> "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. She 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."

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. With regard to this issue, counsel for the applicant canvassed the argument that the decision-maker's function under the relevant statutory provision was in the nature of a "filtering" exercise. I am not persuaded that that description is at all apt. While it was not for the review decision-maker to determine whether the applicant satisfied the definition of a refugee, the provision of s.17 (7) nevertheless require the person conducting the preliminary analysis to be satisfied that the material presented will "significantly" add to the chances of an applicant getting refugee status. Thus, the examination of the material is not just a cursory exercise, albeit that the exercise being engaged on was a "preliminary examination". It was open to and indeed necessary for the purpose of deciding whether the material furnished was "new" that the adjudicator analyse and weigh the material, either on its own merits or against such other relevant material as he may have himself sourced and indeed against any material relating to failed asylum seekers as may have been considered in the earlier asylum application (if that had been the case) and the subsidiary protection and leave to remain applications.

81. As I have said, it is not clear from the face of the decision that an examination of the Ramos report, upon which the applicant largely relied in her s. 17(7) application, was carried out by the decision-maker.

82. Insofar as on the face of the decision country of origin information was identified it was in the context of a quote from the 2006 Report of the UNHCR- "DRC-Treatment of rejected asylum seekers" (which was part of the July 2010 RDC compilation) where at paragraph 8 the UNHCR states "[w]ith the limited information available to the UNHCR, it does not have evidence that there is a systematic abuse, including detention and mistreatment, of failed asylum seekers returned to the DRC..".

83. The reference to the 2006 UNHCR report was preceded by the statement "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." It is not at all clear from the face of the decision that the decision-maker had the Ramos report in his sight when stating as much given that reference is made only to the 2006 UNHCR report. The decision-maker was perfectly entitled to have regard to this report but it could not be at the expense of the applicant's entitlement to have all the material she submitted (including the Ramos report) considered. As I have already said, whatever weight was to be attached to the Ramos report in the context of whether it constituted a new element or finding would be for the decision-maker to assess.

84. A decision as to whether judicial review should follow upon a finding that material was not considered or seen to be considered will depend on the nature of the material. In *Okito v. RAT & Ors* (High Court unreported 16th July 2010), Ryan J. addressed this issue. He states:

> *"if the material achieves a certain minimum level of materiality and credibility, then it should have been taken into account and the method by which it should have been weighed and considered and balanced out in the context of the case as a whole is a matter for the Tribunal. So in those circumstances, if the material does achieve this standard, then judicial review ought in general to follow. I say that it ought in general to follow, because there may be exceptions and qualifications, depending on the circumstances. On the other hand, if the material does not achieve this standard of relevance and credibility, then it is legitimate for the court to say that it is not sufficiently important to warrant the remedy of judicial review and the discretion is appropriately and properly exercised in refusing relief. This position is consistent with the authorities that were cited."*

Ryan J. goes on to say that "*if the material achieves a certain level of materiality and credibility"* it should be taken into account.

85. In the present case, there is no way of ascertaining what level of materiality, if any, the review decision-maker attached to the Ramos report since the decision is entirely silent in respect thereof, or even whether it was considered in the first place. I cannot say one way or another whether the decision-maker was satisfied to leave the consideration of the Ramos report to the s.3 (11) adjudicator, as the first instance decision-maker had done, (even if that would have been lawful, which it would not have been) since there is a consideration of some country information in the review decision by virtue of the reliance placed on the 2006 UNHCR Report.

86. Whatever way one approaches it the decision-maker's conclusion that the applicant failed to provide new evidence for the purpose of the s. 17(7) application is problematic in the absence of any clear indication that he took account of the Ramos report.

87. The bottom line is that the applicant was entitled, on first principles, to have the information on which she relied assessed, particularly in circumstances when the review decision-maker was specifically called upon on to do so. That did not happen.

88. In *M.T.T.K. v. RAT* [2012] IEHC 155, Cross J. was satisfied that both *F.V. v. Minister for Justice, Equality and Law Reform and Okito v. RAT* support the proposition that when in judicial review proceedings a court is called upon to pronounce upon the materiality of any particular evidence, it does not "*engage in a judgemental issue to determine its merits*", which would fall foul of its remit in judicial review. He states: "*When the court is assessing whether there is in existence cogent, authoritative and objective COI, it must not fall into the trap of weighing up and coming to any decision on the merits of the decision."* The exercise to be engaged in by the court in examining the evidence is, in the words of Cross J. (echoing Ryan J. in Okito), "to ensure that it reaches a minimum level of materiality and credibility". (emphasis added)

89. The question is whether this court can now step into the shoes of the review decision-maker and weigh the relevant report for the purposes of the exercise of its discretionary powers in judicial review. This question has to be addressed in light of findings this court has made in respect to the challenge to the Revocation decision, set out elsewhere in this judgment.

90. Given that the Ramos report was produced only in November, 2011 and that it post dated the 2006 UNHCR report by a number of years its subject matter was potentially corroborative of the fear which the applicant was advancing in aid of her application to be allowed re-enter the asylum process. Thus, on its face, it reached "a minimum level of materiality and credibility."

91. However, this court has also been called upon to review the consideration afforded to the Ramos report by the s.3 (11) revocation decision-maker in the context the application to revoke the deportation order. For the reasons set out elsewhere in this judgment, this court has found no basis to impugn the Revocation Decision in its treatment of the Ramos report. My findings in this regard are in the context of a judicial review of the analysis of the Ramos report actually conducted by the s.3(11) revocation decision-maker.

92. Before however pronouncing further on this aspect, I will firstly address other aspects of the challenge to the Review Decision.

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.

Ground (v)

97. The applicant submits that while the decision-maker appeared to take comfort from his "understanding" that returnees to DRC are not identified by the Irish authorities as failed asylum seekers it was nevertheless insufficient for the decision-maker to rely on such an understanding in the absence of making enquiries to ascertain the true position. It is submitted that failed asylum seekers as a matter of fact are put on "Frontex" planes destined for DR Congo without any travel documents, contrary to Article 6 of Council Decision 2004/573/EC "on the organisation of joint flights for removals from the territory of two or more Member States, of third country nationals who are subjects of individual removal orders".

98. That Decision requires Member States to:

> " (a) ensure that each third-country national and the escorts hold valid travel documents and any other additional documents, such as entry and /or transit visas, certificates or records;
>
> (b) inform, as soon as possible, their diplomatic and consular representatives in the third-countries of transit and destination of the arrangements concerning the joint flight, in order to obtain necessary assistance."

99. I note that leave was given by Barr J. on this ground on the basis of the applicant's submission, inter alia, "*that the court be informed in a timely manner of the full facts and practices of the respondent".*

100. In the course of the within proceedings, the respondent produced to the court an example of the "Laissez Passer" travel document with which returnees to the DRC are provided. From the nature of the document seen by the court I accept the respondent's contention that the document does not disclose to the authorities in the DRC that the person to whom it is issued is a failed asylum seeker. The issue here is whether the decision-maker should have explained the basis for his "understanding" that when the State makes arrangements to repatriate persons to the DRC no mention is made of them being failed asylum seekers. The basis of this understanding is not set out. I accept however that the decision-maker must have had some knowledge of how matters are arranged upon which to base his understanding. This was something to which the decision-maker himself adverted and it was not said in response to any case made to him that the procedures utilised by the Irish authorities did not conform to Council Decision 2003/274/EC. No submissions on the particular issue of how the Irish authorities arrange such matters were made either to the first instance decision-maker or to the review decision-maker such as might have put him on enquiry that the applicant was alleging something amiss with the procedures utilised by the Irish authorities. In those circumstances, I am not convinced that the challenge on this ground has been made out.

Summary

101. In the ordinary course of events, were the present challenge the only one which the court had to consider with regard to the Ramos report, the findings which the court has made regarding the frailties in the Review decision would warrant judicial review by way of grant of certiorari and calling for a de novo review of the refusal of the application to re-enter the asylum process. That is because for the purpose of what was before the review decision-maker the Ramos report on its face was material. In the words of Cross J. in M.T.T.K. v RAT, (TAB 12) the court would be precluded from engaging in "a judgemental issue to determine its merits".

102. However, as Ryan J. states in Okito, there may be "*exceptions and qualifications, depending on the circumstances".*

103. Elsewhere in this judgment, for the reasons set out, this court (having considered the Ramos report in the context of a review of the consideration afforded thereto by the revocation decision-maker), has found that the revocation decision-maker did not act irrationally in finding that the report did not meet the requisite guidelines as set by the UNHCR and the Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD) such that it might be considered to constitute reliable country of origin information.

104. In *Okito*, Ryan J. makes reference to materials requiring "*a certain minimum level of materiality and credibility."* I make no findings on the credibility of the Ramos report, nor indeed did the revocation decision-maker. Rather the question centres on the reliability of the report. The revocation-maker effectively concluded that it did not constitute reliable COI since its remit did not comply with the guidelines set by the UNHCR and ACCORD.

105. I am of the view that the court should be extremely wary of stepping into the shoes of the decision-maker and weighing the merits or otherwise of material which should have been properly considered and weighed by the relevant assessor and be seen to have been done. However, at the end of the day, the very basis upon which the applicant relies to re-enter the asylum process has effectively been found not to be cogent, objective or authoritative evidence. In upholding the Revocation Decision on the issue of the Ramos report I have effectively deemed its reliability wanting. My finding in this regard thus puts in issue the "*materiality*" of the Ramos report, in the sense described by the learned Ryan J., even at the "*minimum*" threshold.

106. In all the circumstances therefore, I feel constrained to refuse to exercise my discretion to grant judicial review in this case notwithstanding the frailties in procedure which attach to the review decision.

Accordingly, the relief sought in the Notice of Motion is denied.

The Revocation Decision

Analysis by the executive officer in the Minister's department

107. In the Revocation Decision, the author of the consideration of file was tasked with a consideration of the material and submissions furnished in aid of the application to revoke the deportation order on the basis that there had been a significant change in circumstances, and in particular that the material furnished on behalf of the applicant pointed to "deterioration in conditions in the DRC and the treatment returned asylum seekers face".

108. In the context of the prohibition on refoulement the executive officer turned firstly to the Ramos report and its conclusions. He stated:

> "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 Acknowledgements section it is stated that the report was 'made possible by a growing number of citizens who are willing to give of their time, money and talents..' ...but that no reference is made to the contribution by acknowledged experts in the area. The …report appears to have issued without any input from international human rights organisations, MONUSCO and/or any NGOs on the ground in Kinshasa, and 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."

109. He went on to conclude that:

> a. The report's stated purpose was "advocacy";
>
> b. That its author was an advocate on behalf of asylum seekers in the UK and that she was active in seeking changes to how the UK BA operate;
>
> c. That the report was compiled by activists "apparently without input by acknowledged experts in this field, such as international humans organisations, MONUSCO and/or any NGOs on the ground in Kinshasa;
>
> d. Concern was expressed that the report was produced "from a subjective perspective, rather than objective";

110. For the reasons set out, he had concerns about the relevance and reliability of the Ramos report. However, he was not willing to dismiss the findings contained in the report for those reasons alone and thus considered it necessary to test the report against other available country information "by way of corroboration".

111. In this context, the decision-maker considered a report prepared by the RDC of 15th June 2010 which was also furnished by the applicant's legal representatives. As set out in the consideration of file, that report in turn relied upon "a number of sources of information, including news reports from reputable news agencies such as the BBC and The Guardian, and reports prepared by the United Kingdom Border Agency, and the UNHCR."

112. Notwithstanding that many of the sources quoted in the 2010 RDC report were of some vintage, the decision maker, on balance, preferred the RDC report to the Ramos report on the basis that "it has been produced by a recognised and acknowledged expert in the area of country of origin research; it is produced specifically for the purpose of providing information on a specific topic and not for reasons of advocacy; the information producer is independent and impartial and the findings are presented in an independent and impartial manner; the report is an aggregation of the views of experts with direct knowledge of conditions in the DRC; in addition I am satisfied that the methodology has been applied transparently."

113. Having noted that the RDC report was not current the executive officer had regard to a report released by the United Kingdom Border Agency [United Kingdom Border Agency: Country of Origin Information Service Democratic Republic of Congo, Report of a Fact Finding Mission to Kinshasa Conducted Between 18 and 28 June 2012, Information about the procedure for and treatment of Congolese nationals returning to the Democratic Republic of Congo from the United Kingdom and Western Europe, November 2012" (the UK BA Fact Finding Mission report).

114. The purpose of this report was to "gather information about the treatment of Congolese nationals, both non asylum migrants and failed asylum seekers, who have returned voluntarily or by force to the DRC from the United Kingdom (UK) and other Western European States". It was stated to be undertaken with reference to EU…common guidelines on (Joint) Fact Finding Missions" (November 2010).

115. Its areas of enquiry were:

- Numbers of Congolese nationals (irregular migrants including failed asylum seekers voluntary and enforced) returned to Kinshasa and the wider DRC;
- The process of return at N'djili airport (Kinshasa);
- Documents required for return to DRC;
- Penalties for leaving or arriving in the DRC without a valid passport;
- Checks by immigration officials on arrival;
- Identification of returnees as failed asylum seekers;
- Questioning and/or detention of returnees on arrival;
- Existence of detention facilities on arrival at the airport;
- Whether returnees are held elsewhere if not detained at the airport;
- Profile of those questioned or detained at the airport.

116. The report documented that it sought to interview a broad spectrum of informed sources in order to obtain accurate, relevant, balanced, impartial and up to date information.

117. Those interviewed included representatives of a number of human rights organisations, an official of the Federal Office for Migration of Switzerland, an official with responsibility for human rights at the British Embassy, Kinshasa, an official with responsibility

for migration at the British Embassy, Kinshasa, a representative of the French Embassy, Kinshasa, representatives of police headquarters, Kinshasa, representatives of the International Organisation for Migration (IOM), representatives of the General Inspectorate of Justice, representatives of the Office of the High Commissioner for Human Rights/ United Nations Stabilization Mission in the DRC (MONUSCO) and an official of the Belgian Immigration Office.

118. The executive officer found that "the information producer has established knowledge in the area of country of origin research, the information is provided in an objective manner; the methodology of the research is clearly and transparently set out" and that "the UKBA report meets the principles set out by the UNHCR, as quoted by ACCORD".

119. Based on a variety of sources quoted in the UKBA report, it was determined that:

a. The processing of people arriving at the airport at the Kinshasa "involves the authorities at the airport, generally the Direction Générale de Migration (DGM), satisfactorily establishing a person's identity, either by means of official travel documents or otherwise";

b. The preponderance of responses indicate that once returnees have satisfactorily established their identities they are free to leave the airport. However, there is evidence that returnees will be subject to low level mistreatment by officials, possibly acting without sanction of their supervisors, who extort money or steal belongings from returnees";

c. "On the whole the majority of the agencies consider 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."

120. The executive officer went on to note that the French Embassy "*has not heard about returnees facing difficulties at the airport or being detained on or after arrival".* He noted that representatives of Oeuvres sociales pour le développement (OSD) stated that "[*t]he Organisation is not generally aware of reports of [failed asylum seekers] or other returnees facing difficulties at the airport."* He noted that representatives of the Église du Christ au Congo as stating that the church was "*not aware of substantiated cases of [failed asylum seekers] or other returnees being ill treated on arrival at the airport or afterwards".* He noted a representative of the British Embassy as stating that the Embassy was '*only aware of reports of returnees facing difficulties in the UK regional media*" and that whereas they are '*aware of unsubstantiated reports of returnees being detained … there has been nothing substantiated and that the Embassy 'was not aware of any returnees being detained'".* MONUSCO was quoted as stating that "[*t]he office was not aware of any problems faced by returnees at the airport" but that "[s]ome people abuse their power".* Representatives of the International Organisation for Migration (IOM) were quoted as stating that "*In the past, particularly at the time of the 2nd republic, the general understanding was that returnees were seen to be opponents of the regime, but nowadays things have changed positively".*

121. The executive officer then noted that the UK BA report also quoted representatives of Toges Noires as stating "*[w]hen returnees arrive, almost all of them are going to be detained".* He quoted representatives of OSD who were aware of two cases of returnees from the UK who had been ill treated. It was noted that the most negative comment in the UKBA report came from representatives of Renadhoc who said "*[t]he treatment of returnees is very bad. Some of them when they are released you know they have been ill treated. Strong interviews mean torture is not excluded. Some of them have mental health problems now. The organisation is aware the [failed asylum seekers] or other returnees face difficulties at the airport – after people have been released from detention they tell them their experiences".*

122. The executive officer concluded that overall the preponderance of the responses pointed to no serious mistreatment of returnees at the airport other than low level extortion and/or theft.

123. He next went on to quote OSD as stating; "*There are two possible outcomes for returnees at the airport: 1. DGM take money and release, or 2. if there is important information or the person is wanted – take money and detain 'important information' would be political activist connections or a problem with the government in place. If a DGM officer released someone with either of these backgrounds there would be trouble."*

124. He concluded that the UK BA report indicated that "in certain circumstances returnees may be detained, such detention following on from the returnee having been identified in some way as being liable for detention." It was concluded that the detentions fell into three broad categories. Firstly, a returnee may be detained where it is considered that he or she has a contagious disease. Secondly, a returnee may be detained for reasons "best described as ordinary criminality". Thirdly, where the returnee is perceived to be against the government, where the returnee is "black listed" or where the returnee's ethnicity or origin is thought to be "suspect" in some way. The sources in the UKBA report for this latter category were Toges Noires, a Congolese human rights organisation and a British Embassy official. The decision maker also quoted a representative of Les Amis de Nelson Mandela as stating that returnees from particular regions of the DRC will be badly treated, a view also expressed by representatives of Renadhoc and OSD.

125. It was noted however that Renadhoc expressed the view that "*all returnees get ill treated, it doesn't make any difference"* and that the manner in which a returnee is treated depends on "*profile, especially political allegiance and on the province from which you originate in DRC".*

126. The decision recorded that other agencies referred to in the UK BA report "reject ethnic origin as grounds for maltreatment but rather 'treatment depends…. on the person'." Members of Human Rescue were quoted as stating"[i]ll treatment of returnees is done on purpose, for political reasons."

A human rights organisation was quoted as stating "*[e]ach returnee is a specific case". They have to say why they are returned. The authorities are interested in this. For instance if a person has made some declarations against the government while abroad they can have problems once in DRC. Someone who has demonstrated against the government while abroad or even human rights defenders can face problems."*

127. The analysis continued:

> "Whereas in general a returnee will not be liable to be detained, for certain classes of returnee the danger of being retained 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 "black listed", or whose ethnicity or origin somehow gives rise to suspicion. In this respect I note that [the applicant] 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, [the applicant] has failed to establish a profile that would identify her as an enemy of the government. In addition, she is not from either the Equateor or Kasai Provinces, a factor that was identified

as possibly giving rise to suspicion."

128. The executive officer then turned to the question of whether "[t]he mere status as a failed asylum seeker could expose a person to mistreatment arising from the suspicion that a person who has claimed asylum was in some way opposed to the government of the DRC".

He went on to note:

> "It is not at all clear if a failed asylum seeker could be so identified… Certainly Ireland does not disclose to the DRC, or to any country to which returns are made, that the person so returned is a failed asylum seeker. Without deciding that the authorities could never correctly surmise that a returnee was in fact a failed asylum seeker it is relevant to consider statements by a number of organisations which suggests that knowledge that a returnee is a failed asylum seeker creates a suspicion in the minds of the authorities."

129. Les Amis de Nelson Mandela were quoted as being of the view that failed asylum seekers *"who are arrested do not necessarily have a specific profile. Just the fact of having been in Europe. If someone has been in Europe, the authorities think the person actively opposes the current government they are very much wanted by the authorities here. If they do not have an influent person to help them they are going to be mistreated."* He noted that representatives of Association de Defense des Droits de l'Homme (ASODHO) were of the view that "*[t]hose who have applied for asylum abroad are considered to have given a bad image to the government and identified as members of the opposition. They will be asked about their reason about applying for asylum. If returnees are found to have a political connection they are sent to the ANR."* He observed that a human rights organisation in DRC stated that *"[a]ll people who are believed to be 'combatants' were mistreated once returned"* and noted the view expressed by a representatives of Les Amis de Nelson Mandela *"[t]hose who make asylum applications abroad are perceived by the authorities as traitors".* Representatives of Renadhoc were noted as stating that *"[p]eople who claim asylum whether in the UK or other western European countries put the government in a bad light so that the image Congolese take to other countries is not seen well here by the government, but again it is the person's profile that counts not where the person returns from."* OSD were of the view that *"[t]he authorities are aware people want to go abroad to find work"* and it was noted that a British Embassy official stated *"[t]he Congolese authorities do not have any problems with any particular standpoint on Congolese nationals who apply for asylum in the UK or other parts of Western Europe."* Similar sentiments were expressed by a representative of the Belgian Immigration Office.

130. The statements of those organisations who believed that failed asylum seekers faced mistreatment in the DRC had to be considered "in the light of statements by representatives of the French Embassy, an official of the Federal Office for Migration of Switzerland, representatives of OSD, representatives of Église du Christ au Congo, a representative of the British Embassy, an official from MONUSCO and representatives of IOM to the effect that returnees, including failed asylum seekers, do not face mistreatment."

131. It was found 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 is an understanding of the complexities of irregular migration." The executive officer noted "that assistance is available to returnees who encounter difficulties" as set out in the UKBA report. Furthermore, it was noted that "returnees who have family connections in Kinshasa are able to seek the assistance of their families. In that context he noted that the applicant was from Kinshasa and that she had family living in the city.

132. The analysis concluded as follows:

> "I have read and considered all of the documentation submitted on behalf of [the applicant]. Having considered the Catherine Ramos report in conjunction with the RDC report of 15th June, 2010 – which are documents submitted by Burns 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 [the applicant'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 the opinion that repatriating [the applicant] to DR Congo, is not contrary to s.5 of the Refugee Act 1996, as amended, in this instance."

133. There were no exceptional circumstances found which would suggest that there was a real risk that deporting the applicant breached Article 3 ECHR or that repatriating the applicant would be contrary to s.4 of the Criminal Justice (UN Convention against Torture) Act, 2000. It was further concluded that the deportation of the applicant did not constitute interference in the right to respect for private and family life under Article 8(1) ECHR.

The grounds of challenge

134. In summary, the revocation decision is challenged on the following grounds:

> 2. 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 premises upon which it was purportedly based;
>
> 3. In circumstances where the respondent chose to examine country information published after the date of the revocation application, and where that application confirmed that, at least in some circumstances, a deportee such as the applicant might, if deported, be imprisoned, for however long, it was incumbent upon the respondent to examine independent up-to-date and precise information regarding prison conditions in the DRC in order to ascertain that those conditions would breach Article 3 ECHR;
>
> 4. The weight placed upon the UKBA report as compared to that placed upon country of origin information furnished by the applicant was irrational;
>
> 5. No regard was had to the fact that Article 3 ECHR was absolute in nature and permits of no exceptions. Accordingly a higher standard of proof applied. Such higher standard was not applied. Such higher standard was not applied thus rendering the decision invalid; and
>
> 7. The deportation order was tainted by objective bias.

The applicant's submissions

135. It is submitted that there was no basis for the decision maker to have discounted the Ramos Report on the basis that it was compiled by an "activist". While the author may not have consulted NGOs, the interviews which were conducted with failed asylum seekers were recorded and annexed to the report. Furthermore, while reliance was placed on views expressed by UNHCR to the effect that returned failed asylum seekers were not detained or tortured in the DRC, there was no indication that UNHCR monitored failed asylum seekers, unlike the situation in the Ramos report, where interviews were conducted in the DRC with returnees.

136. Furthermore, the 2012 UKBA Report was not inconsistent with the Ramos Report. It reports that returnees are detained by the DRC authorities, which is consistent with the findings in the Ramos report.

137. While the decision-maker concluded that the majority of the agencies referred to in the UK BA Report were of the view that there was no mistreatment of failed asylum seekers in general, a minority of agencies quoted therein were of the contrary view.

138. Counsel submits that in a human rights case the obligation on a decision maker is more than a mere weighing exercise. Insofar as he was obliged to weigh material, he afforded the Ramos Report no weight, contrary to the approach advocated in *Karanakaran v. Secretary of State for the Home Department* [2000] 3 All ER 449 which states that every piece of evidence should be given some weight. In essence, the decision-maker failed to regard (even from the UK BA Report) the extent to which returned failed asylum seekers are targeted in the DRC. In all the circumstances it cannot be said that the country of origin information which was before him was properly considered.

139. It is submitted that the decision-maker erred in failing to conduct a "rigorous" examination of the relevant new facts as required by McDermott J. *B.M. (Eritrea) v.Min. for Justice* [2013]IEHC 324.

> *"4. The respondent failed to apply the appropriate legal principles to the assessment of the risk of deportation to Eritrea for the applicant based upon these new issues and materials in that he failed to determine, following a rigorous examination of the facts, whether there were substantial grounds for believing that, if deported, the applicant would suffer a real risk of torture, inhuman or degrading treatment or punishment in Eritrea."*

Furthermore, in the face of conflicting information in the UK BA Report itself the decision-maker preferred one set of conflicting information over other information without stating why he accorded preference thereto and thus failed to comply with the requirements of fairness. Counsel relies on D.V.T.S. v. Minister for Justice [2008] I.R. 476.

140. Counsel submits that the decision-maker appears to have considered the risks for the applicant on a "reasonable likelihood" basis which is incorrect in law. It is submitted that the Minister was not entitled to proceed solely on the basis of the preferment of the majority opinion. It is submitted that the appropriate test is set out by Clark J. in *P.B.N v. Min for Justice* [2013] IEHC 435 is whether the applicant has established *"a credible basis for the contention that his or her deportation would breach the prohibition of refoulement or would expose him or her to a real risk of treatment contrary to Article 3 ECHR."* (Para.24)

141. It is submitted that in all the circumstances there was ample evidence in the UK BA Report (as well as in the Ramos Report) which supported the application for revocation of the deportation order. Accordingly, the revocation decision cannot be said to flow from the evidence which was before the decision-maker, which rendered the decision irrational.

142. It is also submitted that the approach of the court in assessing whether the decision might be considered at variance with reason and commonsense must have regard to the principle of proportionality as set out by Murray CJ. in *Meadows v. Minister for Justice* [2010] 2 I.R. 701.

143. Counsel contends that the erroneous justification, upon which the Minister relied on to refuse the application for revocation, warrants the exercise of the court's discretion to quash the decision on substantive grounds and in this regard, counsel cites the judgment of Fennelly J. in Meadows (para.449)

144. It is also argued that insofar as counsel for the respondent put before the court a prototype of a travel document with which the applicant would be furnished upon her deportation to DRC, the applicant can take little comfort from that document and counsel for the applicant urges the court to find that the applicant could not protect herself by simply not revealing her personal history to the DRC authorities as such an approach would be *"unrealistic and unreasonable",* as found by McDermott J. in *B.M. (Eritrea).*

145. It is further submitted that the refusal to revoke the deportation order is tainted by bias by reason of the fact that prior to considering the application for revocation, the respondent had already determined she should not be granted refugee status; that she should be issued with a proposal to deport; that she was not entitled to subsidiary protection and that she should not be granted leave to remain. It is submitted that these circumstances *"invokes the apprehension of the reasonable person"* that the decision to refuse to revoke a deportation order is tainted by objective bias, in accordance with the test set out in *Bula Ltd. v. Tara Mines Ltd. & Ors* [2002] 4IR 412.

The respondent's submissions

146. It is submitted that the analysis conducted by the executive officer was careful and systematic. The applicant's representations were taken into account. He analysed the structure and nature of the Ramos Report and properly concluded that it was compiled by an advocate who had a specific agenda, namely to bring about changes in the procedures employed by the UK BA. He concluded that the report had a limited base, was compiled by activists without input from experts in the field and he had concerns that the report was produced from a subjective rather than an objective perspective. Notwithstanding those conclusions, he did not discount or ignore the report, but rather went on to measure it against other reports, including the 2010 RDC Report furnished by the applicant and against the 2012 UK BA Report sourced by the executive officer himself. In those circumstances, the methodology was exemplary.

147. While counsel for the applicant criticises the UK BA Report as not coming to any specific conclusion, it remains the case that that report is a compilation of information from a variety of sources which the decision-maker was entitled to weigh and thereafter rely on for the reasons set out in the decision.

148. What is urged on the court by counsel for the applicant is that the court should engage in its own weighing exercise in relation to the country of origin material which was before the decision maker, which is not the function of the court in judicial review proceedings. The court's function is to quash the decision if it is established that it is irrational in the sense that it flies in the face of fundamental commonsense and reason. That is the *Meadows* test. That is not the case here, counsel submits, and the mere fact that there are elements in the UK BA Report that support the applicant does not mean that the decision is irrational.

149. The revocation decision sets out the reasons as to why it found that maintaining the existing deportation order would not breach the prohibition on refoulement. It is a long and transparent decision and is not the type of decision which fell foul of the Supreme Court in Meadows.

150. The scope of the court's review in a post-deportation context is well-settled and in this regard counsel refers to *Kouaype v. Minister for Justice* [2005] IEHC 310, *F.R.N. v. Minister for Justice* [2008] IEHC 107, *E.A.I. & Anor. v. Minister for Justice Equality & Law Reform* [2009] IEHC 334 and *J.E. v. Minister for Justice* [2011] 1 I.R. 574.

151. In accordance with the standard of review to be applied to the present case the applicant can only succeed if the decision-maker can be said to have arrived at an irrational decision. The mere fact that counsel for the applicant disagrees with a decision and invites the court to do likewise is not sufficient.

152. Counsel urges the court to adopt the approach of Clark. J. in her judgment on the interlocutory application (*P.B.N. v. Minister for Justice (No. 1)* [2013] IEHC 435) where she upheld the decision-maker's rejection of the Ramos report and his preference for the material contained in the UK BA report.

153. Counsel also urges upon the court to consider as persuasive authority the approach taken in the UK case of *P. & R. v. Secretary of State* [2013] EWHC 3879 (Admin) where Philips J. with regard to a failed asylum seeker had occasion to consider the Ramos Report and the 2012 UKBA Report. In similar vein to Clarke J. in *P.B.N.,* (which was referred to in his judgment), Philips J. held that the UK BA's conclusion as to the "*consensus*" which appeared from the fact finding mission report was justified "*and certainly not irrational".*

154. Finally, it is submitted that it is not clear on what basis the applicant asserts objective bias in the decision making. Different officers made different decisions in relation to the applicant. Thus a reasonable person would not have a reasonable apprehension that she did not get a fair hearing as per the test set by Denham J. in Bula Ltd. v. Tara Mines Ltd.

The applicant's response to the respondent's submissions
155. It is submitted that insofar as counsel for the respondent relies on Kuayope as authority for the restrictive nature of judicial review in the context of a s.3(11) decision it is important to note that the fears expressed in Kuayope had been expressed at the asylum stage. That is not the case with the applicant as she relies on new material in relation to the issue of failed asylum seekers in the DRC, albeit she raised the issue of failed asylum seekers in her subsidiary protection and leave to remain applications.

Considerations
156. I will deal firstly with the applicant's written submissions that in considering the fears expressed by the applicant the court in assessing the material placed before it should if necessary of its own motion obtain up to date material that might shed light on the present situation in the DRC. Reliance is placed on *MJELR v. Rettinger* [2010] IESC 45.

> *157. For the reasons set out by Clark J. in P.B.N., I find that Rettinger has no application to the function which this court is charged with. As to this court's function on judicial review, Clark J. put it thus:*
>
> *"The Court is confined to assessing the legality and reasonableness of the Minister's deportation decisions in accordance with the accepted principles of judicial review. The Court here is decidedly not a primary decision-maker. However, this does not mean that proposed deportees are afforded anything less than a full and rigorous assessment of any asserted risk of treatment contrary to Article 3. It has long been the practice of this Court in deportation proceedings that if new or previously unconsidered evidence is put before the Court which suggests a real risk of treatment contrary to Article 3 ECHR, the Court will recommend that the proceedings should be withdrawn (generally with no order as to costs) and the applicant should bring a fulsome and frank Section 3(11) application, putting all relevant information before the Minister within a specified time frame. This approach has largely resulted in the Minister granting undertakings not to deport pending the determination of a fresh application with a further period of some two or three weeks thereafter to permit the bringing of any challenge to the new decision.. In the limited number of cases where no such undertaking has been forthcoming, the Court has granted an interlocutory junction pending the determination of the fresh application. The proposed deportee's right of access to the Court is thereby protected because if a negative Section 17(7) or Section 3(11) decision issues, he or she has the right to issue fresh proceedings challenging the decision in accordance with the traditional principles of judicial review. Thus, while the Court is limited by the traditional principles of judicial review as to the materials which it may consider in conducting its assessment under Article 3 ECHR, the range of remedies available is sufficient to afford an effective remedy, to ensure that a rigorous analysis of the risk of treatment contrary to Article 3 is undertaken, and to safeguard the foreign national applicant's constitutional right of access to the courts."*

158. In any event, no new material was placed before the court. The challenge centres on the treatment of the material placed before the Minister by the applicant and that sourced by the executive officer.

159. The scope of the court's review of revocation decisions is concisely set out by Cooke J. in *E.A.I. & Anor. v. Minister for Justice Equality & Law Reform* [2009] IEHC 334 where he states:

> *"7. As Clarke J. pointed out in the case of Kouaype v. Minister for Justice, Equality and Law Reform [2005] IEHC 380, the circumstances in which a person refused refugee status can challenge the making of a deportation 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 11(3) 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."*

160. More recently, in B.M. (Eritrea) v. Minister for Justice [2013] IEHC 324 McDermott J. had occasion to review the scope of the court's review in cases such as the present:

> *"41. An application to revoke a deportation order under s. 3(11) of the Immigration Act 1999, usually occurs at the end of an extensive process of case review in the course of which the applicant has failed to secure refugee status. A failed applicant for asylum may apply for subsidiary protection and/or for leave to remain in the state under s. 3 of the Immigration Act 1999, following which a deportation order may be made. At each stage of the process the applicant will have the benefit of a detailed scrutiny of the relevant issues including a fear of persecution, whether there is a risk to the applicant if he is returned to his country of origin notwithstanding his failure to establish such a fear or whether there are other humanitarian reasons why he should be allowed to remain in the state. The issue of non-refoulement will also have been considered before a deportation order is made. Thereafter, an application may be made under the provisions of s. 3(11) of the 1999 Act, to the Minister to revoke or amend the deportation order.*
>
> *42. Hogan J. in Efe & Ors v. the Minister for Justice, Equality and Law Reform and Ors [2011] 2 IR 798, described how s. 3(11) provides a mechanism whereby material facts which post-date the initial deportation decision may be considered by the executive and provide a basis for the reassessment of the decision. This is especially important when new facts affect or pose a risk to the exercise of the applicant's constitutional rights or rights under the European Convention on Human Rights. As stated by Hogan J. the absence of s. 3(11) might be regarded as a failure to vindicate constitutional rights for the purposes of Article 40.3 of the Constitution and a failure to provide an effective remedy under Article 13 of the European Convention on Human Rights. It follows that any consideration of an application under s. 3(11) must concentrate on the new material upon which it is based.*
>
> *43. Consequently, when an application for revocation of a deportation order is made, the nature and scope of the inquiry is defined and constrained to a considerable degree by what has gone before."*

I am satisfied that that is the legal framework in which the present application must be assessed.

161. S. 5(1) of the 1996 Act provides:

> *"A person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.*
>
> *(2) Without prejudice to the generality of subsection (1), a person's freedom shall be regarded as being threatened if, inter alia, in the opinion of the Minister, the person is likely to be subject to a serious assault (including a serious assault of a sexual nature)."*

162. Art. 3 ECHR states:

> *"No one shall be subjected to torture or to inhuman and degrading treatment"*

Since what is at issue for the applicant is the right of protection under s.5 of the 1996 Act and Article 3 ECHR (from which there can be no derogation) the court accepts that on judicial review the decision must be scrutinized for the reasons set out in Meadows v. Minister for Justice [2010] 2 I.R. 701.

163. In Meadows,, Murray CJ states:

> *" It is inherent in the principle of proportionality that where there are grave or serious limitations on the rights and in particular the fundamental rights of individuals as a consequence of an administrative decision the more substantial must be the countervailing considerations that justify it." (Para.62)*

164. In her judgment in the same case, Denham J. described the basis upon which an administrative decision affecting rights may be impugned:

> *".. the court should have regard to the implied constitutional limitation of jurisdiction of all decision makers which affects rights, and whether the effect on the rights of the applicant would be so disproportionate as to justify the court in setting it aside on the ground of manifest unreasonableness."*

It is thus well settled jurisprudence that the potential interference with fundamental human rights, the greater the justification necessary for the reasoning by a decision- maker. That is the upshot of Meadows and is in accordance with the dictum of Hogan J. in *Efe & Ors. v. Minister for Justice* [2011] 2 I.R. 798 and indeed accords with the view expressed by McDermott J. in *B.M. (Eritrea).*

165. In *FRN v Minister for Justice* [2008] IEHC 107, Charlton J. set out the appropriate level of scrutiny in which a court must engage in order to see if the decision is a rational one fairly supported by country of origin information:

> *"The reality of the multiplicity of written decisions on judicial review on refugee matters emanating from the High Court displays strong evidence for the proposition that judges, in considering the actions of the statutory bodies under the Refugee Act 1996, exercise a heightened level of scrutiny when compared to other forms of judicial review that concerns administrative decision makers. I do not think that it would be fair to the principle of the primary importance of human rights merely to apply in judicial review applications of a determination by the Minister a test as to whether his determination as to the situation in the country of origin of the applicant, and as to whether protection was reasonably available within that territory, by asking whether that decision flew in the face of fundamental reason and common sense; the ordinary test for overturning decisions of fact in judicial review of administrative or quasi-judicial tribunals. Rather, it seems to me, that a decision on the country of origin of an applicant and the availability of protection within its territory should be scrutinized if a judicial review is taken and the decision should only stand if it be a rational one that is fairly supported by the country of origin information..."*

166. As a matter of first principles, the Minister was obliged to consider the reasons put forward for the request to revoke and satisfy herself that since the deportation order there was no change of conditions in the country of origin which would attract the application of the prohibition on refoulement or give rise to the absolute protection guaranteed by Art. 3 ECHR.

167. In the present case, the applicant asserted such conditions and relied in large part on the Ramos report. There is no question but that the executive officer embarked upon a consideration of the new material. However, the argument advanced on behalf of the applicant is that he unfairly and irrationally discounted the Ramos report. This is the first issue to be determined.

168. As he was entitled to do, the consideration of file author looked firstly to the provenance of the report, its stated purpose and its sources. Noting that the information in the report came from a limited base, he had regard to certain guidelines as to the reliability of a source in a specific context. He referred to the factors which must be considered when analysing the reliability of a source in a specific context and he quoted from ACCORD which states:

> "No source provides complete and fully objective information as their scope and focus of reporting will be influenced by their mandate or mission. Therefore COI researchers and users should not rely on one single source, but consult many different sources, and different types of sources... in order to achieve the most complete and balanced picture of a country situation possible. They should be aware of the political and ideological context in which a source operates, their mandate and reporting methodology and the intention behind their publications, and assess the information provided accordingly"

He quoted from the principles set out by the UNHCR as to source assessment, as follows:

> "In general, to evaluate any particular source it is important to ascertain:
>
> (i) Who produced the information and for what purposes…;
>
> (ii) Whether the information producer is independent and impartial;
>
> (iii) Whether the information producer has established knowledge;
>
> (iv) Whether the information produced is couched in a suitable tone (objective rather than subjective perspective, no overstatements, etc.);
>
> (v) Whether a scientific methodology has been applied and whether the process has been transparent, or whether the source is overtly judgmental."

Finally, information sources should be regularly re-evaluated as changing circumstances can affect the accuracy and reliability of information."

I am satisfied that the executive officer properly brought to bear upon his consideration of the reliability of the Ramos report the methodology advocated by ACCORD and the UNHCR. Those organisations stress in particular the unreliability of adherence to a single source in compiling country of origin information and the necessity to consult with a number of different types of sources. I am satisfied that it was reasonable and rational for the author of the consideration of file to have regard to these standards.

169. His conclusion that the Ramos report did not meet those standards was reached after the requisite analysis of the report which I am satisfied was undertaken by the various references to the report in the decision. In essence, he concluded that the report was not reliable COI. I can find no basis upon which to impugn that finding or to depart from the conclusions reached by Clark J. on the reliability of the report as set out in *P.B.N v Min for Justice and Equality (No. 1)* [2013] IEHC 435. She stated:

> *"The Court is further satisfied that it was reasonable for the executive officer who analysed the Section 3(11) application to question the reliability of the Unsafe Return report. It is beyond doubt that the author acted with a genuine sense of concern for and empathy with persons deported from the Tees Valley area where the Justice First charity is based.1 However the report is confusingly presented and persistently confounds the legal concepts of refoulement and involuntary return. Further, it clearly is a vehicle for a particular point of view. The introductory paragraphs state that a group of ten asylum seekers and their nine children had established themselves in the Tees Valley and their removal was a matter of distress to those living in the area. After hearing from a number of the returnees, a group of concerned citizens organised for interviews to take place in the DRC in order to gather evidence of the ill-treatment of returnees. Thus the group was seeking evidence to support a particular argument rather than investigating the situation from an objective standpoint. The report itself states that it is designed to support an advocacy campaign (see p. 10, "This report aims to demonstrate the need for …") and several pages are dedicated to chronicling the lobbying efforts of the charity and associated grounds. The report displays neither objectivity nor neutrality……While it refers to selected passages from COI reports which, it says, tend to support its conclusions, it does not give any indication that its investigations were carried out in accordance with independent guidelines, terms of reference or autonomous supervision.*
>
> *40. While there is nothing to prevent an advocate group from compiling documents favourable to its objectives, it is clear that the weight to be attached to documents of this nature cannot compare with that attaching to objective reports prepared under the aegis of the UNHCR which serve to inform rather than to persuade, or by other well-respected organisations such as Amnesty International, Human Rights Watch or Médecins sans Frontières which have a proven record of objectivity."*

170. Despite the reservations expressed in the Revocation Decision about the Ramos report's limited base, the lack of input from acknowledged experts in the field and the fact that it was compiled by activists, the fears raised by the applicant were not discarded. Nor could they be. Rather, they were tested against other available country of origin information. This to my mind was a necessary and proper approach.

171. A comparison of Ramos with the information contained in the RDC report of 10th July, 2010 which the applicant had also submitted (erroneously referred to as 10 June in the decision) was then embarked on. The latter was preferred to Ramos for reasons which are set out in the decision, namely that the RDC report was "an aggregation of the views of experts with direct knowledge of conditions in the DRC" and found to have been produced in "an independent and impartial manner" and that's its methodology had been applied "transparently". The information in the RDC report was of course of some vintage, a factor properly noted by the executive officer particularly in the context of the obligation imposed by s. 5 of the Refugee Act and Art.3 ECHR.

172. The Ramos report was next tested against the UK BA report of November 2012, information which came to hand following the application to revoke the deportation order.

173. The first thing to be observed is that before addressing its substantive content, in accordance with the guidelines set down by ACCORD and the UNHCR the executive officer firstly subjected the report to the same critique regarding its methodology and information-gathering processes as had been applied to Ramos and the RDC information and was satisfied that the report met the guidelines set out by the UNHCR and ACCORD. Notwithstanding that there are sources quoted in the UK BA report which could undoubtedly be said to have a degree of self-interest and thus to lack impartiality and objectivity, the sheer volume of sources (identified earlier in this Judgment) quoted in the report satisfies me that the conclusion that the report met the UNHCR and ACCORD guidelines was reasonable and rational.

174. Ultimately, therefore the executive officer preferred the UK BA report over Ramos as the basis upon which to assess the fears asserted by the applicant. Given his stated concerns as regards the latter report, I find no basis upon which to deem that preference irrational. There is no merit therefore in the argument that the weight duly placed on the UK BA report compared to the information furnished by the applicant was irrational.

175. I turn now to the applicant's criticisms both of the UK BA report itself and the manner in which conflicting information contained in that report was dealt with, or not, in the consideration of file.

176. Despite arguments canvassed by the respondent that the applicant should not be permitted to put the UK BA report before the court since the applicant's counsel effectively acknowledged that the executive officer gave a fair summary of it by including those portions of the report that favoured the claim put forward by the applicant, the court was satisfied that the entire of the UK BA report should be available for the court's scrutiny given that it was the material relied on by the decision-maker, and for the purpose of ascertaining whether there is merit the applicant's contention that there was unfair and or irrational preferment of some aspects of the report over others which might be considered favourable to the applicant's claim.

177. Counsel for the applicant argues that the UK BA report does no more than quote from a variety of sources (some of which corroborate the applicant's claims), yet the Minister did not come to a fixed conclusion on the report. It is contended that there is no sense in the report of what view the UK BA itself ultimately holds with regard to failed asylum seekers in the DRC.

178. Firstly, while I accept that the report itself does not arrive at an ultimate conclusion and comprises disparate views and opinions, I do not see that as fatal to the approach which the executive officer adopted. The sometimes conflicting information was acknowledged. Ultimately, a consensus on discrete issues was arrived at by the Minister. Subject to the proviso that her consensus must be arrived at fairly and rationally and at all times bearing in mind that the matters put in issue by the applicant bear on her fundamental human rights, I can find no fault with the respondent's decision to access the information produced by the UK BA fact finding mission.

179. Furthermore, counsel asserts that it is clear that some of the sources quoted in the report are advocacy groups, yet the Ramos report was discounted on the ground that its author was an advocate. While it is the case that some of the sources for the report could be classed as advocacy groups, the sheer number of organisations quoted in the report which include non advocacy bodies, international organisations and embassies minimises the relevance of this particular argument.

180. The salient issue is whether, based on the analysis of the information in the report, the conclusions reached by the Minister, namely the class of returnees likely to be arrested, detained or otherwise mistreated upon arrival in the DRC, and that the applicant's status as a failed asylum seeker of itself would not lead to arrest, detention, mistreatment or worse, are within the bounds of rationality, bearing in mind the Meadows test as to how the rationality of a decision such as the present has to be assessed.

181. It is apt to recite some of the specific criticisms levelled at the Minister's reliance on UKBA report by counsel for the applicant.

182. Counsel submits that notwithstanding the deficiencies in the report, it is clear from the report itself that a considerable amount of information suggests that there are problems for failed asylum seekers in the DRC, as particularly evident in sections 4 and 5 of the report. Although largely acknowledging that the executive officer sets out those problems in the decision, counsel contends that the difficulty lies in the decision-maker's rationale, particularly in light of the failure in the decision to acknowledge that many of the organizations whose views were preferred did not actually monitor returnees at the airport. In this regard, counsel pointed to section 3 of the report and the myriad admissions that returnees were not monitored on arrival.

183. In this regard, he also states that the UN, who monitors the whole spectrum of human rights in DRC, tends only to focus "on the most serious violations, often associated with ongoing conflict in Eastern DRC".

184. It is asserted that the executive officer appears to come to a conclusion in respect of the applicant based on what the opinions of a majority of the organisations referred to in the report when he concludes that "there would not be a serious threat of mistreatment to returnees, beyond some incidents of extortion and/or theft by corrupt airport officials". It is submitted that he does not acknowledge the extent of the information in the report which is supportive of the applicant. While he quotes some of it he does not make clear why he is not acknowledging it. Alternatively, he discounts it. In essence, counsel contends that the executive officer does not address the material in the report which states that failed asylum seekers are targeted in the DRC. The case was also made that the UK BA report found that returnees were detained by the DRC authorities, which was not inconsistent with the findings in the Ramos report.

185. In aid of his submissions, counsel pointed to a number of instances in the UK BA report which, it is asserted, supported the findings in the Ramos report.

186. He asserts that while the UK BA report quoted the British Embassy being "*only aware of unsubstantiated reports of returnees being detained"*, it also quoted the contrary view held by Toges Noires. In this regard, I note that both views are quoted in the decision. Counsel points to OSD as stating that political activists would be detained. It is submitted that the applicant's circumstances, based on her original claim of persecution on grounds of political opinion, would put her into this class of returnee.

187. I do not accept the argument that the conclusion that the applicant did not fall into this category of returnee should be impugned. Her claim before the Tribunal for refugee status on the basis of political opinion was rejected on credibility grounds. Given that the Minister expressly concluded that the applicant was not at risk as she did not have a political profile, the court is satisfied that the Minister had regard to the claims made to the Tribunal in this regard and, in her own analysis, found no reason to come to a contrary conclusion to that of the Tribunal. I note that there was no factual circumstance set out in the revocation application which could reasonably have led to the conclusion that the applicant would be mistreated or detained on grounds of political activism. Nor is there any averment in her affidavits before this court that she was or is engaged in political activism that the Minister should have considered.

188. Counsel for the applicant also makes the point that the UK BA report quotes Renadhoc and Les Amis de Nelson Mandela as stating that all returnees are ill treated, a view shared by ASADHO. He submits that insofar as the executive officer concluded that "being identified as a failed asylum seeker may give rise to some suspicion in the minds of airport officials", that was not a correct interpretation of the UKBA report given that it actively quoted from some organisations who report that returnees are actively detained and mistreated.

189. Counsel points to one source in the report as stating that all returnees are taken to the DGM provincial prison for "*inquiry reasons"* and that a representative of Les Amis de Nelson Mandela advised that "*in order to look good/improve its image the ANR is known to release people, but then recapture them again and then these people disappear they are not released again…*

> *The organisation is aware of ill-treatment of returnees at the airport, it often happens. The DGM and ANR will search people's belongings to see if they are linked to the European combatants and also to see if they have any family in DRC. Those without family are at risk of disappearing."*

190. He also points to the self-interest of some of the sources quoted in the report, for example the Congolese police, hardly a reliable source, counsel submits. He asserts that some of the organisations referred to in the report have connections to the security services. In this regard the report itself noted that the DGM Number 1 of Protocol is a member of Église du Christ au Congo. He submits that, as such, certain observations in the report must be viewed with a jaundiced eye. While I note the criticism of this organisation, I do not think it sufficiently persuasive to override the information provided by other independent bodies in the UK BA report, namely that failed asylum seekers per se (absent historic political connections in the DRC or political activity abroad) are not under threat of serious harm in the DRC. In particular, the French Embassy who monitors returnees at the airport says returnees are not mistreated at the airport upon return and the Embassy was not aware of any substantiated cases of returnees being ill-treated on arrival.

191. Counsel asserts that the report also notes that a human rights organisation in the DRC had stated that the immigration authorities were able to identify returning failed asylum seekers. Counsel also referred to the following quotation from Les Amis de Nelson Mandela: *"Those who make asylum applications abroad are perceived by the authorities as traitors. The fact of applying for asylum shows a person is running away from them. When those people are sent back here, the authorities are very happy."* It is undoubtedly the case that returnees of whatever ilk may be confronted by corrupt officials and demands for bribes. That to my mind would not reach either a s.5 or Art.3 threshold. Counsel also points to the UK BA report which documents that *"[p]eople who claim asylum whether in the UK or other western European countries put the government in a bad light so the image Congolese take to other countries is not seen well here by the government, but again it is the person's profile that counts not where the person returns from."* I note that this observation is quoted in the decision and, again, the Minister had already taken account of the fact that the applicant did not have a political profile such as might attract adverse attention or treatment from the DRC authorities.

192. It is further submitted that the decision-maker failed to note that a representative of Les Amis de Nelson Mandela also advised that "*[t]hose who return from the UK are more ill-treated than others. It is known there is more liberty of expression and stronger opposition to Kabila in the UK than in Belgium or France. It is very dangerous to send people back from the UK because it is known that Congolese in the UK are against the government. The group of 'combatants' started in the UK."*

193. I find that the executive officer notes this by his reference to other sources who relay similar information but again he rationally and reasonably finds that the preponderance of opinion is that it is political activists who are more likely to be targeted. Earlier he found that the applicant had not established that she had an anti-Government profile that would render her in danger of being detained.

194. Insofar as one source found that those without family were at risk of disappearing, it was noted the applicant did not fall into the category of those at risk of disappearing as she had family in Kinshasa. I can find no basis upon which to impugn either conclusion given the broad consensus reached by the Minister that returnees without a particular political or anti-government profile will not be detained.

195. As regards the issue of the return of failed asylum seekers per se, notwithstanding the comparative analysis conducted by counsel for the applicant between the contents of the UK BA report and the decision in aid of the argument that the Minister unfairly preferred aspects of the UK BA report against others aspects in that same report which were supportive of the Ramos report findings, I am not persuaded that the conclusion that returned asylum seekers per se are not at risk of serious harm or loss of freedom can be said to have been either unfairly or irrationally arrived at.

196. To my mind, the decision gives a fair reflection of the broad spectrum of opinion on the issue of failed asylum seekers per se returned to the DRC. The Minister formed a view based on the totality of the information which she was entitled to do. Of course, it goes without saying that issues which may attract the absolute prohibitions in s. 5 and Art. 3 protection should not be decided simply on the basis that it was appropriate to accept what the majority of organisations expressed in the report unless the Minister was satisfied with the quality of the reportage and satisfied herself that on the basis of that reportage the applicant's circumstances as a failed asylum seeker per se would not lead to a risk of serious harm or detention in the DRC. It seems to me that whatever its limitations attaching to the UK BA report, the consensus from several (neutral) providers of information to the UK BA fact finding mission was that the risk of serious harm or threat to freedom to returnees such as would attract the prohibition on refoulement or Art. 3 protection was to those with a prior criminal history in the DRC, political activists against the authorities and "combatants" and not returned asylum seekers per se. I will return to the issue of criminality and prior criminal history.

197. Thus, insofar as the Minister concluded that the applicant's status as a failed asylum seeker per se did not put her at risk and that she did not have "a contagious disease", was not "perceived to be against the government", did not fit the political profile of those likely to be "black listed" and was not of an ethnicity likely to put her in danger is concerned, I cannot find that any irrationality attaches to those individual conclusions.

198. It is also argued in the course of these proceedings that the applicant can take little comfort from the fact that the travel document upon which she will be sent back to the DRC will not actually identify her as a failed asylum seeker. The type of document with which the applicant will be provided, if returned, has been referred to earlier in this judgment. Given the Minister's finding, which this court upholds, that returnees with a laissez passer will not encounter mistreatment (other than low level extortion or theft) I do not find that a persuasive argument has been made out on this issue.

199. I turn now to the finding that the applicant was not "wanted in connection with some crime committed in, or criminal investigation ongoing in, the DRC". I address this in light of the applicant's counsel's submission that given that the applicant had used "forged" documents to get to Ireland this may bode badly for her, as reflected in the UK BA report, and he asserts that this

should have been addressed by the Minister. It is further submitted that the applicant by virtue of having used "forged documents" to leave the DRC may well fall into the category of returnees referred to by Toges Noires who "may experience problems".

200. Section 2 of the UK BA report addresses the issue of "*Penalties for leaving the DRC on false/invalid passport"* and the report quotes a number of sources on the position of Congolese nationals who attempted to or used false or forged documents to exit the DRC.

201. In summary, the information provided was as follows:

The Swiss Federal Office for Migration (who had been shown full crates of forged/false passports seized by DGM) opined that nothing would happen to those who had false documents seized at Ndjili airport, the seizing of the documents and the flight ticket being deemed sufficient "punishment". A Congolese human rights organisation stated that those who inter alia "used forged documents" "may experience problems". ASADHO were quoted as stating that returnees are questioned and sometimes detained for this. Eglise du Christ au Congo had no information on penalties for leaving the DRC on a false or invalid passport.

The British Embassy reported that a number of British citizens had been arrested because their visas expired- but were just held at the airport. A person arrested for a visa offence subsequently found to be the subject of an outstanding arrest warrant and in whose house a cache of weapons had been found and who had connections to a rebel group was detained for nine months. A human rights organisation in the DRC made reference to Congolese penal law, which provides for penalties for having such documents *"even imprisonment".* Toges Noires stated that there were penalties for leaving the DRC on a fake passport. The French Embassy stated that leaving on a fake or invalid passport is in theory a crime punishable by detention but not in practice and that *"in the DRC most documents are fake".* IOM stated that people could be detained but was unaware of how long or what would happen after detention. A refugee had had difficulty at the airport and was delayed, missing his flight, because neither his passport nor his visa was stamped. He was not detained.

A representative of the Inspectorate Generale of Justice stated that travelling on a false passport was illegal with a sentence of five years. The Belgian Immigration Office stated there were no penalties for leaving DRC on a false or invalid passport.

202. The diverse views as to what might happen to a Congolese national found with a fake or forged passport or suspected by the Congolese authorities to have such or to have left the country with such a passport was not specifically addressed by the executive officer. The question is whether this impugns the overall conclusion that the applicant is not at risk in the DRC. The absence of any direct submissions by the applicant to the Minister on the issue is a factor. However, given the absolute obligations on the Minister under s.5 and Art.3 ECHR, and in circumstances where as appears from the information before the Minister the penal code in the DRC provides for a prison sentence, I have viewed the matter with those obligations in mind. Notwithstanding that the court has upheld discrete findings in the decision that country of origin information does not support the applicant's claim to be at risk as a returned asylum seeker per se, I am persuaded that there was an obligation to address the likelihood of the applicant being asked by the DRC authorities how she left the DRC given that she would be returning on a lassez passer. Her entry on a lassez passer of itself is not the issue. The issue is her exit from the DRC. The country of origin information has conflicting views as to what may happen to a person who may have used a false passport to exit the DRC.

203. The document said by the applicant to have been used by her to travel to this State was a Belgian passport with a "lookalike photo" and a different name and was said to have been obtained in Congo Brazzville. In her s. 11 interview the applicant said that it had been taken by the agent who assisted her in her travels, apparently after she presented it at Dublin airport. Her claim to have utilised a Belgian passport was found by the RAT not to be credible for reasons set out in the Tribunal's decision. The Tribunal's findings were not challenged. Subsequently, the issue of the applicant having been the procurer or bearer of a false or forged document was not put forward as a basis for the application for subsidiary protection or leave to remain, or in the application to revoke the deportation order.

204. The applicant's prior asylum history and immigration history was before the Minister in the revocation application including her claim for asylum on grounds of political opinion which was disbelieved at the Tribunal stage. As I have said, in the present decision, the Minister apparently concurred again with the Tribunal's conclusion that the political claim had no basis.

205. Notwithstanding that the applicant's claim to have entered this State on a fake passport was disbelieved by the Tribunal (and apparently by the Minister in the deportation decision), the Minister was nonetheless on enquiry that there was at least a possibility that the applicant could be subjected to questioning on arrival in the DRC as to exactly what documents she used to exit the country, in circumstances where there was information in the UK BA report that criminal sanctions with a prison sentence was provided for in Congolese law for the use of false document. In light of this COI it seems to me that the Minister at least had the obligation to form a view as to whether upon her return to the DRC the applicant might be questioned by the DRC authorities about how and by means of what documents she left the DRC and to consider, if that was the case, whether she could be at risk of serious harm or loss of freedom as a result and whether she could be held in conditions that might breach Art. 3 ECHR. That consideration would necessarily depend on the Minister's assessment of the objective risk based on the views expressed in the UK BA report, an exercise which is not evident on the face of the decision

206. It is not for the court to step into the shoes of the decision-maker and assess whether (even accepting that she did not leave on a Belgian document) the applicant was someone who was likely to have left the DRC on a false document or to assess the risk to the applicant based on available country of origin information, or indeed even if there is found to be an objective risk (and the court does not pronounce upon that-that being a matter for the decision-maker) whether the applicant was likely to be at risk. These weighing exercises were required to be carried by the Minister.

207. As such, the present decision falls to be quashed not because of what it contains (all of which has been upheld by the court) but rather for what it is missing, namely a consideration of the discrete issue of whether the applicant was likely to have held or used a fake passport or might be suspected of doing so by the DRC authorities, the likelihood of this becoming an issue on her return, and if it were to become an issue the likelihood of any sanction that might attach attracting the application of a s.5 prohibition or a breach of Art 3.

208. I therefore quash the revocation decision but it must be emphasised only to the extent that it failed to consider the above issue in its consideration under s.5 refoulement and Art. 3. I find precedent for this approach in the decision of Cooke J. in *M.A.M.A. v. RAT* [2011] (paras.24-25) where he states:

> *"It is therefore appropriate and necessary to quash the appeal decision but to the extent only that it failed to assess and determine that possibility of prospective risk of persecution. No flaw is established in any other aspect of the*

decision or in the way in which the decision was reached….[T]he decision here falls to be quashed not because of something it contains but for what is missing namely the consideration of the prospective risk."

Alleged Bias

209. By the time of the revocation application, the Minister had determined: that the applicant not be declared a refugee; that she should be issued with a proposal to deport; that she was not entitled to subsidiary protection; and that she should not be granted leave to remain. Accordingly, it is submitted on behalf of the applicant that the Minister cannot be regarded as impartial in the context of the revocation application in view of the myriad prior adverse decisions. It is submitted that the refusal to revoke the decision is tainted by objective bias and thereby invalid. I note however that this issue was not pursued in oral submissions with any degree of vigour.

210. The test for objective bias is set out by Denham J. in *Bula Ltd. V. Tara Mines*, as follows:

> *"…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."*

211. I am not persuaded that the challenge to the decision on this ground (7) has been made out. The applicant invoked the s. 3(11) process. Her file and the materials upon which she relied were reviewed by officials in the Minister's department who were not involved in the prior decision. Furthermore, there is every indication on the face of the decision that the matter was approached from the perspective asserted by the applicant, namely that "there was a significant change in circumstances since her Deportation order was made" and a review on that basis duly ensued. I do not therefore find that "*the apprehension of the reasonable person was invoked".*

Summary

212. The relief sought in the Notice of Motion is granted to the extent that the decision is quashed to the extent that in the s.5 and Art.3 considerations it failed to contain a reasoned assessment of what, if any, risk is posed to the applicant if deported as someone who claims to have exited the DRC on a false passport and the matter is thus remitted for reconsideration on this discrete basis for a supplemental decision to remedy the omission, without obligation to re-open the other considerations as set out in the Revocation Decision.