Neutral Citation Number: [2009] IEHC 26

THE HIGH COURT

JUDICIAL REVIEW

2007 1436 JR

BETWEEN

L.C.L.

APPLICANT

AND

THE REFUGEE APPEALS TRIBUNAL AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENTS

JUDGMENT of Ms. Justice Clark delivered on the 21st of January, 2009.

The applicant seeks leave to apply for judicial review of the decision of the Refugee Appeals Tribunal (RAT), dated 30th August, 2007, to affirm the earlier recommendation of the Office of the Refugee Applications Commissioner (ORAC), dated 15th July, 2004, that the applicant should not be granted a declaration of refugee status. Mr. Saul Woolfson B.L. appeared for the applicant and Ms. Sinead McGrath B.L. appeared for the respondents. The hearing took place in Court 1 at the Kings Inns on 13th and 14th January, 2009

Factual Background

1. The applicant claims to be a national of Angola, a Protestant and of Mokongo ethnicity whose first language was Kikongo and whose other languages were Lingala, French, Fioti and a bit of Portuguese. His account of events which led to his application for asylum is as follows: He was born in Cabinda, a separatist enclave of Angola, in 1975. Later that year, his family moved as refugees to what was then Zaire, where his parents lived in a refugee camp and worked as farmers. His parents attempted to return to Angola when the civil war ended in 1994 but the truck in which they were travelling was ambushed and they were killed. The applicant and his brother remained in Zaire. From 1994 to 1998, the applicant worked as a carpenter in what was to become the Democratic Republic of Congo or DRC. Although the details of this period are not entirely clear or consistent, it appears that from 1998 to 2000, he and his brother were captured by the National Union for the Total Independence of Angola (UNITA) and forced to work with the army carrying out attacks against villages occupied by the Popular Movement for the Liberation of Angola (MPLA). In 2000, the applicant escaped when the MPLA attacked their UNITA base. He returned to live with his grandfather in the village of his birth which was two or three hours from Cabinda city, and worked on his grandfather's coffee farm.

2. The applicant says that about eight months later in 2000, the village chief invited him to become a member of the Front for the Liberation of the Enclave of Cabinda - Armed Forces of Cabinda (FLEC-FAC), which is a faction or splinter group of the original FLEC separatist movement. He did so, and from 2000 to 2003 worked as the coordinator for his particular village; in his questionnaire he said that his function was to organise meetings in villages so as to impart information about the FLEC movement while at interview he said that everyone in Cabinda is a FLEC supporter and his work as coordinator was to take information from Cabinda (the State capital) and bring it to his village. People in his village did not know what was going on and he told them about how the country was rich but all the jobs went to Angolans and how they were being colonised by MPLA. Meetings in the village took place whenever they had something to say which occurred about every two months.

3. The applicant says that on 28th April, 2003, he, his wife and others who were attending a FLEC meeting in Luanda in Angola were arrested by Angolan authorities and detained in a police station. A week later, they were transferred to a detention centre for two weeks and then to Namibe province. After almost two weeks in the detention centre in Namibe, he witnessed the execution of his wife who was shot because she was always crying and causing trouble. Two days later a soldier was ordered to take the applicant and his cell mate out to be shot. The soldier had been ordered to kill them but was unwilling to do so as he was also a member of FLEC. The soldier was from his own tribe and told them that he would do all that he could to help them. They were taken to a jeep by the soldier and driven to the Namibian border where someone was waiting to take them to Namibia. The following day a white man came to the house where they were staying and took photographs and the following day told them they would be travelling. T he applicant and his cell mate A. travelled to Dublin airport via Namibia and Frankfurt with this man M.; he does not know who paid for the travel arrangements but suspects his grandfather or the soldier who helped them may have been involved. He has not seen A. since and does not to know M.'s address.

Procedural Background

4. The applicant applied for asylum in the State on 3rd June, 2003. With his ASY-1 form he submitted what he says is his FLEC-FAC membership card. He filled out a questionnaire, and he attended for interviews with ORAC in December, 2003 and June, 2004. He was questioned at length about his knowledge of FLEC-FAC leaders and of how one joins the organisation and about features of the city of Cabinda. He was also asked to translate basic phrases into Portuguese. He explained his lack of knowledge of Cabinda to the fact that he only went to the party HQ and did not walk around or stay there overnight. He was unable to name the "senior" members of FLEC-FAC who were at the meeting in Luanda and did not recognise key names in the organisation although he knew when the organisation was founded and who the leader was. He did not know a lot about the specific language of the Cabindans and named it incorrectly. He was unable to translate simple sentences into Portuguese and sought to explain this inconsistency with his period with the Portuguese-speaking UNITA by saying that although he understood a bit of Portuguese, they had a translator in UNITA. He presented

his FLEC-FAC membership card at his interview and when he applied for asylum. He said it was provided by the village chief and that all members of FLEC have such cards but they did not carry them on them because of the danger of the MPLA catching anyone with such a card. He said he never had an Angolan ID card. His grandfather used to keep his FLEC-FAC membership card for him. When asked how he got the card to bring to Ireland he responded that the *"commandant that helped me to escape from prison brought me the card. I don't know where he got it from. When I went to Luanda to attend the meeting I didn't bring it with me……..Maybe the commandant got in touch with him and he gave him my card. I don't know."* When asked why the address on the card was not the home address which he gave, he explained that the address was that of the headquarters of the FLEC movement: *"I live in a village and I cannot give the village address. I just give the address of the HQ. If someone wants to find out more about me, they can go there to find out more."*

5. A negative recommendation issued from ORAC on 15th July, 2004. In the s. 13 report, it was noted that there were "serious doubts" that the applicant was involved with FLEC-FAC and was persecuted on that basis. Significance was attached to the applicant's apparent lack of knowledge about FLEC-FAC, his lack of knowledge about Cabinda city, and his inability to speak Portuguese.

6. A Notice of Appeal to the RAT was filed on 9th August, 2004. A medical report prepared by two doctors attached to the SPIRASI organisation dated 8th December, 2003 was attached. An oral hearing was held where the applicant was represented by counsel. The Refugee Tribunal Member's decision affirming the ORAC recommendation issued in February, 2005. That decision was subject to judicial review proceedings which were compromised. Several attempts were made to schedule a fresh oral hearing, but a number of adjournments occurred. In the interim, the applicant's legal representatives obtained and submitted in support of the appeal, six previous RAT decisions and several country of origin information (COI) reports. A fresh oral hearing was eventually held and this continued over two days in 23rd May, 2007 and 21st June, 2007. At the hearing, the applicant's legal representatives handed in written submissions dealing *inter alia* with the credibility findings made in the s. 13 report and the relevance of the previous RAT decisions submitted. They also submitted additional COI reports.

7. A second negative RAT decision issued on 30th August, 2007 and it is this decision that is the subject of the present challenge. In that decision the Tribunal Member set out the evidence given by the applicant at the oral hearing and the submissions made on his behalf. He then set out a number of applicable legal provisions before turning to analyse the applicant's claim. He identified *"a number of problematic inconsistencies"* in the applicant's account of events which he set out and then rejected the applicant's personal credibility on this cumulative basis. He noted that he had considered the medical reports but found that evidence to be contingent upon whether or not he believed the applicant's story as to how he came to suffer the injuries detailed therein. He dismissed the relevance of the previous RAT decisions, and noted that he had considered the applicant's submission on failed asylum seekers. He stated that he had observed the applicant's overall demeanour and the way he gave his evidence, and found that they indicated that his account was not credible.

8. A proposal to deport was issued to the applicant on 11th October, 2007.

Extension of Time
9. The RAT decision was notified to the applicant by letter dated 31st August, 2007; he commenced the within proceedings on 1st November, 2007. He is therefore outside of the 14-day period allowed by section 5(2) of the Illegal Immigrants (Trafficking) Act 2000 by a period of some six weeks. He has provided lengthy explanations in his grounding affidavit for that delay, relating primarily to his change of solicitors from the Refugee Legal Service (RLS) to his present representatives, and a delay in obtaining the applicant's file from the RLS. The respondents accept that the delay in the present case is not particularly lengthy. In normal circumstances, if the details of the applicant's case for judicial review merited an extension of time, I would be prepared to extend that time.

THE APPLICANT'S SUBMISSIONS
10. The applicant prefaced his arguments by stating that as there had been no replying affidavit filed by the respondent, the court was bound to accept the contents of the applicant's affidavit as correct. His primary complaints in respect of the RAT decision may be summarised as follows:-

a. The process by which credibility was assessed was flawed;

b. The Tribunal Member failed to consider adequately the contents of the SPIRASI medical report when assessing his credibility;

c. The Tribunal Member failed to give adequate consideration to the applicant's claim that he feared persecution as a failed asylum seeker in assessing his claim;

d. The Tribunal Member failed to consider all relevant facts in relation to the applicant's country of origin;

e. The Tribunal Member failed to adequately assess the relevance of six previous RAT decisions submitted by the applicant

(a) Process by which Credibility was assessed
11. The applicant submits that the process by which the Tribunal Member assessed his credibility was assessed was flawed by reason of:-

(i) Factual errors; and

(ii) Failure to consider explanations.

12. Reliance is placed on *Carciu v. The Minister for Justice, Equality and Law Reform* (Unreported, High Court, Finlay Geoghegan J., 4th July, 2003) and the judgment of Clarke J. at the leave stage in *Imafu v. The Minister for Justice,*

Equality and Law Reform [2005] I.E.H.C. 182.

(i) Factual Errors
13. The applicant asserts that the Tribunal Member made a number of significant factual errors with respect to the applicant's FLEC-FAC membership card, his travel through Dublin airport, how he came to be a FLEC-FAC member and the assertion that he went "from village to village". This demonstrates that the Tribunal Member failed to exercise the necessary care and diligence and further, it is argued that these are errors that materially affect the decision.

14. The Tribunal Member drew a negative credibility finding regarding the applicant's membership card from the fact that the person who helped him to escape from prison brought his FLEC-FAC membership card to the applicant and that he was unable to say where it was previously. The applicant submits that he stated at his s. 11 interview that he had been given a membership card by the village chief when he joined FLEC-FAC, that he gave it to his grandfather for safe keeping as it was dangerous to carry such cards, and that it was returned to him by the commandant who helped him to escape, maybe after being in touch with his grandfather and that he had therefore fully accounted for where it was previously.

15. With respect to his travel through immigration, the Tribunal Member drew a negative credibility finding that the person with whom the applicant travelled handled all of the documents; the Tribunal Member noted that this was "not consistent with the actions of the authorities at Dublin Airport". The applicant avers that his evidence at the RAT oral hearing was that his agent gave him a false passport just before reaching immigration, and that he thereafter returned the passport to the agent. In other words he handed in the passport himself.

16. On the subject of how he became a FLEC-FAC member, the Tribunal Member stated that the applicant was vague at the oral hearing when asked how he became a FLEC-FAC member, "except to say that he just became one". In his grounding affidavit, the applicant says that he was quite specific in that regard, both at the RAT oral hearing and at his s. 11 interview, stating that he was asked to join as a coordinator.

17. As for the Tribunal Member's statement, when outlining the applicant's claim at the start of his decision, that the applicant's role as a FLEC-FAC coordinator involved him "travelling from village to village", the applicant says in his grounding affidavit that he never said that he went from village to village.

18. Reliance is placed on *Keagnene v. The Refugee Appeals Tribunal* [2007] I.E.H.C. 17. In that case, Herbert J. accepted that the Tribunal Member had "misunderstood or misconstrued the evidence of the Applicant as to how he obtained entry to this State" and he granted leave on the following basis:-

> "In these circumstances, the conclusions of the Member of the Refugee Appeals Tribunal at reason five of his decision are based upon a mistake of fact and, were therefore arrived at by the application of unfair procedures. […] I am satisfied that the findings by the Member of the Refugee Appeals Tribunal at reason five of his decision are material and significant particularly by reference to the fact that the Legislature considered it sufficiently important to provide at s. 11(B)(c) of the Refugee Act 1996, as inserted by s. 7(f) of the Immigration Act, 2003, that in assessing the credibility of an Applicant for the purpose of determining an appeal, the Refugee Appeals Tribunal shall (the emphasis is mine) have regard to whether the Applicant has provide a full and true explanation of how he or she travelled to and arrived in the State."

(ii) Consideration of explanations given
19. It is submitted that the Tribunal Member failed to engage with or to give reasons for rejecting the various explanations proffered by the applicant with respect to inconsistencies in his account of events identified in the s. 13 report. The Court's attention was drawn to the explanation given in relation to doubts expressed in the s. 13 report as to how the applicant could have obtained information on a FLEC-FAC military chief (Boma), who came into power after the applicant left Cabinda, without having contacted anyone in Cabinda. The applicant explained at p. 3 of the written submissions handed in on the day of the oral hearing that his knowledge post-dates his departure from Cabinda and that he obtained the information on the internet.

20. The Court's attention was also drawn to the explanation given at p. 3 of the same written submissions for the doubts expressed in the s. 13 report with respect to the applicant's lack of knowledge of Cabinda city. The applicant explains that there are several statues in the city, but that the applicant does not know if there are nameplates on the statues, and that it is safe to say that no streets have signs indicating the street name. In his s. 11 interview, he says that he knew the cathedral was there but he was never in it and did not know its name. 9 In his explanation to this Court he says that as a protestant it was understandable that he would not be familiar with the name of a Catholic cathedral.

21. It is submitted that those explanations are plausible and that if the tribunal member rejected them that reasons should have been given. Reliance is placed on *L.L.M. v. The Refugee Appeals Tribunal* [2008] I.E.H.C. 390. In that case, the applicant claimed that instead of arresting him, the security forces mistakenly arrested his uncle, who had the same name and qualifications as him. The Tribunal Member found the mistaken arrest to be implausible on the basis that the applicant was known to the security forces and was targeted by them. The applicant indicated, in explanation for the apparent implausibility of his account, that uncle was arrested in Bas Congo while his own activities were conducted in Kinshasa, and that it was there that he was known to the authorities. Having found that the Tribunal Member had made a number of other factual errors, McMahon J. held as follows:-

> "To my mind these were reasonable and plausible explanations which deserved proper and more careful consideration and if they were to be rejected more detailed reasons were warranted. In any event, when the Tribunal member concludes in relation to this matter that "this further undermines the applicant's credibility with regard to his claim" it would suggest that it was not the main cause of doubt in the Tribunal member's mind but a subsidiary and supporting conclusion.
>
> It is my view that in failing to address these matters in greater detail and where the Tribunal member entertained serious doubts about the applicant's account of the mistaken identity issue, his reservations should have been put more explicitly to the applicant to give him the opportunity to convince the member, before reaching his conclusion."

22. Reliance is also placed on the judgments of Finlay Geoghegan J. in *Traore v. The Refugee Appeals Tribunal* [2004] I.E.H.C. 606 and *Bujari v. The Minister for Justice, Equality and Law Reform & Ors* [2003] I.E.H.C. 18.

(b) Consideration of Medical Report
23. The applicant contends that the Tribunal Member erred by failing to take account of the SPIRASI report when assessing his credibility, and by stating that his consideration of that report was contingent upon whether he believed the applicant's story about how he came to suffer the injuries detailed in the report. It was further argued that the Tribunal Member made reference to the SPIRASI report only after assessing his credibility, and not in the context of that assessment as one of the factors considered in that assessment. While Mr. Saul Woolfson B.L., counsel for the applicant, accepted that it was ultimately a matter for the Tribunal Member to determine how much weight he attributed to the medical report, he was not entitled to relegate it to an afterthought of his credibility assessment. It is contended that the report contains information directly relevant to the assessment of credibility and material to negative findings made. Reliance is placed on *Khazadi v. The Refugee Appeals Tribunal* (Unreported, High Court, Gilligan J., 19th April, 2007), and Regulation 5(1)(b) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006).

(c) Consideration of Fear of Persecution as Failed Asylum Seeker
24. In his grounding affidavit, the applicant says that he stated at his oral appeal hearing before the RAT that he feared being returned to Angola because he would be at risk, as a failed asylum seeker, of being arrested and killed by the Angolan authorities. He says that his legal representative then made a specific submission concerning the risk faced by failed asylum seekers if returned to Angola. The Tribunal Member dealt with this issue as follows in his decision, :-

> "The Tribunal has considered the Applicant's submission on failed asylum seekers."

25. The applicant complains that the Tribunal Member failed to determine or properly consider this separate and distinct element of the applicant's fear of persecution. It is contended that it was insufficient for the Tribunal Member to baldly state that he had considered the issue. Reliance is placed on *S.I. v. The Refugee Appeals Tribunal* [2008] I.E.H.C. 165. In that case, the applicants claimed *inter alia* to fear persecution if returned to Nigeria as members of a particular social group i.e. persons suffering from HIV/AIDS. The Tribunal Member assessed that element of their claim by reason of the denial to the family of essential medical care in their country of origin. Finlay Geoghegan J. noted that the Tribunal Member did not exclude as a matter of law the applicant's entitlement to rely on such fear as part of his claim for refugee status, and she did not consider the position of women or children or the availability of treatment or medical care for children with AIDS in Nigeria. In that context, she granted leave, noting as follows:-

> "[…] in allowing leave on this ground, I am not determining that the applicant is necessarily entitled to rely upon a fear of persecution by reason of a denial of essential medical care to his family members (including his child with AIDS) in Nigeria, but having made the claim he is entitled to have the Tribunal Member consider and determine it in accordance with the relevant legal principles."

26. The applicant claims that by analogy, having made the claim that he fears persecution as a failed asylum seeker, he was entitled to have the Tribunal Member consider that fear and determine it in accordance with the legal principles relevant to the assessment of entitlement to refugee status, and he relied on two previous RAT decisions and the decision of the UK Immigration Appeal Tribunal in RN (Returnees) Zimbabwe CG [2008] UKAIT 00083 (19th November, 2008).

(d) Consideration of all relevant facts as they relate to Angola
27. It was submitted that Regulation 5(1) (a) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006) creates a mandatory obligation on each adjudicator to consider country of origin information (COI), in the absence of a finding that the applicant is not from that country at all. It was argued that the Tribunal Member acted in breach of this obligation by having regard to COI only insofar as it relates to leaders of FLEC-FAC and is unfavourable to the applicant's apparent lack of knowledge of positions held in that Party and not to how the party members face persecution in Cabinda. He complained that there was thus no real consideration of COI in the assessment of credibility.

(e) Consideration of previous RAT Decisions
28. The Tribunal Member dealt with the six previous RAT decisions as follows:-

> "The Applicant's legal advisers have submitted six previous decisions of the Tribunal relating to other appeals. The Tribunal has considered these Decisions in the context of the current appeal. The Irish Courts have made it clear on a number of occasions that the Tribunal is not bound in any way to follow previous decisions of the Tribunal concerning other Appeals (see Fasakin and Atanasov). Clearly this is a sound proposition in view of the ever changing facts and circumstances in the Countries of Origin concerned, and of the very individual nature of appeals in this context. As the Tribunal is frequently reminded by legal advisers, the refugee definition requires an analysis of the subjective, as well as the objective circumstances in each appeal. The Tribunal has taken into account the individual facts in the instant Appeal. Given the facts of this particular case the Tribunal finds that the previous decisions submitted are not of sufficient relevance to the instant appeal to warrant a conclusion that the current recommendation be overturned."

29. The applicant complains that this is a standard paragraph of a rote and formulaic nature routinely inserted into RAT decisions in cases where previous Tribunal decisions have been submitted for consideration. It was argued that the use of this standard passage indicates a rejection of the decisions without considering their relevance in establishing relevant legal principles. It was further submitted that even if that paragraph were found to constitute an adequate assessment of the relevance of the RAT decisions, it was conducted in the context where negative credibility findings had already been drawn.

THE RESPONDENTS' SUBMISSIONS
30. The respondents submit that no substantial grounds had been established to ground any contention that the RAT decision ought to be quashed.

(a) Process by which Credibility was assessed
31. The respondents submit that the assessment of credibility is a matter for a decision-maker, and the Court must be careful to avoid substituting its views for that of a Tribunal Member; reliance is placed, among others, on the decision of Peart J. at the post-leave stage in *Imafu v. The Minister for Justice, Equality and Law Reform* [2005] I.E.H.C. 416. The respondents submit that the Tribunal Member had regard to extensive factors affecting the credibility of the applicant, and that the applicant was given a full and fair opportunity to deal with those factors. It is submitted that the applicant's credibility was central throughout the entire asylum process, and that the Tribunal Member carried out a full and fair analysis in arriving at the credibility assessment. It is argued that the Tribunal Member did not make 'bald statements' regarding credibility, but rather carried out a rational and reasonable analysis of the evidence presented.

(i) Factual Errors
32. The respondents submit that in the light of the fact that it became apparent during the course of the applicant's oral argument that there was, in fact, a note of the RAT oral hearing which has not been exhibited, the Court should take a jaundiced view of the alleged errors asserted.

33. The respondent addressed each of the alleged errors of fact in turn. The first alleged error related to the Tribunal Member's finding that the applicant was unable to say where the membership card was previously. The respondents submit that this is not in fact an error as the finding was that the applicant was vague at the s. 11 interview as to where the soldier had obtained his membership card and had responded that the commandant who helped him to escape from prison brought the card to him, stating as follows:-

> "I don't know where he got it from. When I went to Luanda to attend the meeting I didn't bring it with me……..Maybe the commandant got in touch with him and he gave him my card. I don't know."

34. With respect to the issue of the applicant's travel through the airport, the respondents submitted that the Tribunal Member's finding was not necessarily in direct conflict with the applicant's evidence, which was that the white man brought him through immigration. It was contended that there was very little substantial difference between the two accounts and certainly none that made any material difference.

35. With respect to the Tribunal Member's finding that the applicant moved from village to village, the Court's attention is drawn to question 30(c) of the questionnaire where the applicant stated that he organised meetings in the villages and the interview where he said that he organised meetings in villages.

36. The respondents submitted that that there is no inherent contradiction between the finding that the applicant was vague as to how he became a member of FLEC-FAC and the applicant's evidence. There was also a difference between COI relating to recruitment procedures in FLEC-FAC and the applicant's evidence.

37. The respondents further submit that if these were errors, those errors were immaterial as so many other substantial credibility findings were made. Reliance is placed, as to materiality, on *Traore v. The Refugee Appeals Tribunal* [2004] IEHC 606. In that case, Finlay Geoghegan J. found that the Tribunal Member had erred when recording the evidence that was before her, but added the following caveat:-

> "I do not wish to suggest that every error made by a Tribunal Member as to the evidence given will necessarily render the decision invalid. It will, obviously, depend on the materiality of the error to the decision reached. The error must be such that the decision maker is in breach of the obligation to assess the story given by the applicant or the obligation to consider the evidence given in accordance with the principles of constitutional justice."

(ii) Consideration of explanations given
38. The respondents submit that it was within the Tribunal Member's discretion to have regard to which matters he attached weight and that he was not obliged to make reference to each and every matter raised by the applicant. They cited *Muanza v. The Refugee Appeals Tribunal* (Unreported, High Court, Birmingham J., 8th February, 2008) where it had been argued that the Tribunal Member failed to have regard to explanations given by the applicant regarding apparent inconsistencies in his account of events. Birmingham J. held that the it is the function of the Tribunal Member to consider the plausibility or otherwise of an account but that he or she is not obliged to make reference to each and every assertion made by the applicant, and that the consideration of credibility does not involve the making of findings on one particular strand of evidence – the applicant's credibility must be considered in the round. Birmingham J. further expressed the view that RAT decisions must not be trawled for immaterial errors, and must be considered holistically.

(b) Consideration of Medical Report
39. The respondents submit that the facts of *Khazadi v. The Refugee Appeals Tribunal* (Unreported, High Court, Gilligan J., 19th April, 2007) are distinguishable from those of the present case as in *Khazadi*, the Tribunal Member did not link the medical reports and the issue of credibility at all, whereas in this case it is clear as a matter of 'forensic timing' that when decision is read as a whole, the Tribunal Member did have regard to the SPIRASI report when considering the applicant's credibility. In *Khazadi*, the medical reports were more extensive in nature and contained explicit views on credibility. In *M.E. v The Refugee Appeals Tribunal* [2008] IEHC 192, Birmingham J. had regard to the gradations of weight attached to objective findings in support of torture in the Istanbul Protocol and distinguished *Khazadi* on the basis that the medical evidence in that case was of an entirely different quality and quantity and that the doctor had specifically requested that it be taken into account. Reliance is also placed on the judgment of Gilligan J. in *J.L. and J.M. v. The Refugee Appeals Tribunal* [2008] I.E.H.C. 254, and Hedigan J. in *J.A. v. The Refugee Appeals Tribunal* [2008] I.E.H.C. 310. Counsel for the respondents argued that if one were to read the decision as a whole, it is clear that the medical report was taken into account in assessing credibility. For extensive reasons the applicant had been found not credible and it was in that context that the contents of the medical report from SPIRASI were not accepted as relevant.

(c) Failure to consider fear of persecution if returned as a failed asylum seeker
40. The respondents submit that the applicant's claim of a fear of persecution if returned to Angola as a failed asylum seeker is a matter that will properly be considered by the Minister at the deportation order stage, under s. 5 of the Refugee Act 1996. The respondents argued that the judgment of Finlay Geoghegan J. in *S.I. v. The Minister for Justice, Equality and Law Reform* [2007] I.E.H.C. 165 does not actually say that a person may be entitled to refugee status on

the basis of their fear of persecution as a failed asylum seeker. It is submitted that the decision of the UK Immigration Appeals Tribunal in *RN (Returnees) Zimbabwe CG* [2008] UKAIT 00083 (19th November, 2008), at paragraphs 2.04 -2.06 and 2.30 – 2.32, demonstrates that a bare assertion that a failed refugee seeker will be persecuted on return to their country is not sufficient, and that it is incumbent upon an applicant to make out their claim. It is contended that as the applicant did not make any concrete submissions in that regard at the oral hearing he could never therefore have been granted a declaration on that basis.

(d) Consideration of all relevant facts relating to Angola
41. It is submitted that COI is, in fact, referenced in the RAT decision. It is further submitted that COI must be taken into account only in circumstances where it is relevant. Reliance is placed on *Ojelabi v. The Refugee Appeals Tribunal & Anor* [2005] I.E.H.C. 42. In that case, Peart J. held that the Tribunal Member found that the applicant's credibility was totally absent. Peart J. continued as follows:-

> "This Court sees no reason to fault the manner in which credibility was assessed. As applications go, this one must come within the category which has disclosed no merit and lacks all credibility. In these circumstances, none of the grounds by which it is sought to impugn the decision can succeed. The reasons for the decision are clearly set out in the s.13 report and the Decision. The lack of credibility fundamentally infects the subjective element of a well-founded fear of persecution. The applicant was simply not believed, as I have said. In such a situation, the objective element of the well-founded fear assessment does not require to be made, since without a credible subjective element, the objective element does not become relevant. That disposes of the grounds relied upon which criticise the manner in which the RAC dealt with the ability of the police and Courts system to function in Nigeria."

42. Further reliance is placed on the decision of Hedigan J. in *J.A. v The Refugee Appeals Tribunal* [2008] IEHC 310.

(e) Consideration of previous RAT decisions
43. The respondents note that O'Leary J. held as follows in *Fasakin v. The Refugee Appeals Tribunal* [2005] I.E.H.C. 423:-

> "Evidence from family members other than the applicant could be relevant in the event that a particular family was the subject of persecution. Similarly evidence of ethnic persecution can be persuasive though not yet personal to the applicant. However, the decision of a body in a particular case is neither evidence in an other case nor does it create a binding authority for future cases. Each case must be considered on its own merits."

44. It is noted that the applicant appears to have accepted this point.

45. The respondents note that there was a finding that the applicant's evidence was consistent and credible in each of the six previous decisions submitted by the applicant, and its contended that the facts of those cases constituted a very different situation to the present, where the applicant's credibility was impugned. In *J.A. v The Refugee Appeals Tribunal* [2008] IEHC 310, Hedigan J. held – citing *Muanza v The Refugee Appeals Tribunal* (Unreported, High Court, Birmingham J., 8th February, 2008); *Banzuzi v The Minister for Justice, Equality and Law Reform* [2007] IEHC 2; and *G.K. & Others v The Minister for Justice, Equality and Law Reform & Ors* [2002] 2 IR 418) - that it does not follow that the absence of an express reference to a document in a decision indicates that account was not taken of that document. Hedigan J. noted that it is for the Tribunal Member to decide whether or not a document merits specific reference, depending on the assessment of its probative or corroborative value.

THE COURT'S ASSESSMENT
46. As this case involves an application to which section 5(2) of the Illegal Immigrants (Trafficking) Act 2000 applies, the applicant must show substantial grounds for the contention that the RAT decision ought to be quashed. It is so well established that this means that the grounds relied on must be reasonable, arguable and weighty, as opposed to trivial or tenuous that it is unnecessary to repeat it.

47. This court prefaces its judgment by stating that it has some serious misgivings regarding the fairness of process in dealing with grounds governing factual findings and alleged errors made by the RAT when no transcript or note of the proceedings was presented to the court. It is apparent from the RAT decision that the evidence given to the Tribunal differed in some respects to that given at the two interviews with ORAC or as written down in the questionnaire. Counsel for the applicant was not prepared to say that no note of the proceedings existed but that no "*accurate*" note existed. The RLS, who were present and who had engaged counsel for the RAT hearing, were not represented before me nor were they made aware that these proceedings were in being, apart from a general awareness that the applicant had engaged solicitors to seek their files. The court pointed out that there was therefore a heavy burden on the person preparing the applicant's grounding affidavit to ensure that what was averred was true. Counsel for the applicant was unhappy with this view expressed by the court. The current situation is thoroughly unsatisfactory, especially in the context of an affidavit in which extensive averments were made in relation to what was said at the RAT oral hearing. No resolution was found to this court's concerns apart from reiterating that previous courts had accepted that what was not denied was accepted relying *on Keagnene v. The Refugee Appeals Tribunal* [2007] I.E.H.C. 17, where Herbert J. held:-

> "No replying Affidavit, denying or contesting in any way the contents of these paragraphs was filed by or on behalf of the Presenting Officer or the Member of the Refugee Appeals Tribunal. In such circumstances the court must accept that the facts deposed to in the grounding Affidavit, as distinct from comments and arguments, are correct."

(a) Treatment of Credibility
48. The treatment of credibility has on numerous occasions been recognised as a function granted by statute to the ORAC officers or the RAT members. They are the persons who have the opportunity to hear the applicant, to see the manner in which that applicant responds to questions, to view attitude and demeanour and to assess credibility in accordance with statutory guidelines. In this regard, the thirteen paragraphs in s. 11B of the Refugee Act 1996, as inserted by s. 7(f) of the Immigration Act 2003, have function and meaning and cannot be lightly ignored. If a person seeks to convince a receiving country that he is a person who should genuinely be afforded international protection and

be declared a refugee then it is up to him to in the first instance to convince the first stage assessors that he is a genuine refugee, that he has cooperated in every way with the assessment of his case, that he comes from where he says he comes from where he genuinely fears persecution, and further that his country does not afford him protection or permit him to safely relocate in his own country to escape persecution. These are fairly basic requirements. The Immigration Act 2003 and the European Communities (Eligibility for Protection) Regulations (S.I. No. 518 of 2006) sets out a permitted but not definitive methodology for determining credibility assessments in relation to how the applicant got from his own country to this one.

49. The assessment which was concluded in compliance with these statutory guidelines indicates that the applicant's history and answers at interview did not commend themselves to ORAC as supporting the contention that the applicant was a person eligible for refugee status. The applicant appealed this finding and sought to explain the inconsistencies and changes in his narrative by the presentation of a medical report outlining that he was traumatised and displayed symptoms of PTSD, and was found to have superficial skin scarring "consistent" with his history of torture by the use of electrodes at the time he filled in his application and attended for interview. This report was first presented to ORAC after the first interview and well before the second interview and was prepared on the basis of two examinations which took place in August and September, 2003, only months after the applicant's arrival in Ireland.

50. While this court has no jurisdiction to reverse or negate any findings made by the RAT in its appeal assessment of the evidence, it must be satisfied that there was no abuse by the Tribunal Member of his statutory office; that he considered the evidence in a fair manner; that the applicant was permitted to put his case in full; and that all documents furnished at the appeal were considered and weighed in the whole. This court has carefully read every document furnished and has noted many significant changes in important aspects of the applicant's narrative on key events. Significant variations in testimony were noted by ORAC at the s. 11 interview as they occurred and cannot have escaped the Tribunal Member when making his credibility assessments. As an example I have examined a major event such as the death of the applicant's wife. This was described in three different ways on different occasions. As there is no transcript or note of the RAT oral hearing it is not known how this event was dealt with at the hearing before the RAT and seems not to have been commented upon.

51. The applicant complains of three specific errors of fact which he alleges are indicative of a want of care and attention sufficient to quash the decision of the Tribunal Member as unlawful and unfair. I have considered these alleged errors in the context of the documents before me and from the RAT decision and I am satisfied that they are neither material nor relevant and are founded on a number of differing versions of those specific pieces of evidence.

(b) Consideration of Medical Report
52. I am, however, concerned about two aspects of the process by which the hearing was conducted. The medical report from SPIRASI deserved to be specifically referred to and was worthy of some analysis before its relevance was rejected. The findings made in that report may not have been highly placed on the hierarchy of probative value outlined in the Istanbul Protocol but the report and its place in the credibility assessment and the consideration of explanations for errors in the applicant's questionnaire should have been stated in the decision. The SPIRASI report details 12 small concentric scars on the applicant's arms in the region anterior to the elbow joints, each measuring between ¼ and ½ an inch. It then states:-

> "The consistent size and shape of the small scars would support possible application of an electronic device and burns to soft tissue generally affect skin pigmentation. The scars are, therefore, deemed to be consistent with the stated history."

53. The SPIRASI report also states that the nature and severity of the ill-treatment that the applicant reports sustaining bring it within the definition of torture contained in the UN Convention against Torture, and that the applicant is in need of bereavement and post traumatic counselling. In the circumstances, I am prepared to grant leave to seek judicial review of the RAT decision on this ground contained at B (iv) as modified.

(c) Consideration of Fear of Persecution as failed asylum seeker
54. This is a ground appropriate to a consideration for subsidiary protection under the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006) and not appropriate at the asylum stage.

(d) Consideration of all relevant facts relating to Angola
55. Regulation 5(1)(a) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006) provides as follows:-

> "5. (1) The following matters shall be taken into account by a protection decision-maker for the purposes of making a protection decision:
>
> (a) all **relevant** facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of the country of origin and the manner in which they are applied […]." (my emphasis added).

56. It logically follows that if country of origin information is not relevant, as when a primary finding of lack of credibility has been based on a rational analysis which explains why, in the view of the deciding officer, the truth has not been told - as occurred in *Imafu v. The Refugee Appeals Tribunal* [2007] I.E.H.C. 305 - no amount of country of origin information will be therefore relevant.

(e) Consideration of previous RAT decisions
57. I am satisfied that substantial grounds sufficient for leave have been made out on this ground. This conclusion was arrived at following an examination by the court of the six decisions referred to in this application and which were presented to the Tribunal Member. They all dealt with RAT appeals from applicants with a Cabinda and FLEC connection. There was no evidence in the decision impugned that the previous RAT decisions were considered, rejected or distinguished by the Tribunal Member. It was left to counsel for the respondents to seek to urge this court that credibility had been established in all those cases and that this was the distinguishing feature with this case. If that is correct, and it is unnecessary for me to make a finding on the point, then the differences between those decisions and the applicant's case should, at the very least, have been referred to in the decision. The quotation highlighted by the applicant from the decision has appeared verbatim in other decisions of the RAT and is suggestive of a blanket rejection of previous RAT

decisions without further consideration or evaluation. This element of the decision, together with the rejection of the contents of the medical report without reference to reasons, is suggestive of a want of fair process.

Conclusion
58. In the light of the foregoing, I am satisfied that substantial grounds have been shown and, accordingly, I grant leave on the following grounds B(iv) in part and C and leave the applicant to rephrase the ground to reflect this decision:-

(i) The Tribunal Member acted in breach of the applicant's right to fair procedures and natural and constitutional justice in failing to have due regard to the contents of the SPIRASI medical report and, if disregarding the report in the assessment of the applicant's credibility, in failing to give adequate reasons for doing so; and

(ii) The Tribunal Member erred in failing to give individual consideration to each of the six previous Tribunal decisions submitted by the applicant, and for failing to give reasons for why the decisions were not deemed relevant, and by adopting what appears to be a fixed and rigid policy in the consideration of previous Tribunal decisions by the use of a formulaic paragraph.