Neutral Citation [2016] IEHC 425

THE HIGH COURT

JUDICIAL REVIEW

[2015] No. 378 JR

BETWEEN

A. N. K.

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 25th day of July, 2016

1. The applicant applies for leave to seek judicial review of a decision of 12th June, 2015, made by the respondent refusing to revoke a deportation order made on 8th March, 2011.

2. The applicant has exhibited the examination of file under s. 3(11) of the Immigration Act, 1999, which records the decision making process in respect of the revocation application. That text records facts which form the basis of the following description of the relevant facts.

3. The applicant was born in 1982 and arrived in the State in August, 2008, and sought asylum. His asylum application was rejected at first instance and on appeal. A subsequent application for subsidiary protection was unsuccessful and the Minister made a deportation order on 8th March, 2011. Following further representations the order was affirmed on 3rd October, 2011.

4. Application to re-enter the asylum system was refused ultimately by letter of 19th March, 2013. In that application it was contended that a document entitled "Unsafe return refoulement of Congolese asylum seekers" supported the claim that it was unsafe to return their asylum seekers to the Democratic Republic of Congo.

5. Litigation ensued in relation to the unsuccessful application to re-enter the asylum process. Those proceedings were struck out and the Minister undertook to withdraw the decision of 7th November, 2013, refusing the applicant's request for revocation of his deportation order and facilitating new representations on the revocation application. Further submissions were made in respect of the revocation application on 28th February, 2015, which asserted that returned asylum seekers faced the risk of persecution.

6. It was found that it had not been demonstrated that any new elements or findings had arisen or been presented that would warrant A.N.K.'s readmission to the protection process. Notification issued subsequently that the application for readmission had been refused. The separate request to the Minister under Section 3(11), Immigration Act, 1999, as amended – 28/04/2015 was addressed as follows:-

> "As mentioned above, reliance was placed by Burns Kelly Corrigan on the original Unsafe Return Report by Catherine Ramos, of an organisation called Justice First, published in November, 2011 (cited by them in the 3(11) application of 21/11/2012) and also her follow-up report published in October 2013, written in response to criticism of the first document by the UK Home Office. As summarised up by Burns Kelly Corrigan, these reports concluded that, *inter alia*:
>
> • Since 2006, the UKBA hypothesis that it is safe to return people is unsound.
>
> • There is no effective monitoring of those refouled and unsuccessful asylum seekers fall outside the mandate of the UNHCR. NGOs and the UN cannot access the airport and are not able to 'witness.' arrests.
>
> • When inhuman and degrading treatment has been reported to NGOs, this information has not been acted on nor shared and is being used for 'information' only. 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. This belief is reinforced by the death of Floribert Chebeya, President of Voix des San Voix.
>
> • A policy exists to punish asylum seekers suspected of complaining about ill-treatment and the lack of human rights in the DRC, as they are betraying their country and the President.
>
> • Travel documents identity failed asylum seekers and therefore places them at further risk on return … (being) suspected of having left on a false passport, an imprisonable offence.
>
> • Reporting by returnees of instances of inhuman and degrading treatment to the British Embassy is unrealistic. The Embassy is not easily accessible to people without money or transport. At the end of the road where the Embassy is situated there is a manner military road block. Congolese G4S are on duty at the Embassy's reception windows.
>
> Unsafe Return Refoulement of Congolese Asylum Seekers. A Report compiled by Catherine Ramos (24/11/2011)
>
> http://justicefirst.org.uk/wp-content/uploads/UNSAFE-RETURN-DECEMBER-5TH-2011.pdf
>
> Unsafe Return II – Compiled by Catherine Ramos (03/10/2013)
>
> http://justicefirst.org.uk/wp-content/uploads/UNSAFE-RETURNS-II-October-3-14-50.pdf

As additional support for the above points, Burns Kelly Corrigan cite two documents researched by the Refugee Documentation Centre, a UK Home Office DRC country of origin information report (09/03/2012) and a report entitled *'Freedom from Fear': The treatment of refused Congolese Asylum seekers (04/06/2012).*

In its document entitled *'Democratic Republic of Congo (DRC) POLICY BULLETIN 2/2014',* referring, in the first instance to the 2011 report and then the 2013 report, the UK Home Office states that *'The report was based on investigations undertaken by Ms. Ramos, including visits to Kinshasa, of the experiences of 14 enforced and three voluntary Congolese returnees in the period 2006 to 2011. It alleges that enforced and voluntary returnees to DRC are routinely detained, raped, tortured and generally serious victimised on the grounds that they have, in seeking asylum, betrayed their country'*

However, the Home Office goes on to state:

'The 'Unsafe Return [1]' report was considered and its recommendations addressed in the DRC Country Policy Bulletin 1/2012 published November 2012 (CPB 1/2012). The bulletin concluded that the report, when considered in the totality of country information, did not demonstrate that FAS per se were at risk of ill treatment on return to the DRC and therefore did not support the report's recommendation that the Home Office needed to revise its policy on returns to the DRC.'

The policy Bulletin notes that *'On 8 October 2013 Justice First published a follow up report to "Unsafe Return [1]", entitled: "Unsafe Report 2 Report". On its web site Justice First describes this report as "The Unsafe Return 2 " updates the original report by Catherine Ramos, which documents the post return experience of 17 Congolese men and women who were forcibly removed to DR Congo from the UK between 2006-2011. Eleven of these were clients of Justice First."*

The report refers to anonymous allegations of mistreatment and consequently it has not been possible to verify the identities of those making the claims, nor to establish any substance to these. This anonymous approach for allegations of mistreatment was criticised in the country guidance case of BK and in other country CG cases.'

The Policy Bulletin states that:

"The Home Office has considered the Unsafe Return 2 report and concluded that it provides no new evidence. It has the same flaws as the original Unsafe Return report, as found by the High Courts of England and Wales (7.3.1).

The author has no experience or training in the subject areas which she is commenting on and has approached the issue from an emotive basis, with no attention to due reporting techniques. The author has accepted the stories from applicants/returnees, their families and lawyers without validating the evidence to support their allegations. She does not accept the findings in the country guidance case for the DRC of BK (Democratic Republic of Congo) v. Secretary of State for the Home Department [2008] EWCA Civ. 1322 (03 December 2008) that "In all but one case those whose asylum claims have been traced – disclose that they were persons whose credibility about past treatment was rejected by adjudicators", [First Tier judge of the Immigration and Asylum Chamber] (para. 381) and "They [failed asylum seekers] have a vested interest in claiming that they were mistreated on return" (paragraph 383)."

Home Office – Democratic Republic of Congo (DRC) POLICY BULLETIN 2/2014
http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/366714/DRC_PolicyBulletin_14_10_22_final.pdf

In *BM and Others (returnees and non-criminals)* (CG) [2015] UKUT 293, a case heard by the UK Upper Tribunal (published on 02/06/2015), which involved five DRC nationals appealing against deportation to their country of origin, it was found at para. 76 that:

> 76. Fundamentally, there is no substantiated allegation of arbitrary arrest or ill treatment of any DRC national who is a failed asylum seeker or a foreign national offender returning to his or her country or origin. We add that there is no suggestion, direct or inferential, that some or all of these agencies are, for whatever reason, incapable of providing concrete evidence of this kind. Moreover, insofar as the evidence of any NGO supports superficially any of the Appellants' cases, we must not overlook that it emanates from organisations who are unlikely to have an entire neutral or unbiased agenda, having regard to the realities of government and politics in the DRC. To this we add that such evidence is undermined and contradicted by more recent evidence to which we propose to attach substantial weight, particularly that considered in [37]-[43] above. Where there are conflicts between the two broad competing bodies of evidence, we have no hesitation in preferring the latter.

Paragraphs 37-43 refer to:

UKBA COI Bulletin, February, 2013:

> 37. In February 2013 UKBA published the "*Bulletin: Statistics and Information on the Treatment of Returns (to Kinshasa)*". This is a short report containing data relating to the return of DRC nationals to their country of origin from certain western European states, Canada and Australia. It draws on, *inter alia,* information provided by the Inter Governmental Conference on Migration, Asylum and Refugees ("IGC"). This organisation is an amalgam of 17 participating states, the UNHCR, the IOM and the European Commission. The data relates to the period 2009-2012 and was collated by the IGC in its survey of April 2012. Eleven of the participating states reported that they were unaware of any reports or allegations that voluntary or forced returnees had *"faced difficulties and/or been mistreated"* upon returning to Kinshasa. The report records that, pursuant to inter governmental agreement, the emergency travel document ("ETA") issued by the DRC Embassy in the transmitting state is acceptable to the DRC authorities. Furthermore, the United Kingdom does not disclose whether those returning are foreign national offenders or unsuccessful asylum claimants. Active monitoring by British Embassy officials at Kinshasa Airport had disclosed nothing of an untoward nature.
>
> 38. The COI bulleting also documents information provided by AI (see [24]-[28] *supra*). This information confirmed that AI does not have an office in DRC and, further, is in possession of no specific information about the ill treatment of returned DRC nationals. The researcher was aware of the allegations of ill treatment contained in the JF Report (noted in [34] above). There is a brief reference to UNHCR:
>
> *"Officials should note that the UNHCR supports the repatriation of 'refugees' to the DRC predominantly*

from neighbouring African countries, not western Europe."

It also notes the information provided by HRW that this organisation, due to resource constraints, had not been monitoring the treatment of returned DRC nationals. Finally, the report attaches a letter from the British Embassy in Kinshasa documenting the unremarkable events at the airport following the return of three "*enforced returnees*" from the United Kingdom.

UKBA Country Policy Bulleting Number 2, 2014

39. In October 2014 the Home Office published "*Democratic Republic of Congo (DRC) Policy Bulletin 2/2014" ("the Bulletin").* The purpose of this publication is expressed in the following terms:

> "… To update the policy of the Home Office on returns to the [DRC] in light of the judgment in *R v. SSHD, ex parte P (DRC)* and *R v. SSHD ex parte R (DRC)* in December 2013 and the further information referred to in this document."
>
> This report further states that it provides "*up to date policy guidance*", superseding the February 2014 report. It contains some of the most recent information evidence of its kind available to this Tribunal.

40. The Bulletin documents that various European and other states continue to return DRC nationals to their country of origin. It contains the following summary:

> *"These countries stated that they have no evidence that returnees are mistreated solely on the ground that they are returnees, or because of where they have travelled from. However, returnees might be questioned and there may be a short period of detention as part of normal immigration controls."*

It continues:

> *"The information from IGC states also noted that on arrival returnees to the DRC, as with other travellers, might be subject to harassment, including attempts at extortion, but there is no evidence of any serious mistreatment."*

["IGC" denotes Inter Governmental Conference, an EU agency.]

And in the next passage:

> *"The information provided by Belgium through the IGC and to the DRC fact finding mission of June 2012 is especially important as this is the former colonial power for DRC, with continuing strong links to the country. The Belgium immigration authorities have returned significant numbers of Congolese FAS, have had allegations of mistreatment of returns which have been investigated and no substance to the claims have [sic] been found."*

This bulletin further contends, based on the evidence provided, that foreign national offenders returning to the DRC are not at risk *qua* this status and that those returning arouse the interest of the DRC authorities only if they are suspected of criminality in DRC or are the subject of an unexecuted arrest warrant there.

41. As regard the JF report of 2011, the Home Office maintains its earlier stance, summarised thus:

> *"… The report, when considered in the totality of country information, did not demonstrate that FAS per se were at risk of ill treatment on return to the DRC and therefore did not support the report's recommendation that the Home Office needed to revise its policy on returns to the DRC."*
>
> Annexed to the report are the various requests for information addressed to the participating states and their responses. These disclose nothing untoward.

42. The Bulletin also documents the British High Commission of Nairobi's record of its meeting with the Director of the DGM in January 2014. In response to specific questions, the Directors stated, *inter alia*:

> (a) As the DGM is concerned only with nationality and identity, the questioning of arriving returnees was confined accordingly.
>
> (b) There are no recorded cases of the DGM detaining any returning DRC nationals.
>
> (c) There is no record of any returning DRC national who had a warrant outstanding in the country.
>
> (d) Any criminal conviction outside DRC is irrelevant: this is of no interest to DGM.
>
> (e) The entirety of the process of identifying the returning national, beginning with interviews in the United Kingdom and embracing document verification and the issue of ETDs in Kinshasa, is carried out by DGM. The DRC Ambassador in the United Kingdom has no role in this process.

This report also annexes a further interview of the DGM Director, in September 2014, together with a record of a meeting with a London based Congolese DGM official, to like effect.

British Embassy (Kinshasa) Evidence: November/December 2014

43. The first striking feature of this evidence is its vintage. Having been generated in November/December 2014, it constitutes the most recent evidence available to this Tribunal. The constituent elements of this evidence, all of it emanating from the British Embassy in Kinshasa, are multiple, which we summarise thus:

(i) On 14 November 2014, an Embassy official monitored the return of a DRC national at Kinshasa airport. Nothing untoward occurred and follow up enquiries were entirely positive.

(ii) On 18 November 2014 first hand information was obtained from the Belgium Embassy relating to the return of 23 DRC nationals by air from Belgium to Kinshasa. The information supplied, which is impressively detailed, yielded nothing untoward. The official described "*a very transparent relationship with both the DGM and ANR*", added to which no family members had communicated any concerns or complications. Belgium had returned 172 DRG nationals since 2012, without any known problems. The informant was unaware of any harassment, detention or ill treatment of APARECO members. The interest of the DRC Government was confined to "combatants". We interpose here an observation: it is apparent from this report and others – and we so find – that the term "*combatants*" denotes those who have actively opposed the regime both historically and by their activities overseas.

(iii) On 20 November 2014 the British Embassy in Kinshasa documented a discussion with the IOM Chef de Mission. "IOM" is the principal intergovernmental organisation in the sphere of migration, established in 1951 to manage and facilitate the resettlement of an estimated 11 million migrants in Western Europe. It was confirmed that the IOM has a scheme for monitoring voluntary returning DRC nationals, involving observations at the airport and embracing all types of returnees. The informant reporting nothing untoward. IOM also undertakes contact with returning nationals subsequently. It provides support to some returnees. This discrete report continues:

> *"The DRC authorities are not interested in whether a returnee is a FAS. They maybe more interested in whether a returnee has committed a crime overseas, but they do not request this information from IOM … Sometimes when a person has committed a crime, the authorities want to know its nature and the returnees are questioned by ANR …*
>
> *That process may take one to several hours, but they are released after being questioned. As far as IOM knows and from all information it has received from informal sources at the airport, returnees are not put in a detention facility".*

Finally, the Chef de Mission confirmed that IOM has no evidence of the ill treatment of any returning DRC national with whom IOM interacts as a result of providing reintegration assistance.

(iv) Next, the "*Swiss Premier Collaborateur*" provided information to the British Embassy in Kinshasa on 20 November 2014. This official had responsibility for migration and human rights and had occupied his post since June 2013. He reported:

> *"The DRC authorities have an interest in those who pose a political risk, or who are a high level activist … He did not think that the DRC authorities had an interest in those who had simply applied for asylum and he was unsure whether they would be interested in those who are FNOs as they had never asked him for these details."*

He confirmed that all DRC nationals returning from Switzerland are met by an embassy official, normally the Consul, at Kinshasa airport, where there was appropriate liaison with the DGM officials.

(v) On 2 December 2014 the French Immigration Officer based at the French Embassy in Kinshasa since 2012 provided information to the British Embassy in Kinshasa. He reported that during the period 2012 – 2014 France had returned some 150 DRC nationals to Kinshasa. Information relating to such persons is provided to the DRC authorities only if they have been convicted of serious crimes such as murder or rape. Otherwise, foreign national offenders and failed asylum seekers are of no interest to the DRC authorities. The French Embassy does not monitor events at the airport and has no substantiated evidence of ill treatment.

(vi) On 10 December 2014 the Embassy compiled a report of a discussion with the Executive Director of a Kinshasa based human rights organisation which promotes and defends human rights and democracy in DRC. This organisation monitors the return of DRC nationals to Kinshasa airport. The interviewee described a level of cooperation with DGM. Airport monitoring was carried out on two or three occasions in 2013. Some interviewed returnees may be extorted by DGM or ANR officials. The Executive Director considered that the DRC authorities have no particular interest in failed asylum seekers or foreign national offenders. Their interest would, rather, relate to returning nationals in respect of whom there is an unexecuted arrest warrant. DGM maintains a "black list" of persons who are subjected to further questioning by the ANR. The black listed categories are persons in respect of whom there are unexecuted arrest warrants in DRC and *"opposition political activists, for example those who had plotted a coup against the Government or who were believed to have been involved in attacks against Congolese authorities whilst visiting overseas*." The Executive Director was not aware of any returning failed asylum seeker or foreign national offender having experienced problems upon arrival. He provided a brief description of the arrest and detention of three persons who did not belong to these categories. He described "*rare*" instances of returning nationals who contacted his organisation subsequently to report that ANR was displaying an interest in them. Finally, he suggested that the organisation APARECO operates clandestinely in DRC and that some of its members were amongst those who had recently been granted a pardon by the President.

(vii) There is a further British Embassy (Kinshasa) report dated 12 December 2014 of a meeting with the UN Human Rights Co-ordinator who had been in DRC for two years. Asked whether the DRC authorities have any interest in returning failed asylum seekers or foreign national offenders, he replied in the negative. While there had been some reports of subsequent arrest or harassment of returning nationals, none of these persons had emanated from the United Kingdom. The interviewee believed that the interest of the DRC authorities was focused on "*those linked to radical opposition political parties*". His organisation had no substantiated reports of ill treatment of any returning DRC nationals. It does not carry out monitoring at the airport. He confirmed that APARECO does not operate openly in DRC and believed that one British national of DRC origin had been arrested while on holiday in DRC on the ground that he was a member of some radical opposition party.

(viii) This collection of British Embassy (Kinshasa) reports is completed by one relating to a person who had been returned to DRC from the United Kingdom in October 2014. This person returned under the "*Facilitated Returns Scheme*". Prior to returning he had been interviewed by a DRC official in the United Kingdom and had disclosed information about his offending there, together with other personal and family data. Upon arrival at Kinshasa airport he underwent an evidently routine DGM interview and experienced no problems. Since returning neither DGM nor ANR had displayed any interest in him.

Following on from the above, the country guidance enshrined in the decision is as follows:

> (i) DRC national who have been convicted of offences in the United Kingdom are not at real risk of being persecuted for a Refugee Convention reason or serious harm or treatment proscribed by Article 3 ECHR in the event of returning to their country of origin.
>
> (ii) DRC nationals who have unsuccessfully claimed asylum in the United Kingdom are not at real risk of persecution for a Refugee Convention reason or serious harm or treatment proscribed by Article 3 ECHR in the event of returning to their country of origin.
>
> (iii) DRC nationals who have a significant and visible profile within APARECO (UK) are, in the event of returning to their country of origin, at real risk of persecution for a Convention reason or serious harm treatment proscribed by Article 3 ECHR by virtue of falling within one of the risk categories identified by the Upper Tribunal in MM (UDPS Members – Risk on Return) Democratic Republic of Congo CG [207] UKAIT 00023. Those belonging to this category include persons who are, or are perceived to be, leaders, office bearers and spokespersons. As a general rule, mere rank and file members of APARECO are unlikely to fall within this category. However, each case will be fact sensitive, with particular attention directed to the likely knowledge and perceptions of DRC state agents.
>
> (iv) The DRC authorities have an interest in certain types of convicted or suspected offenders, namely those who have unexecuted prison sentences in DRC or in respect of whom there are unexecuted arrest warrants or who supposedly committed an offence, such as document fraud, when departing DRC. Such persons are at risk of imprisonment for lengthy periods and, hence, treatment proscribed by Article 3 ECHR."

7. The author concludes as follows:-

> " Given the recent UKUT finding, the latest documentation adduced, suggestive of reasonable grounds for A.N.K. to fear victimisation by the authorities on the basis of his failed asylum seeker status, fails to convince
>
> …
>
> Consequently, I am of the opinion that the assertion that A.N.K. is at risk of harm due to his status as a failed asylum seeker is without foundation."

Pleadings

8. The first ground advanced in favour of leave is pleaded as follows:-

> "The impugned decision was arrived at in breach of the principle of *audi alteram partem* and/or the applicant's right to be heard. The application to revoke was made by solicitor's letter dated the 28th April 2015. Information not included with the application was utilised by the first respondent and which did not exist at the date of the application, namely, a decision from the UK Immigration Appeal Tribunal published on the 2nd June 2015. The applicant was entitled to be forewarned that it was intended to use this decision to effectively refute the claim of the applicant so that he could have made submissions thereon. The applicant, had he been given the opportunity, would have referred to the fact of cases pending before our domestic courts of a similar nature the UK case and requested that no reliance should have been placed on the UK case, at least until judgment is available in the similar cases before our domestic courts. The denial of such an opportunity was unfair and unreasonable and *ultra vires* the powers of the first respondent."

9. The applicant informed the court that:-

> "This ground is very similar to ground 1 in P.B.N. [2015] IEHC 124 the wording of which is set out at paragraph 98 of the P.B.N. leave judgment. Relief on this ground was refused by the High Court at paragraph 102. The Applicant in this case wishes to formally apply for the relief on Ground 1 and assumes same will be refused following P.B.N.."

I agree with the applicant that the ground is very similar in the two cases.

10. The ground was rejected by Barr J. in P.B.N. by reference to a decision of Cooke J. in *E.A.I. v. Minister for Justice* [2009] IEHC 334 where Cooke J said:-

> "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."

11. Barr J. said, at para. 102 of *P.B.N.*:-

> "…it is clear on the authorities cited by the respondent that the Minister is not obliged to engage in correspondence with the applicant once his submissions have been submitted to the Minister."

On that basis Barr J. refused to grant leave to seek judicial review. The dicta of Barr J. have the same import as those of MacMenamin J. in *C.R.A. v. Minister for Justice* [2007] 3 I.R. 603, [2007] IEHC 19 where he said at para. 82:-

> 82 Section 3 is not an interactive process. The requirements of natural justice and the statutory requirements are satisfied once the prospective deportee has been afforded an opportunity to make submissions and these submissions have been

considered by the Minister, particularly in the consideration of whether the principle of non-refoulement under s. 5 of the Act of 1996 has been satisfied."

12. Guidance on the scope of review of deportation revocation decisions is to be found in *Kangethe v. Minister for Justice Equality & Law Reform* [2010] IEHC 351 where Cooke J. said:-

> "It is well settled law that the grounds upon which a decision refusing revocation under s. 3 (11) may be challenged are limited. In his judgment of 9th November, 2005, in *Kouaype v. MJELR* [2005] IEHC 380, Clarke J. identified the limited grounds upon which a decision to make the deportation order may be open to challenge:
>
> (a) Failure to consider whether the prohibition on refoulement applied;
>
> (b) That the Minister could not reasonably come to the view on which the decision to deport was based;
>
> (c) Failure to allow the asylum seeker to make representations by way of humanitarian considerations; and
>
> (d) Failure to consider those representations.
>
> It follows that the circumstances in which a challenge can be made to a subsequent decision to refuse to revoke a deportation order are at least as limited. Such an application necessarily proceeds upon the basis that the deportation order is valid.
>
> 5. This Court described the approach that should be taken in its ex tempore judgment of the 17th December, 2009, in the case of *M.A. v. MJELR* where the Court said:
>
> 'When an application to revoke is made to the Minister under s. 3 of the Act the Minister has, in effect, two duties. He is required to consider carefully and fairly the reasons that are put forward for revocation and he must also verify that since the deportation order was made no change of circumstance had occurred either so far as concerns the applicant or the situation in the country of origin which could bring into play any of the statutory prohibitions on the return of a failed asylum seeker to the country of origin. Otherwise … in dealing with an application to revoke the Minister is not obliged to embark on any new investigation or inquiry nor is he obliged to enter into any exchange of observations in replies or into any debate with the applicant or the applicant's legal representatives or even perhaps to supply any extensive narrative statement of his reasons for the refusal once it is clear to the Court that the Minister has properly discharged those two functions a decision to refuse to revoke a valid order of deportation will not be interfered with by judicial review.'"

Cooke J. concluded that:-

> "The only issue that can arise in respect of a decision to refuse revocation under s. 3 (11) is whether in the light of the changed circumstances advanced in the application to revoke, the Minister has erred in law or made some material mistake of fact in his decision to refuse revocation. That can only be so if, in the light of the reasons given for the refusal, it is demonstrated that the implementation of the deportation has now become illegal by reason of the changed circumstances."

13. The applicant has submitted that the decision of Finlay Geoghegan J. in *Olatunji v. Refugee Appeals Tribunal* [2006] IEHC 113 supports Ground 1. There, the Judge said:-

> "I was referred to the decision of Clarke J. in *Idiakheua v. Minister for Justice, Equality and Law Reform and R.A.T.* (Unreported, High Court, Clarke J., 10th May, 2005) in which he considered the requirement on a member of the R.A.T. to put matters of concern and/or perceived discrepancy to an applicant and give them an opportunity of dealing with same. In that decision, he stated at pp. 9-10:
>
> "If a matter is likely to be important to the determination of the RAT then that matter must be fairly put to the applicant so that the applicant will have an opportunity to answer it. If that means the matter being put by the Tribunal itself then an obligation so to do rests upon the Tribunal.
>
> ...
>
> This remains the case whether the issue is one concerning facts given in evidence by the applicant, questions concerning country of origin information which might be addressed either by the applicant or by the applicant's advisors or, indeed legal issues which might be likely only to be addressed by the applicant's advisors.
>
> In setting out the above I would wish to make clear that the obligation to fairly draw the attention of the applicant or the applicant's advisors to issues which may be of concern to the Tribunal arises only in respect of matters which are of substance and significance in relation to the Tribunal's determination."
>
> I would respectfully agree with the above."

14. Finlay Geoghegan J then went on to say that:-

> "…the Tribunal Member was under an obligation to put to the applicant the relevant matters which appeared to the Tribunal Member to support such a conclusion and give the applicant an opportunity of commenting or dealing with same."

15. The R.A.T., as noted by Finlay Geoghegan J., is under a statutory obligation to furnish information in its possession to an appellant. I am not of the view that the functions of the R.A.T. and the functions of the Minister under s. 3(11) of the Immigration Act are comparable and thus the reasoning in *Olatunji* is inapplicable in this case.

16. I agree with the reasoning of Barr J. in *P.B.N.* and with the dicta of MacMenamin and Cooke J.J. (see above) to the effect that the Minister is not required to debate issues with a person seeking revocation. That law is well settled and I note that the decision of Barr J. refusing leave on this ground was not appealed. The Minister's duty is to consider the case made for revocation and to explain why it is

refused, if that is the decision. Failure to permit an applicant to comment on material intended to be used in the s. 3(11) decision is not a reviewable error. (Obviously due process rules would not permit the Minister to contradict an applicant's personal facts or narrative based on material not available to the applicant. Rejecting an applicant's narrative based on self contradiction or internal inconsistency does not require that the matter be put to the applicant for comment.)

As anticipated by the applicant, I am following the decision of Barr J. in *P.B.N.* and I refuse relief on the first ground advanced by the applicant in this case.

17. Ground no. 2 is pleaded as follows:-

> "Without prejudice to the generality of the previous ground there was no rational basis upon which it could have been rationally concluded that the applicant's life or freedom would not be threatened were he to be expelled from the State and returned to the DRC. This did no flow from the premises upon which it was purportedly based.

The basis upon which the case for revocation is rejected is clearly set out in the decision. There was a rational basis for the decision. The decision maker agreed with the approach adopted by the Upper Tribunal in the U.K. rejecting an identical argument to that advanced by the applicant in this case. The conclusion (that failed asylum seekers were not at risk on return) flowed logically from the premise (that the Ramos reports were unreliable and that better information on the fate of failed asylum seekers was available).

18. Ground two goes on to say:-

> "There was no consideration given to the information and documentation furnished with the application."

The case made by the applicant was comprehensively set out and considered.

19. Ground two goes on to allege:-

> "The alternative information utilised by the respondent was used selectively against the interests of the applicant."

No particulars of this allegation are given. It is a bare unsubstantiated plea.

20. Ground two goes on to say:-

> "No consideration was given to the "Unsafe Returns" document submitted which relates to the treatment of failed asylum seekers from Europe to DR Congo. The matters raised by the applicant in his application to revoke were not properly addressed."

As can be seen from the text of the decision set out above, extensive consideration was given to the applicant's case and in particular to the documents referred to.

21. Ground three asserts:-

> "No reliance should have been placed on the UK Policy Document which was not, but was treated as if it were, country of origin information."

No evidence or submission has been shown or made to persuade me that a particular document was wrongly treated as county of origin information. Nor has it been explained what mischief might attach to such if it were true. Substantial grounds are not made out and leave is refused.

22. The fourth ground is:-

> "By reason of the failure to address the substance of the applicant's application to revoke, no proper reason or rationale is provided for the refusal to revoke."

As is clear from the decision quoted above, extensive consideration is given to the applicant's case that failed asylum seekers face risk on return to DR Congo. The reason for the rejection of the claim is clearly expressed. Substantial grounds are not made out and leave is refused.

23. The fifth ground is:-

> "The weight placed upon the reports utilised by the first respondent as compared to that placed upon the information furnished by the applicant was irrational."

24. A similar plea failed to attract a grant of leave in *Kangethe v. Minister for Justice Equality & Law Reform* [2010] IEHC 351, a case challenging a refusal to revoke a deportation order, where Cooke J. said:-

> "Thus, there has in this case, been a careful and detailed consideration of the matters put forward as the basis for revocation of the order. In the absence of any claim that some mistake has been made on any material fact it does not constitute an arguable case as to the illegality of the refusal to merely assert that the balance struck by the Minister is unreasonable or disproportionate."

This bare plea of irrationality is insufficient to constitute a substantial ground that the decision is irrational. Leave is refused.

25. The sixth ground is:-

> "There was a failure on the part of the first respondent to consider matters such as *non-refoulement* and the undoubted interference with the applicant's private life rights under the Constitution and under the European Convention on Human Rights thus rendering the decision not to revoke unlawful."

26. I accept that the decision does not appear to address in express terms the issue of non-refoulemnt. Non-refoulement was addressed in the decision to deport. The decision maker rejected the case made that new circumstances made deportation unsafe. Thus the *status quo ante* applied and fresh consideration of non-refoulement was not required. I cannot detect that any case was made to the Minister in respect of interference with private life rights and no indication has been given on this application for leave as to the facts which

support a contention that private life rights would be violated. Thus substantial grounds are not made out on this point and leave is refused.

27. The seventh ground is:-

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

The applicant has not demonstrated that the material considered by the Minister indicated a problem with prison conditions. This was not a live issue at any time whether by reference to the material submitted by the applicant or the additional material examined by the Minister. No authority or legal principle has been advanced to demonstrate that an enquiry into prison conditions had been triggered and that the Minister had acted unlawfully by not conducting the enquiry. Substantial grounds have not been made out.

28. The eighth ground is that:-

> "The weight placed upon the UKBA reports and case law as compared to that placed upon the information furnished by the applicant was irrational. The UKBA is no more independent than the organisation responsible for the compilation of the information furnished by the applicant.

The respondent was entitled to place such weight as was appropriate on material found to be persuasive. The reason one side of the argument was preferred in the decision of the Upper Tribunal is exhaustively explained in that decision. No argument as to irrationality is made out on this plea and leave is refused.

29. The ninth ground is:-

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

This plea is unrelated to the facts of this case. In any event no evidence is produced in support of the plea that certain matters were not considered. The Charter has no bearing on the s.3(11) decision making process as it does not involve the application of E.U. law. The assertions as to the standard of proof appear to be unrelated to the decision in suit and no facts have been advanced in support of the allegation. Leave is refused.

30. The tenth ground is:--

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

31. The applicant freely invoked the Minister's powers under s.3(11) of the Act without complaint as to bias. The Minister was not asked to delegate the function to a person who was not associated with other decisions in respect of the applicant. Having invited the Minister to revoke the deportation order, the applicant cannot now complain that the Minister used the powers as requested by the applicant. This ground is not made out to the requisite standard.

32. Leave to seek judicial review is refused.