Neutral Citation Number [2012] IEHC 125

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 766 J.R.]

BETWEEN

OLIVER NINGA MBI

APPLICANT

AND

MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Kevin Cross delivered the 23rd day of March, 2012

1. In the above proceedings, the applicant is applying for leave for judicial review by way of *certiorari* and other reliefs concerning first of all the decision of the first named respondent to refuse to grant the applicant subsidiary protection and secondly, to the deportation order issued in respect of the applicant.

2. It is accepted that in the case of the application for leave for judicial review in respect of the subsidiary protection decision that the standard applicable is arguable grounds and in the case of the deportation order, it is substantial grounds. It is also accepted that if the application for judicial review in respect of the subsidiary protection decision is granted that the application in respect of the deportation order must follow. The applicant requires an extension of time in respect of the deportation order application which was brought some two weeks outside the time stipulated by law (fourteen days). The applicant has sought leave and been granted leave to file a supplementary affidavit explaining the reasons for the delay indicating that he immediately consulted his then solicitors (the Legal Aid Board) and they advised that they could not be of assistance and that one week later he contacted his present solicitors to arranged to meet him and he furnished instructions on 5th August, 2011, to challenge the deportation order and subsidiary protection order and counsel was briefed and a meeting was held on 24th August, 2011, which was the date of the motion.

3. In the circumstances, I will grant the applicant the extension of time required to challenge the deportation order.

History

4. The applicant is a national of the Democratic Republic of Congo born on 16th May, 1972, where he alleges that he is a member of an opposition political group called the Movement for the Liberation of Congo ("MLC").

5. The applicant alleges that on 22nd March, 2007, he was summonsed to the MLC headquarters to deal with a situation where the power supply had been cut (he is a trained electrical engineer) and while he was there, gunshots were heard and he found himself in the middle of a gunfight between the MLC followers and government forces who were seeking to disarm the MLC members.

6. The applicant alleges that while trying to escape he was arrested by government troops and taken to a police station and that he was tortured, deprived of food and water and threatened with execution. In particular, he was asked to reveal the location of the leader of the MLC, Mr. Benba.

7. The applicant says that he was blindfolded, stabbed in the back and hit over the head with the butt of a gun which caused him to bleed and fall unconscious and his head was bandaged and he escaped on payment of US$2,000 thanks to the intervention of a nurse and eventually fetched up within the State.

8. On 17th February, 2008, the applicant completed an application for refugee status and the Refugee Legal Service (RLS) submitted documentation in support of his application on 20th May, 2008 and requested that no interviews took place until a medico legal report from SPIRASI was available. On 4th June, 2008, ORAC replied to the request from the RLS stating that no undertaken could be given to delay the process and the applicant was duly interviewed on 18th June, 2008, and a report was furnished recommending that the applicant should not be declared a refugee which was notified to the applicant.

9. On 5th August, 2008, the RLS lodged an appeal with the Refugee Appeals Tribunal (RAT) and the RLS submitted a medico legal report in support of the applicant's application and furnished further documentation.

10. On 2nd April, 2009, an oral hearing was heard in respect of the applicant's appeal and the RAT recommended that the ORAC recommendation be affirmed and the applicant should not be declared a refugee. This decision was notified to the applicant on 31st March, 2010.

11. On 14th May, 2010, the Minister refused the applicant's application for refugee status which was notified on 17th May, 2010, the applicant was duly informed that the first named respondent proposed to make a deportation order.

12. On 4th June, 2010, the applicant's solicitors, the RLS, submitted an application for subsidiary protection pursuant to the 2006 Regulations and an application for permission to remain under s. 3 of the Immigration Act 1999.

13. It is in respect of the refusal of these applications that the within proceedings were initiated.

14. The applicant in these proceedings relies on a total of sixteen grounds. A number of these grounds have been decided previously against the applicant in a number of cases.

15. Mr. Paul O'Shea of counsel is to be commended that he accepted the indication of this Court in *Jayeola v. Minister for Justice and*

Equality [2011] 656 J.R. (3rd February, 2012) in which case I indicated that the appropriate procedure in such matters was to formally raise these points that had previously been decided, should they be required in any further hearing of the matter and then to proceed to argue the substantive grounds of the case.

16. In this regard, Mr. O'Shea formally submitted, *inter alia*, that Article 4.1 of the Qualification Directive had not been properly transposed into domestic law by means of S.I. No. 518 of 2006 by any other means as the Article stated:-

> "...In cooperation with the applicant and it is the duty of the Member States to assess the relevant elements of the claim."

17. Notwithstanding the reference to the court of justice by Hogan J. in *M.M. (Mujyanama)*, the High Court has decided in a large number of cases e.g. *Ahmed v. MJELR* (Unreported, High Court, Birmingham J. 24th March, 2011); *BJSA (Sera Leone) (Hiele) v. MJELR* [2011] 1 IEHC 38 (Cooke J.) and myself in *Jayeola* (above) and in other cases that this point is without merit and accordingly, I refuse leave on this ground.

18. Secondly, the applicant formally also submitted that there was a lack of effective remedy in Irish law by means, *inter alia*, of the inability of the applicant to produce new material and further, there was a breach of the principle of equivalence as it was alleged that there was no mechanism whereby an applicant could appeal from their refusal of subsidiary protection.

19. These points have also been decided against the applicant in a large number of cases e.g. *Efe v. Minister for Justice, Equality and Law Reform (2)* [2011] IEHC 214, *P.I & E.I. v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Hogan J. 11th January, 2011); *ISOF v. MJELR (No.2)* [2010] IEHC 455, Cooke J. and indeed by myself in *Jayeola* (above), these points also are in the view of the court unsustainable and I will refuse leave on those grounds.

Substantive Grounds

20. The applicant concedes that the application for subsidiary protection relied upon substantially the same information as was supplied to the RAT for its decision.

21. Where subsidiary protection applicants put forward the same set of facts, the Minister is entitled to and must have regard to the asylum decisions and in particular the credibility decisions during the process and he is not obliged to reopen or reinvestigate the asylum decision- see *N.F. v. Minister for Justice, Equality and Law Reform* (Unreported, High Court, Charleton J.)

22. In *Obuseh v. Minister for Justice, Equality and Law Reform* [2010] 1 IEHC 93, Clark J. stated:-

> "The Court finds it difficult to envisage any circumstances where an asylum applicant is found not credible in his/her claim as to the existence of a well founded fear of persecution will be granted subsidiary protection on the same facts. One has to ask oneself how, if a person's assertion relating to a fear of persecution is not believed, it can logically be possible that he/she might be eligible for protection on the basis of the same story under the Qualification Directive and Protection Regulations. Subsidiary protection is exactly what it says it is- it provides complementary protection to those applicants who do not meet Convention requirements to establish persecution but who nevertheless require protection....
>
> If therefore the applicant has been rejected on credibility grounds for refugee status and he wishes to obtain subsidiary protection, he faces the unenviable task of establishing substantial grounds for believing that he will face a risk of serious harm from the death penalty or execution or torture or inhuman or degrading treatment on his return to his country of origin within the meaning of Article 15(a) or (b) of the Qualification Directive."

23. In this case, the Minister, *inter alia*, relied upon the credibility findings adverse to the applicant in the decision of ORAC and in particular of the RAT. The Minister also came to substantially the same conclusions as the RAT in relation to relocation and State protection.

24. There has been no challenge to the decisions of the ORAC or the RAT by way of judicial review and indeed in the application for subsidiary protection, there was no submission in the application that the decisions in relation to credibility or the country of origin decisions were arrived at on a legally erroneous basis.

25. Counsel on behalf of the applicant urges that the applicant was at the time was represented by the RLS who he alleges do not generally challenge decisions by way of judicial review possibly due to resources problems. Be that as it may, the RLS who have great experience in handling claims on behalf of persons seeking refugee status etc. did not in their application for subsidiary protection raise any objection to the basis upon which the earlier decisions had been arrived upon.

26. The applicant has referred me to the decision of Hogan J. in *H.M v. MJELR* [2011] IEHC 16 when he said:-

> "These are issues with which the Minister arguably should have engaged before concluding that the applicant was not entitled to subsidiary protection and that he should be deported. As I have already indicated, both decisions rely heavily on the Tribunal's reasoning on the credibility and refugee *sur place* issues. This in itself is in principle perfectly acceptable, but where such reasoning is itself open to objection, then it will also infect the Minister's decision, even where the decision of the Tribunal has not been challenged in judicial review proceedings."

27. Counsel for the respondent, Mr. Conlan Smyth, referred me to the decision of Cooke J. in *Dbisi v. Minister for Justice* (Unreported, High Court, 2nd February, 2012). Cooke J. did not refer to *H.M.* but he did reiterate the established jurisprudence of this Court when he stated:-

> "The scheme of the 2006 Act when taken in conjunction with the provisions of the Acts of 1996 and 1999 in complementing the asylum process, presupposes that the application for subsidiary protection will have been examined in the first instance during the asylum process before it comes to be considered under the Regulations by the Minister. It follows, in the view of the Court, that where the s. 13 Report (or for that matter the decision of the Tribunal on appeal) has found that an asylum seeker's claim is implausible or lacks credibility such that the events described or the facts relied upon are considered not to have happened or not to have involved the applicant, there is no obligation on the Minister to reconsider the same facts or events and to decide whether they should be considered plausible or credible in the light of explanations given in the application for subsidiary protection; at least in the absence of new evidence, information or other basis capable of demonstrating that the original findings were vitiated by material error on the part of the decision makers. To require the Minister to do so would effectively convert an application for subsidiary protection

into a form of a second appeal against the refusal of a declaration of refugee status.

It would also, in the view of the court, lead to the inherently contradictory result that in a case where an asylum claim based on past persecution for a specific Convention reason (race, religion, political opinion *etc*.) has been rejected on grounds of lack of credibility as to the events or facts relied upon, a challenge to those findings made in an application for subsidiary protection would require the Minister to decide not whether the applicant was eligible for that protection but whether the applicant was a refugee. It is a precondition of the admissibility of an application for subsidiary protection that the applicant is not a refugee (see definition of 'person eligible for subsidiary protection' in Article 2 of the Qualifications Directive (2004/83/EC) and Regulation 2(1) of the 2006 Regulations."

28. Cooke J. later said:-

"It follows in the judgment of the Court, that where factual claims including those turning on credibility, have been examined and rejected in the asylum process and have formed the basis of the Minister's refusal of the declaration which is a precondition to the subsidiary protection application, the Minister cannot be compelled by the making of the latter application to reopen and reconsider the same facts, events and assertions. This can only be done, in the judgment of the Court, by means of the statutory appeal to the Refugee Appeals Tribunal.

Accordingly insofar as the determination is based on the rejection in paragraph 8 of the applicant's entitlement to the benefit of the doubt based upon the findings made in the s. 13 Report, no arguable case for the grant of leave based upon Ground O. of the amended statement of grounds is made out. The application for subsidiary protection did not allege that the s. 13 Report was in any sense mistaken or erroneous in its understanding of the factual basis of the claim made..."

29. It is difficult but not, I think, impossible to reconcile the judgment of Hogan J. in *H.M* (above) and Cooke J. in *Dbisi* (above). The Minister is not under an obligation to revisit the factual findings especially including the credibility findings of the ORAC or the RAT. The function of the court when assessing the matter for the purposes of a judicial review is to establish whether or not in this case the Minister's decision was irrational and in this regard the guidance of Cooke J. in *ISOF v. Minister for Justice, Equality and Law Reform (No. 2)* [2010] IEHC 457 is invaluable:-

"Where the validity of an administrative or quasi judicial decision comes before the court on judicial review, the Court's starting point is the decision itself; the basis upon which it has been reached and the process by which it has been decided. It does not have before it an appeal against the decision, much less a merits-based appeal by way of re-adjudication of the original issue. Its jurisdiction is based upon the content of the decision and the law applicable thereto. Where the challenge to the decision is based upon the assertion that it has the effect of intruding disproportionately upon the fundamental rights of those affected by it, it is the duty of the court to assess whether the applicant demonstrates that it is disproportionate in the sense of being irrational or unreasonable according to the *Keegan/O'Keeffe* test. It does so by reference to the evidence, information and documentation available to or procurable by the decision maker at the time... In the judgment of the Court no material difference exists between the evaluation of proportionality as regards the interference with 'qualified rights' (as in the present case) and 'absolute rights' (as in the case of *Meadows*). If constitutional rights are in issue (whether absolute or qualified) it is the function and duty of the High Court to vindicate them. The same can be said for rights entitled to protection under the European Convention of Human Rights and the need for the High Court, in compliance with Article 13 of the Convention, to provide an effective remedy for that protection."

30. Accordingly, the passage from Hogan J. in H.M. quoted above, does not alter the established jurisprudence of this Court as pronounced by Cooke J. in *Dbisi* (above): it is for the Minister in subsidiary protection to make his decision. He must do so on the basis of S.I 518 of 2006 always guarding against refoulement. It is only if the Minister errs in his conclusions, in the judicial review sense that he could be successfully challenged. This challenge, of course, would include a challenge on the law as reaffirmed in *Meadows*. If the credibility of the applicant has been rejected by the RAT then unless the Minister's reasoning is defective then the Minister is entitled to rely upon this conclusion and cannot be successfully challenged if he does so. To do otherwise, not alone would have the Minister being obliged in effect to decide again whether the applicant was or was not a refugee but would give a far too great officious scrutiny to "learned men in wigs and gowns" and the proper persons to assess credibility are the persons who viewed the applicant, listened to his evidence, heard his cross examination and observed him.

31. Officious scrutiny, or indeed anxious scrutiny forms no part of Irish law as was reaffirmed in *Meadows*. It affords far too great retrospective power to judges who have not been tasked with the decision making in the first place. Whatever in theory might be said of it, such scrutiny invariably invades not the decision making process but the merits of the decision itself and this in the view of the court is ultimately a breach of the separation of powers. Proportionality is not a stand alone right but rather the method by which the court will examine the process when constitutional or ECtHR rights are engaged.

32. What was being stated by Hogan J. in *H.M.* is that if, for example, an applicant is from the DRC and the RAT deals with country of origin information from the Republic of Congo (Brazzaville) then the Minister is not entitled to utilise such erroneous country of origin information in his subsidiary protection decision or, as in *H.M.* (above) the fact that an applicant's credibility as a convert to Christianity had been rejected does not necessarily deal with the issue of how an Afghan religious judge would be likely to treat the applicant' apparent apostasy.

The Subsidiary Protection Decision

33. The decision maker correctly indicated that there were three main issues to be established:-

(a) whether they are substantial grounds for believing that the applicant would face a real risk of torture or inhumane or degrading treatment in his country of origin and in particular the risk of such treatment as a result of his stated fear of the State authorities there;

(b) whether there is substantial grounds for believing that the applicant would face a real risk and serious and individual treat to his life by indiscriminate violence in situations of international or internal armed conflict in his country of origin; and

(c) whether the applicant could avail of State protection against such threats.

34. The applicant first contended that the application for subsidiary protection and in relation to the deportation order were both

made "without prejudice" to the final determination of two cases pending before the CJEU (*Dokie* and *Ajibola*). The applicant maintains that the respondent ought not to have proceeded to make his decision until at least communicating with the applicant so the applicant could have furnished any new information in possession.

35. In effect, the applicant is here making an argument based upon legitimate expectation. I do not see any merit in this argument. The applicant is not entitled to prevent the Minister for making his decision and has not demonstrated any information that he might have furnished had he been told the Minister was going to proceed to make his determination.

36. The decision maker in the subsidiary protection decision proceeded as he was entitled and indeed obliged to do to assess the application in accordance with Regulation 5 detailing the country of origin information and which analysed a number of reports on the DRC to answer the question whether there are substantial grounds in believing the applicant would face a real risk of torture or inhuman or degrading treatment in his country of origin.

37. The decision maker concluded:-

> "The preceding country of origin information indicates that although in recent times political parties have been able to operate without restriction or outside interference for the most part, and rights of political assembly and expression exist on a *prima facie* basis, nevertheless the Congolese State authorities have been known to target certain political opponents for torture and detention. Further it is noted that the preceding country of origin information indicates that members of the Congolese State security forces have been implicated in such political suppression."

38. Having made that assessment, the decision maker then proceeded to assess the viability of the option of State protection and again analysed the quantity of country of origin information and concluded:-

> "State protection in the Democratic Republic of Congo is a viable option for the applicant. In any event, internal relocation in Democratic Republic of Congo may be a viable option for the applicant as the following country of origin information sourced from the United States State Department indicates..."

39. The decision then concluded on this point as follows:-

> "While it is accepted that many forms of suppression of political opposition takes place in the Democratic Republic of Congo, nevertheless, it is not accepted that the applicant would be without protection there were he to seek same. Therefore, it is not accepted that the applicant faces a real risk of torture or inhuman or degrading treatment in his country of origin."

40. This conclusion is attacked as being irrational. I do not find that an arguable case has been made out on that basis. The Minister examined the COI and his conclusions may or may not have been the conclusions the court would have come to had the court been deciding the issue but they flowed rationally from that examination. Accordingly, they cannot be successfully judicially reviewed.

41. The subsidiary protection decision then goes on to address the issues to whether there are substantial grounds to believe that the applicant would face a real risk of serious and individual (my emphasis) threat to his life by reason of indiscriminate violence in situations of international or internal arm conflict in his country of origin. The decision maker examined some country of origin information indicating that "the security situation in the eastern region of the Democratic Republic of Congo remains a serious concern". The decision maker goes on to analyse further information which concludes:-

> "The proceeding country of origin information indicates that outside eastern regions of the country most of the Democratic Republic of Congo remains free of armed conflict."

42. The decision maker then analysed the case of *Elgafaji v. N.L.* (Case C-465/07) of the European Court of Justice and stated that:-

> "In order for someone to qualify for protection on the basis of indiscriminate violence without needing to show why they individually would be at risk, the level of violence would need to be so high that anyone irrespective of his or her personal circumstances returned to the country or part of the country in question would be at risk 'solely on account of his presence in the territory of that country or region'."

And the decision maker concluded:-

> "The evidence does not support a conclusion that levels of indiscriminate violence are so high in many parts of the Democratic Republic of Congo, that anyone returned to many parts of that country would be a risk from indiscriminate violence. It is necessary therefore to consider in each case the circumstances of the individual applicant to ascertain whether he personally would be at real risk from indiscriminate violence in all the circumstances of the case...
>
> While it is accepted that the situations of violence may from time to time to exist in certain regions of the Democratic Republic of Congo, it is not accepted that this situation in the Democratic Republic of Congo itself amounts to a situation of international or internal armed conflict as defined in Common Article 3 of the 1949 Geneva Convention and the 1977 Additional Protocols I and II concerning armed conflicts of an international or non-international character. Therefore, it is not accepted that the applicant runs a real risk of serious and individual threat by reasons of indiscriminate violence in situations of armed conflict."

43. The applicant again challenges those conclusions as being irrational and again I am not of the view that he has laid out any arguable grounds for such a contention. There is a clear basis for the conclusions reached by the decision maker.

44. It should be pointed out that it is only at this stage of the decision (more than half way through it) that the decision maker for the first time refers to the credibility findings of ORAC and the RAT which he details further in his decision and which he says indicate that the applicant should not be given the benefit of the doubt.

45. The decision maker then states he has given cognizance to all the matters referred to in the application for subsidiary protection including all documents submitted by the applicant on his behalf as part of his application for asylum. Counsel criticised this as being a formulaic paragraph. However, in the absence of any indication that this paragraph is untrue (and there is no such indication) then the court must accept that the decision maker did indeed do as he stated.

46. The decision maker then goes on to analyse the personal circumstances of the applicant and repeats the conclusions in relation to credibility of the Tribunal Member.

47. The Tribunal Member summarised a significant number of ways in which he felt the applicant lacked credibility and went on to state:-

> "I do not believe that the applicant was persecuted in the DRC as he alleges and I do not believe he will be persecuted should he return to the DRC.
>
> The cumulative effect of the foregoing observations in relation to the applicant's credibility materially and detrimentally effect the veracity of what he purports to state and the substantive trust of his claim. Having considered para. 204 of the UNHCR Handbook in relation to the applicant's general credibility, I cannot afford the applicant the benefit of the doubt. He has contrived a story for the Tribunal, which I reject, and his failure to tell the truth during his appeal has been exposed in cross examination.
>
> In assessing the credibility of the applicant, I have had the opportunity of hearing and observing the manner in which the evidence was given and his demeanour. I found his *(sic)* to be evasive and contradictory in his evidence as to its contents and presentation and I found his story to be inconsistent, contradictory, implausible and wholly lacking credibility. I found the applicant to be deliberately evasive and vague."

48. Mr. O'Shea's first criticism of the credibility findings is that based largely or substantially on demeanour there was a considerable delay between the oral hearing (2nd April, 2009) and the decision (22nd March, 2010)-approximately one year.

49. The delay indeed was substantial and indeed inordinate and Mr. O'Shea referred me to the decision of Charleton J. in *Blogun v. Refugee Appeals Tribunal* (Unreported, High Court, 29th January, 2008) [2005] 1301 J.R., which granted leave for judicial review on the grounds of delay between the hearing and the decision. It was emphasised by counsel for the respondent that, in the instant case, the credibility decisions by the Tribunal were not based upon demeanour. It is the view of the Court that even where decisions are based on demeanour, a decision maker acting fairly who intends or is minded to make an adverse decision based upon demeanour will invariably have taken notes and his decision will not and must not arise out of a process that tends to recall demeanour after an extensive lapse of time.

50. This having been said, however, in the instant case the credibility decisions of the Tribunal were not primarily based upon demeanour (though demeanour was a part) but were based upon a rational analysis of various inconsistencies in the evidence of the applicant before the RAT.

51. Furthermore, as has been indicated there has been no challenge to the decision of the RAT and there was no suggestion in the subsidiary application decision that the RAT erred at law. Had the RAT decision been challenged on the basis of the inordinate delay, a court would have had the benefit of an affidavit of the Tribunal Member to explain why his decision was delayed and the court could have assessed that issue including on the issue of proportionality. In this case, however, the same solicitor who witnessed the applicant's alleged inconsistencies as they were found raised no objection to any of the findings of the RAT on the basis that they were irrational, unreasonable or lacking in proportionality. The decision the applicant now seeks to attack is the Minister's decision and he cannot in these proceedings collaterally attack the decision of the RAT which was unchallenged on this basis either by way of judicial review or submission.

52. From the foregoing, I am not of the view that the applicant has shown any arguable grounds for the contention that the delay (regrettable and inordinate though it was) between the hearing by the RAT and its decision render the Minister's reliance upon it when no challenge had been made to it, irrational or unreasonable.

The Medical Challenge

53. The next challenge to the Minister's decision was in relation to his acceptance of the credibility decision based upon the rejection by the Tribunal of the account by the applicant that he had been tortured by security forces of the State after his arrest.

54. The RAT member had indicated that he had read the report submitted by Dr. Sabrina Vessia of SPIRASI. SPIRASI are highly respected doctors who had an expertise in reporting and examining, *inter alia*, asylum seekers to ascertain their injuries and if possible to indicate the cause therefore.

55. The decision maker indicated that he did not accept the conclusions of the SPIRASI reports as being corroborating the applicant's evidence. The decision maker stated that he came to that conclusion "for the reasons set out at A and B above".

56. In point of fact, paras. "A. and B. above" do not come to any conclusions and I accept that the probability is that the decision maker meant that he came his conclusions based on the credibility reasons set out at A. to F. above. In any event, the error in relation to "A. and B." is a small one and is not material.

57. The applicant's main challenge to the medical evidence and its treatment by the decision is that no proper consideration was given to the medical report in the context of his s. 3 and subsidiary protection applications.

58. The RAT examined the SPIRASI report and did not accept the report as corroborating the applicant's evidence. It did so following the reasoning of the Court of Appeal in *S. v. Secretary of State for the Home Department* [2007] Imm. A.R. 1 which adopted the reasoning of the Tribunal presided over by Ouseley J. in *H.E. (DRC CG)* [2004] U.K. IAT 00321:-

> "A particular difficulty arises in the contention that a report should be seen as corroborating the evidence of an applicant for protection. A doctor does not usually assess the credibility of an applicant; it is not usually appropriate for him to do so in respect of a patient or client. That is in any event the task of the fact-finder who will have often more material than the doctor, and will have heard the evidence tested. So for very good and understandable reasons the medical report will nearly always accept at face value what the patient or client says about his history. The report may be able to offer a description of physical conditions and an opinion as to the degree of consistency of what has been observed with what has been said by the applicant. But for those conditions, e.g. scarring, to be merely consistent with what has been said by the applicant, does no more than state that it is consistent with other causes also. It is not common for the phrases which indicate a higher probative value in the observed conditions to be used. That limits the weight which can be afforded to such a report when judging the credibility of the claim. Rather than offering significant separate support for the claim, a conclusion as to mere consistency generally only has the effect of not negating the claim."

59. The decision maker in the subsidiary protection decision adopted the reasoning of the Tribunal and indicated that he did not warrant the benefit of the doubt and that his stated fear of returning to the DRC was not found to be credible.

60. In this regard, the decision of Hogan J. in H.M. (above) may indeed be relevant. If the decision maker's use of medical evidence did not flow from the facts or was defective in reasoning then the fact that the decision maker relied upon the same conclusion as the RAT will not save his decision from being struck down in this Court. What this Court will not do is to go behind the decisions of the decision maker in accepting the RAT's findings in relation to credibility. If the RAT was legally wrong in relation to its use of the medical evidence and if the Minister was similarly wrong then the Minister's decision can be and should be open to judicial review. It is in this sense that the court holds that there is no essential contradiction between the decision of Hogan J. in *H.M.* (above) and the decision of Cooke J. in *Dbisi* (above).

61. Counsel for the applicant relies upon the decision of the ECtHR in *R.C. v. Sweden* (41827/07) (9th March, 2010). This case stated:-

> "The Court acknowledges that, owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof. However, when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies...In principle, the applicant has to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3... Where such evidence is adduced, it is for the Government to dispel any doubts about it." (Emphasis Added)

62. In *R.C.*, the ECtHR specifically found that the court did not share the conclusion of the Government of Sweden that the information provided by the applicant was such to undermine his general credibility noting that one of the Migration Courts lay judges considered that the applicant had given a credible account of events and ought to have granted asylum. The ECtHR went on to question a number of the credibility findings of the Migration Court and found that the applicant's story was consistent throughout the proceedings. Dealing with the medical evidence, the ECtHR noted that the applicant produced a certificate from what was in effect a general practitioner indicating that the applicant's scars and injuries "may have been caused by ill-treatment or torture". The ECtHR went on to state:-

> "In such circumstances, it was for the Migration Board to dispel any doubts that might have persisted as to the cause of such scarring... In the Court's view, the Migration Board ought to have directed that an expert opinion be obtained as to the probable cause of the applicant's scars in circumstances where he had made out a prima *facie case* as to their origin. It did not do so and neither did the appellate courts. While the burden of proof, in principle, rests on the applicant, the Court disagrees with the Government's view that it was incumbent upon him to produce such expert opinion. In cases such as the present one, the State has a duty to ascertain all relevant facts, particularly in circumstances where there is a strong indication that an applicant's injuries may have been caused by torture."

63. In the *R.C.* case, the ECtHR commissioned an expert report which indicated there were numerous scars in the applicant's body and that while some of them may have been caused by means other than the torture but the court accepted the report's general conclusion of the injuries to a large extent were consistent with having been inflicted on the applicant by other persons in the manner in which he describes thereby strongly indicating that he has been a victim of torture.

64. The court went on to state that it was evident from the information available on Iran that the authorities frequently detain and ill-treat persons who participate in peaceful demonstrations in the country. In *R.C.*, the injuries found by the expert commissioned by the ECtHR included scars observed on his body which had the appearance and localisation which corresponded well with his statements of how they had marks on his ankle could have appeared as a consequence of having been suspended upside-down by his ankles as suggested and pigmentation on his neck corresponded well with a burn injury.

65. In that case, the expert noted that alternative causes for the origins of the scars could not be completely excluded but that experience showed that self-inflicted injuries, in injuries resulting of an accident normally had different distribution to those shown by the applicant and the findings in the *R.C.* case, favoured the conclusion that the injuries had been inflicted on the applicant completely or to a large extent by other persons in the manner claimed by him. Thus, "the findings strongly indicated that the applicant had been tortured".

66. In the instant case, there is much to differentiate the situation from that found by the ECtHR in *R.C.* (above). In the first instance, the applicant's credibility has not been found by any decision maker to be in anyway credible. In the second instance, the expert obtained in support of the applicant, in effect, an expert in injuries that may have been inflicted by torture unlike the general practitioner in the *R.C.* case and it is not the view of the court that any further expert was required.

67. Of most importance, however, the nature of the injuries and the conclusion of the medical expert in this case differentiates it from the *R.C.* case. In particular, the scars left by burns in the *R.C.* case are not replicated. The expert apparently discovered scarring consistent with the applicant's evidence that he had been stabbed with a knife but here the similarities ended.

68. In the case of *Mibanga v. Secretary State for Home Development* [2005] EWCA Civ. 367, the Court of Appeal quashed a decision by the adjudicator who had disregarded two expert reports in concluding that the appellant's case had lacked credibility and in that case, the injuries described were extraordinary in their severity and their nature being of massive scars of different kinds all over Mr. Mibanga's body which were described in detail consistent with beatings with a belt, bites of leeches and the application of electrodes to the applicant's genitals.

69. It is the view of this Court that the reasoning of the Court of Appeal in *Mibanga* was similar to that of the ECtHR in *R.C. v. Sweden*. In both cases, there was a finding of a defective reasoning by the decision maker in relation to credibility and ignoring of powerful medical reports which overwhelmingly supported what the applicant had said. In both the *R.C.* and the *Mibanga* cases the scarring and physical marks found on the applicant were highly unusual and related to specific details of the torture claimed by the applicant (scalding burns in one case and marks including bites of leeches in *Mibanga*).

70. The case of *Mibanga* was discussed in *S. v. Secretary of State for Home Department* (above) which distinguished the facts in that case from *Mibanga* stating:-

> "It seems to me that the logic of the *Mibanga* case does not apply to this case, essentially for two separate reasons. One

is that the structure of the immigration judges reasoning here does not fall fowl of the artificial separation and structural failure which were found to exist in *Mibanga*, and the other is that the medical evidence in *Mibanga* was so powerful and so extraordinary as to take that case into an exceptional area."

71. In this case, the decision maker came to the conclusions in relation to credibility and his reliance upon the conclusions in the Tribunal on the medical reports were not in the view of the court defective or irrational.

72. There is nothing in this case that would suggest that the nature of the findings by the medical expert offered by the applicant did anything other than have the effect of not negating the applicant's claim. Secondly, the nature of the injuries sustained by the applicant in this case, as in the case of *S. v. Secretary of State for Home Department* were clearly different from the injuries in *R.C. v. Sweden* or in *Mibanga*.

73. For these reasons, the court does not accept that the applicant is entitled to leave for judicial review on the above grounds.

The Deportation Decision
74. Apart from the grounds which the court has already rejected in dealing with the subsidiary protection decision, the applicant challenges the deportation decision, *inter alia*, that no rational grounds were provided for the decision.

75. In the deportation decision, the decision maker again considered the medical report furnished by the applicant and specifically dealt with the provisions of s. 3(6) of the Immigration Act 1999 and s. 5 of the Refugee Act 1996, s. 4 of the Criminal Justice (U.N. Convention Against Torture) Act 2000 and Article 8 of the European Convention on Human Rights. The conclusion of the decision maker was that refoulement was not found to be an issue in the case and that no issue arose under s. 4 of the Act of 2000 and that no issue arose in relation to private and family rights under Article 8.

76. The court does not hold that any ground has been made whereby leave should be granted in relation to the deportation decision.

Conclusion
77. The application must fail on the basis of all grounds advanced.