THE HIGH COURT

JUDICIAL REVIEW- ASYLUM LIST

[2015 No. 380 J.R.]

BETWEEN

D.M.K.K. (DRC)

APPLICANT

AND

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

RESPONDENTS

JUDGMENT of the Hon. Ms. Justice Stewart delivered on 14th day of December, 2017.

1. The applicant currently before the Court seeks, *inter alia*, an order of *certiorari* quashing the decision of the respondent refusing his application for re-admittance to the asylum process under s. 17(7) of the Refugee Act 1996 and declarations that certain aspects of the asylum process are in breach of European law. Leave was granted by MacEochaidh J. on 6th July, 2015. Other points in the case were adjourned by agreement until the Court of Appeal handed down its judgment in *N.M. (DRC) v. Minister for Justice, Equality and Law Reform* [2016] IECA 217. That judgment was delivered on 14th July, 2016, and will be addressed in the submissions below.

Background

2. The applicant was born in 1978 and is a national of the Democratic Republic of Congo (DRC). He arrived in this jurisdiction on 4th June, 2009, and sought asylum as an Angolan/Cabindese national on grounds of persecution for political opinion. He alleged that he had been kidnapped in October, 2007, detained for 14 months and repeatedly beaten by armed men, who believed he was in possession of documents relating to the Cabindan organisation. His wife and first-born son arrived in the State in 2012 and are currently in the process of applying for subsidiary protection. He states that the couple have had two more children since then. No applications have been made on their behalf. A deportation order was issued in respect of the applicant on 29th November, 2013, following the failure of his application for asylum. He then used a valid DRC passport to secure a UK visa. The UK Border Agency has since informed the authorities in this jurisdiction that the applicant's fingerprints matched an individual of Congolese nationality who had been issued a multi-visit business visa.

3. Subsequent to the failure of his asylum application, information came to the applicant's attention that, due to deteriorating conditions in the DRC, he would be in danger of persecution if returned there by reason of his status as a failed asylum seeker. This information included two reports compiled by a Ms. Catherine Ramos, entitled "Unsafe Return". On foot of these reports, the applicant submitted an application on 28th April, 2015, for re-admittance to the asylum process under s. 17(7). This was refused on 25th June, 2015.

Applicant's Submissions

4. Michael Conlon SC, with Paul O'Shea BL, submit on behalf of the applicant that the Ramos reports constitute new evidence within the meaning of the 1996 Act. He refers to *P.B.N. (DR Congo) v. Minister for Justice & Equality, Ireland and the Attorney General* [2015] IEHC 124, where Barr J. found that these same reports could be considered as new evidence that the applicant was not in a position to present during the original application. The applicant also relies on *A.A. (Iraq) v. Minister for Justice, Ireland and the Attorney General* [2012] IEHC 63, wherein Cross J. found that the burdens in need of discharge for a successful s. 17(7) application are "not very onerous". Cross J. also found that the material in question need only have the potential of containing the ingredients necessary to bring the applicant within the definition of a refugee.

5. The applicant submits that the failure to disclose material heavily relied upon by the respondent (namely the recent English decision in *B.M. and Ors (returnees - criminal and non-criminal) (CG)* [2015] UKUT 293, which contributed to the respondent's COI analysis) amounts to a breach of natural justice and fair procedures. He acknowledges that Barr J.'s reasoning in paras. 81 to 85 of *P.B.N.* holds against him on this point, as the respondent is not obliged to enter into correspondence with the applicant once submissions have been made. However, he asks the Court to depart from Barr J.'s judgment on two grounds:

> - Unlike the cases that Barr J. relied on, this case is not one where the issue of unsafe return for failed asylum seekers was considered adequately at a previous stage in the process,
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> - European law was not raised before Barr J. The applicant argues that, since EU law is being applied in the context of s. 17(7), the relevant policies and principles (particularly Art. 41 of the Charter) apply. He argues that CJEU case law (such as *M.M. v. Minister for Justice, Equality & Law Reform and Ors* (C-277/11) recognises a right to be notified of the key documents, central issues and core arguments that inform a public authority's reasoning, so that the affected party may air his views and maintain an effective defence. The applicant highlights Humphreys J.'s views on fair procedures in subsidiary protection cases, as expressed at para. 58 of his judgment in *W.T. v. Minister for Justice & Equality* [2016] IEHC 108. But he also submits that *W.T.* can be distinguished from his case because the evidence relied on by the respondent in *W.T.* did not materially contradict the evidence put forward on the applicant's behalf. In any event, he alleges that the right to be notified has been acknowledged in domestic and English decisions like Finlay-Geoghegan J.'s decision in *Olatunji v. RAT and Minister for Justice, Equality & Law Reform* [2006] IEHC 113 and Lord Mustill's judgment in Re *D & Ors (Minors)* (Adoption Reports: Confidentiality) [1995] 4 All ER 385.

The applicant relies on the obiter dictum of Cooke J. in *M.A.M.A. v. RAT and Ors* [2011] 2 I.R. 729 that legal authorities are not a proper basis from which to draw country of origin information (COI). The applicant also challenges the alleged lack of clarity in the impugned decision regarding whether or not the respondent actually read the COI referenced in *B.M.* or simply quoted the extracts referred to therein.

6. The applicant alleges that the impugned decision fails to properly address the representations made and evidence adduced because the reasoning for which the applicant's material was rejected is unclear. Therefore, he submits that it is in breach of the principles outlined by the Supreme Court in *Meadows v. Minister for Justice, Equality & Law Reform and Ors*. [2010] IESC 3 and *Mallak v. Minister for Justice, Equality & Law Reform* [2012] 3 I.R. 297. The applicant also refers to domestic and EU legislation that require

reasons to be given for a decision.

7. The applicant submits that the Ramos reports put the respondent on inquiry as to how failed asylum seekers are treated upon return to the DRC and that the respondent erred in law by failing to properly address these matters. Paras. 91 – 93 of *P.B.N.* are relied on in this regard.

8. The applicant alleges that the respondent acted ultra vires her powers under s. 17(7). He submits that the section empowers the respondent to determine:

> - whether new evidence have been presented that significantly increases the likelihood that the applicant needs protection, and
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> - whether the applicant lacked the capability to present that evidence as part of his previous application through no fault of his own.

He contends that the European Union (Subsidiary Protection) Regulations 2013 (S.I. No. 426 of 2013) do not empower the respondent to perform the functions of the Office of the Refugee Applications Commissioner (ORAC) and Refugee Appeals Tribunal (RAT), as she allegedly did in this case by investigating the issue. The applicant also argues that the respondent has acted in breach of s. 17(7D) of the 1996 Act, as inserted by the European Communities (Asylum Procedures) Regulations 2011 (S.I. No. 51 of 2011). He submits that, the respondent is bound to consent to a re-entry application where the two elements set out above have been met. On this issue, he relies on the Supreme Court's decision in *P.B.N. (CR Congo) v. Minister for Justice* [2014] IESC 9.

9. The applicant argues that the respondent acted improperly by relying on findings made by the asylum authorities in his prior asylum application, particularly by relying on the findings related to credibility. This is allegedly so because the impugned decision relates to the treatment of failed asylum seekers, a group to which he unquestionably belongs, thus diminshing the role that credibility has to play in reaching a decision. In making this submission, he relies of R*.B.K. v. Minister for Justice, Equality and Law Reform*, an *ex tempore* decision of MacEochaidh J. delivered on 6th May, 2015. Paragraph 9 of that decision states:-

> *"I am satisfied that the applicant has presented an arguable case for the existence of a credible basis for the existence of a real risk of serious harm. I will grant an injunction restraining the deportation. I should also say that I was asked to bear in mind that the credibility of applicant has been repeatedly rejected and I observe that that is so. However, what was rejected was the credibility as to his original asylum claim and that asylum claim may well have been based on falsehoods and incredible or implausible assertions but the basis upon which the applicant has sought to re-enter the asylum system is wholly independent and unrelated to the basis upon which he originally sought asylum. And so, no matter how badly he misled the authorities in earlier applications, his discrete application for re-entry based upon a separate ground of fear of harm because is a returned failed asylum seeker must be separately assessed and therefore I do not think it this is an appropriate consideration to weigh against him at this interlocutory stage. It may well be an appropriate matter to weigh against him at a later stage or at a stage where discretion is being exercised by the court as to whether final remedy should be granted or not, and I emphasise that last point. I am satisfied that it is an appropriate case in which to grant an interlocutory injunction."*

10. The applicant submitted that the current deportation regime in this jurisdiction is a violation of his right of access to the courts, as he is liable to be deported at any moment without notice and without being afforded the opportunity to pursue appropriate legal remedies. The respondents highlight that an undertaking has been given not to deport the applicant. In supplemental submissions, the applicant states that he is not pursuing this point further.

11. In the respondents' statement of opposition, they point out that the applicant did raise the issue of the treatment of failed asylum seekers during his original asylum application before the ORAC and again during his subsidiary protection application. He did so by relying on an article published by The Guardian newspaper. They also draw the Court's attention to the fact that both Ramos reports pre-date the refusal of subsidiary protection, by four months and two months respectively. In response, the applicant argues that his s. 17(7) application was not refused on grounds that there was no new evidence and that the correct comparator under Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, O.J. L 326/13 13.12.2005 (referred to hereon after as the Procedures Directive) was the original asylum application. He argues further that the applicant was not a failed asylum seeker at the time of the original application, that the ORAC did not engage with the Guardian article, that the Ramos reports are more expansive than the article was and that the second Ramos report post-dates the decision made in regard to subsidiary protection. In making these varied arguments, the applicant relies on paras. 60 – 68 of Faherty J.'s judgment in *P.B.N. v. Minister for Justice & Equality* [2016] IEHC 316.

12. The applicant alleges that the respondent failed to properly engage with the material and authorities relied on by the applicant, particularly *S.S.L. v. Minister for Justice & Equality and Ors*. [2013] IEHC 421. The respondent submits that this decision is under appeal. The applicant replies that this explanation was not offered by the decision maker and is not sound in any event, as *S.S.L.*'s legal standing subsists unless and until that appeal is successful. The respondents clarified in oral submissions that reference is made to the appeal in *S.S.L.* because that judgment allegedly contains errors of fact and it would be improper to ask the Minister to take such findings into account. They also argue that the findings of fact in one case are not necessarily carried over to every other case that comes before the courts involving a similar issue. The applicant rebuts this argument on the grounds that all findings in a court judgment are entitled to a presumption of correctness until an appellate court finds otherwise.

> - Subsequent legal developments

13. During the course of this hearing, several decisions of the Superior Courts were handed down that are of relevance to these proceedings. The first of these is *N.M. (supra)* which addressed the question of whether or not judicial review, as envisioned by s. 17 (7), was an effective remedy under Art. 39 of the Procedures Directive. The Court of Appeal answered this question in the affirmative. The applicant submits that this judgment requires the Court to apply a standard of judicial review that satisfies the ECJ's judgment in the *Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration* C-69/10 [2011] E.C.R. I-7151.

14. The second case of relevance is Faherty J.'s decision in *P.B.N. (supra).* The applicant submits that several of the illegalities identified in *P.B.N.* are also present in this case, such as the manner in which the Ramos reports were considered by the respondent. It is submitted that Faherty J.'s decision to quash the s. 3(11) decision on grounds of failure to consider how the applicant would be treated by DRC authorities for using a false passport may also be relevant to this case. At para. 105, Faherty J. found that the Ramos reports were not cogent, objective or authoritative evidence and thus failed the test of materiality. The applicant criticises this finding on grounds that: 1) that determination is a matter for the asylum authorities, 2) the application of one decision maker's

conclusions to another decision contravenes paras. 90 – 92 of the CJEU's decision in *M.M. (supra),* and 3) the manner in which Faherty J. refused to exercise her discretion was improper.

15. The applicant also argues that the Advocate General's opinion in *M.M. (No. 2)* C560/14 is relevant to this case, particularly his comments on the right to be heard.

16. In light of all of the above, the applicant poses three potential questions of European law that may form the basis for a reference to the CJEU:-

> - Does the Procedures Directive require a decision maker to disclose the central evidence on which he proposes to rely in order to refuse a subsequent application for asylum at the preliminary examination stage?
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> - If so, may a reviewing court nevertheless refuse a remedy because it is satisfied that evidence put before the decision maker is insufficiently material?
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> - In a bifurcated system, does the Procedures Directive permit a Member State to exclude a subsequent application at the preliminary examination stage of the asylum process because elements which arose after the first application for asylum were submitted as part of an application for subsidiary protection?

Respondents' Submissions

17. Emily Farrell BL, on behalf of the respondents, submits that readmission to the asylum process is dealt with in Art. 32 of the Procedures Directive, as the State has not opted into the Recast Directive, so the applicant cannot rely on the direct effect thereof. The respondents rely on *L.H. (Georgia) v. Minister for Justice & Equality* [2011] IEHC 406 as a statement on the law on this issue: The respondent is only compelled to grant his consent to a subsequent application where new elements or findings exist that make it significantly more likely that the application will be successful and these new elements could not have been presented in the course of an earlier application through no fault of the applicant. In applying this test, the respondents question the value of Cross J.'s judgment in *A.A.* on grounds that it was determined under the old law, before the 2011 Regulations came into force. They refer to para. 32 of *L.H.*, which states that the 2011 Regulations have raised the standard that an application for consent must meet.

18. The respondents also dispute any attempt to rely on the Supreme Court's judgment in *P.B.N.*, on grounds that it relates to an injunction application, rather than leave to apply for judicial review.

19. With regard to the credibility finding, the respondents note that this finding was employed in several decisions related to the applicant, none of which were challenged in judicial review proceedings. Notwithstanding that, the respondent denies relying on these findings in deciding whether to grant consent under s. 17(7).

20. The respondents rely on Hanna J.'s decision in *M.K. v. Minister for Justice & Equality* [2014] IEHC 658 to make the distinction between a new element or finding and new evidence on the same element or finding. They submit that the test outlined in *L.H.* calls for the former, while the material relied on the applicant should be classified as the latter. They allege that the applicant's material is merely new evidence of the same element raised before the ORAC and detailed in over four pages of his subsidiary protection application. The respondents highlight that the applicant was legally represented at all material times in his dealings with the respondents.

21. Regarding the manner in which the decision maker addressed the applicant's evidence, the respondents rely on Humphreys J.'s decision in *R.A. v. Minister for Justice & Equality* [2015] IEHC 686 that a narrative statement of the evidence is not required unless evidence of improper consideration can be put before the Court. The respondents argue that no such evidence has been tendered in this case. They rely on Hardiman J.'s judgment in G*.K. and Ors. v. Minister for Justice, Equality and Law Reform and Ors.* [2002] 2 I.R. 418, wherein he states that an express statement that representations have been taken into consideration (as exists in the impugned decision currently before the Court) is sufficient unless evidence to the contrary can be produced.

22. In terms of the fair procedures issue, the respondent relies on Birmingham J.'s judgment in *Ahmed v. Minister for Justice & Equality* (Unreported, 24th March, 2011), in which he approved of a decision maker's attempts to source the most up-to-date material before making a decision. He also found that, generally speaking, there was no obligation on a decision-maker to liaise with an applicant about the documents being sourced. In reaching this decision, Birmingham J. relied on *F.N. v. Minister for Justice, Equality & Law Reform* [2009] 1 I.R. 88. The respondents go on to cite several other cases that come to similar conclusions, most notably *Baby O v. Minister for Justice, Equality & Law Reform and Ors*. [2002] 2 I.R. 169. The applicant submits that it is incorrect to rely on *Ahmed* and *F.N.* because those cases related to deportation, which is not subject to EU law in this jurisdiction. He refers the Court to M*.M. v. Minister for Justice, Equality and Law Reform (No. 3)* [2013] IEHC 9 as a more accurate statement of the law in the current context.

23. The respondents submit that the constitutional right to be heard is not materially different to any right under Art. 41 in the Charter. It is also submitted that that right has been respected by the respondents, as evidenced by the considerable volume of documents submitted by the applicant.

24. It is submitted that several of the cases relied on by the applicant, including A.S.O. v. RAT and Ors. [2009] IEHC 607, *Olatunji v. RAT and Anor*. [2006] IEHC 113 and the CJEU's decision in *M.M.*, are distinguishable from this case because Art. 4 of the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted O.J. L 304/12 30.9.2004 (hereon after referred to as the Qualification Directive) does not apply to s. 17(7) applications.

25. The respondents submit that they are entitled to rely on the *B.M.* decision when assessing the risk of return to the DRC. Reliance on Country Guidance (CG) is an allegedly established practice and has been approved in other High Court decisions, such as *Ahmed* and *A.W. v. Minister for Justice (No. 2)* [2016] IEHC 111. The respondents argue that reliance on CG, such as *B.M.*, does not equate with reliance on a particular judicial review because of the breadth of material considered is much broader. By contrast, a judicial review is restrained to a particular set of facts and the material relevant to those facts, such as they existed at the time the decision was made. The respondents allege that Cooke J.'s *obiter dictum* does not apply to this case because the improper material in *M.A.M.A.* was a House of Lords decision and not CG. The respondents submit that the material submitted by the applicant was either taken into account in the *B.M.* decision or pre-dated *B.M.* significantly.

26. The respondents rely on *Mallak* and *F.P. & A.L. v. Minister for Justice, Equality & Law Reform* [2002] 1 I.R. 164 in submitting that the extent of the obligation to give reasons varies depending on the nature of the decision at issue. They also rely on *Meadows* and its findings that the rationale of a decision should be clear. They allege that the impugned decision meets these standards. It is submitted that *M.M. (No. 2)* has no significant bearing on these proceedings because the s. 17(7) procedure is a preliminary application, rather than a decision on a substantive entitlement to a particular protection status. As a result, the nature and extent of the right to be heard can allegedly be curtailed. In making this argument, the respondents rely on paras. 33, 34 and 39 of the Advocate General Opinion in *M.M. (No. 2).*

- Subsequent legal developments

27. The respondents submit that *N.M.* does not change the standard of judicial review and affirms the adequacy of the remedies available under s. 17(7).

28. The respondents direct the Court's attention to Faherty J.'s findings in *P.B.N.* that some measure of investigation is allowable under s. 17(7), which is necessarily constrained by its status as a "preliminary examination". They also underline her finding that a s. 17(7) decision can have regard to material furnished in the course of other applications made by the applicant. On that basis, they rebut the applicant's submission that the impugned decision was made in a manner outside the powers afforded under the Act. Reference is also made to a line of authorities, including *M.T.T.K. (DRC) v. RAT and Anor*. [2012] IEHC 155 and Clark J.'s decision in *P.B.N. (DR Congo) v. Minister for Justice, Equality and Law Reform No. 1* [2013] IEHC 435. The respondents argue that, according to these cases, while the Court cannot encroach on the decision-maker's remit, the Court can assess whether the evidence in question meets a minimum standard of materiality and credibility, in that it is cogent, objective and authoritative evidence. The fundamental nature of this assessment is underlined by the respondent, as the failure to satisfy it was sufficient to convince Faherty J. not to exercise her discretion and grant *certiorari*, notwithstanding the failure to provide sufficient reasons under *Meadows*. While it is conceded that the impugned decision does not consider the Ramos reports in the same detail as *P.B.N.*, the respondents maintain that that they were considered and outweighed by more recent COI.

29. The respondents refers again to *A.W. (No. 2)* and *No. 3* [2016] IEHC 422, arguing that the decision echoes the findings of Faherty J. in *P.B.N.* with regard to the Ramos reports and reflects the reasoning set out in the impugned decision in this case.

Decision

30. The main issue to be determined in these proceedings is whether or not, in determining an application pursuant to s. 17(7) of the Refugee Act 1996 (as amended), the decision maker dealt adequately and lawfully with the country information with which it was furnished. Further, the applicant claims that the decision-making process, and the determination arising therefrom, was conducted in breach of the rules of natural justice because there was an over-reliance on the decision of the United Kingdom's Upper Tribunal in B.M., which was delivered shortly before the date that the determination the subject matter of these proceedings was made. The intention to rely on *B.M.* was not disclosed to the applicant and/or his legal advisors and the applicant contends that there was an over-reliance upon this decision by the decision-maker in circumstances where its existence and/or the fact that it would be a determining factor in the decision was not shared with the applicant and/or his legal advisor. The applicant also contends that there were a number of potential points of EU law which arise for consideration in this case; namely with regard to the adequacy of the reasoning and the decision reached by the decision maker, which is allegedly being facilitated by a divergence between the requirements of EU law and the practices being implemented pursuant to national domestic law.

31. The applicant was maintaining and made submissions at the initial hearing date for these proceedings in relation to a requirement for an advance notification of a deportation arrangement. That matter was subsequently settled by way of a decision of the Court of Appeal and those points were not pursued at the resumed hearing.

32. Questions over the return of those who have failed in their application to be admitted to asylum in a country such as Ireland to the Democratic Republic of Congo (DRC) have become a difficult and vexed, as evidenced by a number of asylum cases both here and in the United Kingdom. The central issue is that, given the level of civil and political unrest in the DRC, persons whose return to their country of origin has been directed by a national court often claim that to do so would be to expose them to risk of a *refoulement*, contrary to the provisions of the Refugee Convention 1951. A lot has been written on this topic and it has given rise to numerous decisions of the Superior Courts, both in this jurisdiction and in neighbouring jurisdictions.

33. At the heart of these proceedings is the criteria that ought to apply when an application is made by somebody who has applied previously for asylum, been unsuccessful and, more often than not, has subsequently applied for subsidiary protection with similar results. Section 17(7) of the Refugee Act 1996 (as amended) is designed in such a manner as to assist in weeding out unsubstantiated or unmeritorious applications for readmission to the system. It is accepted on behalf of the applicants that a certain materiality of evidence is required. It is not simply a question of issuing a statement with the application indicating that the applicant fears that he/she will be subject to torture if and when he/she is returned to the DRC. However, the applicant in this case contends that there is sufficient published information both in academic, NGO and newspaper print to support his concerns.

34. On the resumed hearing date, the applicant was no longer pursuing the submission that there was an requirement to be notified before any attempt was made to put in place a deportation arrangement. It was further accepted that, as a result of the Court of Appeal decision in *N.M.*, judicial review was an effective remedy in respect of a s. 17(7) decision. That being the case, the focus of this decision and the matter to be decided by this Court is the nature of the hearing conducted by the decision maker and whether or not the applicant was afforded fair procedures and natural justice. It is not in contention, and indeed it is recited in the decision the subject matter of this application, that the applicant solicitor submitted a large volume of information in relation to the DRC. In the *N.M.* decision, the Court of Appeal (Hogan J.), indicated that, arising from the ECJ's decision in *Doiuf*, which effectively found that judicial review was a substantive and effective remedy in such cases, the High Court hearing a judicial review is entitled to subject the reasons arrived at by the decision maker to a thorough review. However, it seems to me that, if it is not apparent from the decision as to how the determination was arrived at, it becomes virtually impossible for the Court to subject the decision to the thorough review required. Allied to this conundrum is the inability on a judicial review for this Court to consider fresh or new evidence in respect of the matter under consideration. It is well established that, in judicial review, the High Court is not in a position to substitute its view or opinion of the evidence for that of the decision maker. Thus, it seems to me that, if the decision is to stand, it must be capable of scrutiny of the type envisaged, both with regard to the content of the decision and the evidence reviewed.

35. It is abundantly clear that the decision maker accepted and endorsed *B.M.* Indeed, nine pages of the decision contain *verbatim* extracts from the *B.M.* decision. At the same time, the decision maker rejected the evidence put forward by the applicant and it is not at all clear to this Court how an ostensible rejection of the applicant's country of origin information was arrived at. This Court needs to be able to understand the rationale for the decision and the rejection of the applicant's information. This should be clear from reading the decision and unfortunately in my view it not clear.

36. The applicant is seeking an order of *certiorari* to quash the decision of the respondent made on 25th June, 2015, refusing the applicant leave to be readmitted to the asylum process pursuant to s. 17(7) of the Refugee Act 1996. The applicant contends that there was a breach of fair procedures and natural justice, in that the new evidence submitted by the applicant regarding the treatment of failed asylum seekers in DRC was not considered by the decision maker beyond a mere itemised list on p. 2 of the decision. Other than that, it would appear that the submitted information was not dealt with in the decision.

37. A lot of time and attention has been devoted to Unsafe Return Reports 1 and 2. From the papers furnished to the Court, it appears that the first unsafe return report is dated 5th February, 2011. The second unsafe return report is dated 3rd October, 2013. In the affidavit of Chris Carroll sworn on the 25th day of February, 2016, the second unsafe return report is referred to as having a date of January, 2012. This does not appear to accord with the papers furnished to this Court. In addition, the second unsafe return report specifically refers to events which occurred in late 2012 and 2013. The applicant's solicitor specifically submitted in the s. 17(7) application that the assessment by the UK Border Agency that it is safe to return people to the DRC is unsound. The application was accompanied by a very detailed submission and supporting documentation. It was submitted further by the applicant's solicitor that the unsafe return report had not been published when the application for subsidiary protection was made.

38. While a lot of material has been presented to the Court and extensive submissions, both written and oral, have been made, a number of matters seem not to be in dispute. Section 17(7) requires an applicant to satisfy the decision maker that there is new material available for consideration and that this material was not available at the time of the previous application. I am satisfied that the previous application being referred to is the previous asylum application and not the subsidiary protection application. Faherty J. refers to it as the direct comparator in her decision in P.B.N. and I agree with that designation. In *L.H. (Georgia) v. Minister for Justice & Equality*, Cooke J. pointed to the distinction between the function and purpose of the decision maker in s. 17(7) applications when considering an application to readmit and that of a decision maker considering the merits of the application i.e. the prohibition on *refoulement* itself. At para. 23, he stated:-

> *"23. Whether the Minister grants or refuses his consent under s.17(7) in a given case he remains bound by the obligation to comply with s.5 of the Act of 1996. Accordingly, if one leaves aside the issues of a "new claim" as compared to the original application for asylum and of failure to make it earlier, when the Minister is asked to consider an application under the subsection the essential issue to be addressed is whether the material he is asked to examine as the basis for a further application contains potentially the ingredients required to establish that the applicant comes within the definition of "refugee". Does the material point to the possible existence of a well-founded fear of persecution: does that relate to the country he has fled; is its source a state authority or some source tolerated by state authorities; and does the reason for the persecution have a Convention nexus? While there is an obvious overlap between the ingredients of a claim to refugee status and the circumstances that may attract the prohibition on refoulement, the Minister is not, in the view of the Court, considering the possible application of that prohibition but only whether, if remitted to the Commissioner for investigation, the further application may establish that the applicant is a refugee."*

The decision maker must also further be satisfied that, through no fault of the applicant, the information was not presented at the earlier date, i.e. the first asylum application hearing.

39. The documentation submitted by the applicant post-dates the decision in the original asylum process. The decision maker, in my view, appears to adjudicate on the substance of the claims and/or concerns raised, rather than on whether the information was capable of constituting new and/or material evidence. If so satisfied that it does constitute new evidence, the Minister is obliged to re-admit the applicant to the asylum process. Cross J.'s decision in *A.A.* in a key example of this, wherein he points out that the burden of proof which the applicant has to overcome in a s. 17(7) application is not very onerous.

40. In relation to the decision of Humphreys J. in *A.W. (No. 2)* and relied on by the respondent, it seems to me that that decision can be distinguished, as it seems apparent from the judgment that the decision maker in that case engaged with the information submitted by the applicant and ultimately rejected same. No such engagement is apparent upon reading the decision under challenge in this case.

41. In relation to Faherty J.'s decision in the *P.B.N.,* I agree with her conclusions regarding the Ramos reports and her finding that it could constitute *prima facie* new material. However, I note that she ultimately refused to grant *certiorari* because of the absence of materiality and, in my view, this appears to be linked to an extensive review of the documentation concerning the s. 3(11) decision under challenge in those proceedings. This case can be distinguished from *P.B.N.* as, in that case, the Court was dealing with a second judicial review application in respect of the s. 3(11) decision and the Ramos Reports were considered in that context. Whereas, in this case the Court is solely reviewing the legality of the s 17(7) decision.

42. In this case, the subsidiary protection decision is dated 28th March, 2012. Unsafe Return Report 1 was submitted with that application. However it is also clear that the second unsafe return report and a substantial body of other documentation post-dates the subsidiary protection decision. They were submitted in support of the s. 17(7) application. It is not apparent from the decision under challenge in these proceedings that, other than the statement that it had been considered, the substance of this additional documentation, which *prima facie* could constitute new material, was not evaluated in any manner or fashion by the decision maker. Indeed, it is not even clear whether the decision maker had evaluated the information submitted and relied upon in *B.M.*, or whether they simply quoted directly from the text of that decision.

43. I agree with Humphreys J. that the decision maker is not obliged to set out the content of all of the documents considered by them. However, in my view, it should be apparent from reading the decision that a critical evaluation took place. Further, where a decision such as *B.M.* is preferred over a substantive body of work, and indeed legal authority from this jurisdiction, some semblance of a comparative exercise should be apparent from the text of the decision itself. In many cases involving challenges to the Refugee Appeals Tribunal this court has said that every piece of information does not have to be recited in the decision and a statement that it has been taken into account by the decision maker is accepted. However in that type of decision making process, there is often an oral hearing and even if a paper only appeal, the factual narrative and background is usually contained in the body of the decision. In other words the fact that documents have been considered is evident from the text and content of the decision itself. It seems to me that in considering a s17(7) application a listing of the applicants supporting documentation, without any further reference and/or consideration in the body of the decision itself is not sufficient. In my view, any level of a comparative exercise is absent from this decision. The decision maker was not charged with determining the reliability or accuracy of the new information but rather with determining whether it was capable of constituting new information which warranted re-admission to the asylum process. This has not occurred and, for that reason, I am of the view that the decision making process lacked transparency and fairness and did not comply with fair procedures and natural justice.

44. In light of the foregoing, it seems to me that this judicial review can be determined on that point alone, i.e. the absence of fair

procedures and the failure to consider the material put before it by the applicant to any extent and/or to an extent that this Court could subject the decision to the thorough review envisaged by Hogan J. in *N.B.* This conclusion leaves the Court with no option but to quash the decision.

45. I am not of the view that a reference on any question of EU law raised by the applicants is necessary at this juncture in order to determine these proceedings. The issue of an obligation on the decision maker to notify the applicant of any new matters being relied upon, in this case the *B.M.* decision, has been dealt with in previous cases, where no such obligation has been identified. There has to be some finality in the manner in which matters are heard and determined. However, it seems to me, and although this issue was not central to what I have to decide, what sets this case apart is the reliance by the decision maker on *B.M.* to such an extent that it was to the exclusion of everything else. If the case fell to be determined on that point alone, I would feel compelled to find in favour of the applicant on this point. However, this over-reliance formed part of, and gave rise to, the infirmity identified above in relation to a lack of fair procedures and natural justice.

46. As this disposes of the case, I do not propose to rule upon the other issues raised in the applicant's submissions. Such points should be dealt with if and when they are necessary in order to dispose of an application.

47. I therefore grant an order for *certiorari* quashing the decision of the respondent dated the 25th day of June, 2015.