Neutral Citation: [2014] IEHC 658

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 1015 JR]

BETWEEN/

M.K.

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

JUDGMENT of Mr. Justice Hanna delivered the 15th day of December, 2014

1. This is a post-leave application for an order of *certiorari* by way of judicial review quashing the decision of the respondent, notified to the applicant's solicitors by letter dated 4th October, 2011, refusing the applicant's application, pursuant to s.17(7) of the Refugee Act 1996, as amended, to make a fresh application for a declaration of refugee status.

Background

2. The applicant, who is from the Democratic Republic of Congo ("DRC"), was born in Kinshasa on 31st December, 1970. She is a protestant and of Bakongo ethnicity. She is married and has 6 children. Her husband and children are in the DRC. The applicant claimed to have fled the DRC on 18th June, 2008, and to have arrived in Ireland the following day. She stated that she travelled through Congo Brazzaville, and Paris. She claimed asylum in Ireland on the grounds of political opinion, religion, and/or membership of a particular social group.

3. The applicant claimed to have worked in the DRC as a nurse in the police force. She said that her family were members of Bundu dia Kongo ("the BDK"), a religious and political group, though she was unable to recall when they joined. She stated that her father and mother were arrested on 1oth July, 2002, because of their involvement in a protest march. The applicant stated that they were beaten and died in prison. She claimed that her sister was also imprisoned and killed. The applicant states that the march was about the rights of people in the DRC, including the right of freedom to worship.

4. The applicant claimed that her husband attended a BDK meeting on 30th June, 2006, but that before it concluded the police stopped the meeting and beat the people who were in attendance. Those present were arrested and taken to Kiameze prison. The applicant claimed not to have heard from her husband since this time.

5. The applicant stated that she joined the BDK on 1st January, 2007. Following the massacre in Bas Congo between 31st January and 2nd February, 2008, members of the BDK in Kinshasa decided to stage a protest. The applicant claimed that she took leaflets to her workplace and distributed them among her colleagues. At a meeting at her workplace on 20th February, 2008, the applicant stated that the commander/manager noticed some of the applicant's colleagues with the leaflets and, upon inquiring about them, he was told that the applicant had distributed them. The commander indicated that he would deal with this matter when he had finished what he was doing.

6. The applicant claimed that she learnt that the commander was aware that she had handed out the leaflets, and that she knew she would be in trouble. The applicant stated that she decided to run away before this could happen. She said that she stayed with friends in Masina. She claimed that on 29th February, 2008, she left her children with a friend and attended a protest meeting. A crowd assembled for the protest. However, the police arrived and, according to the applicant, the crowd was dispersed and they were arrested and beaten with soft plastic sticks, before being taken to the Provincial Inspectorate of the Police of Kinshasa.

7. The applicant claimed that she was beaten while in police custody, and that she was raped on 3 occasions. During this time she claimed to have contracted malaria, and to have suffered from blood pressure and stomach pains. She stated that she became extremely ill, at which point the commander sent her to hospital where she was an in-patient for two and a half months. The applicant recovered during this time and was able to walk again.

8. The applicant stated that while in hospital she met Louise Mbo, an anaesthetist, who had studied with the applicant's husband. The applicant told Ms. Mbo her story. She stated that Ms. Mbo agreed to help her out of her situation. There were two police men posted to guard the applicant in the hospital. Ms. Mbo paid them money and they allowed the applicant to escape. The applicant stated that she went to her friend's farm, and that two of her cousins, and her friend's husband, organised payment for her travel to Ireland. The applicant stated that she travelled to Ireland with an agent and that she acted as his wife. She claimed that she had never travelled before and that the agent presented travel documents on her behalf at immigration control.

9. The applicant claimed that she was being sought by the police for rebelling against the authorities. She explained that distributing the leaflets was a breach of police ethics, as they are supposed to be politically neutral; and that because of her actions, if she is returned to the DRC, she is at risk of being killed. The applicant stated that she would not be safe in the DRC and that this is why she had to come to Ireland.

10. The applicant completed her application for asylum questionnaire and had an interview with ORAC in the usual way. The Commissioner recommended that the applicant not be declared a refugee. She appealed his decision to the RAT. However, the Tribunal, in its decision dated 28th June, 2010, affirmed ORAC's recommendation. The RAT's decision was based primarily on its finding that the applicant was not credible.

11. The applicant had submitted a medical report from Dr. Donal O'Donovan in support of her claim for asylum. The RAT's consideration

of the medical report is set out in the following terms at para. F of its decision:

> *Dr. O'Donovan states in his report that the applicant's injuries which he lists are highly consistent with the stated cause. The Tribunal is asked to accept the report as corroborating the applicant's evidence. I do not accept the report for the reasons set out above.*

12. The RAT went on to note at p. 21 of its decision:

> *If all the doctor does is say that the scarring/injury is "highly consistent" with the claimed history without also addressing the relative likelihood of few other possible causes, the report will clearly be of less potential value that if it does. As illustrated by the evidence in this case, it may probably leave an immigration judge to find that a finding of "highly consistent" has very limited value.*

Application for re-admittance to the asylum system pursuant to s. 17(7)

13. Following the rejection of her appeal by the RAT, the applicant made an application to the respondent pursuant to s. 17(7) of the Refugee Act 1996, as amended, by letter dated 8th August, 2011, seeking the consent of the respondent to make a further application for refugee status. There were three grounds upon which readmission to the asylum system was sought. However, only one of these is relevant to the present case, i.e. the applicant's contention that the dismissal by the RAT of the medical report, in the terms reproduced above, was "simply not good enough." In this regard, the applicant's letter stated:

> *The Tribunal Member has duties under various instruments to cooperate and apply and share the burden of proving an applicant's claim. The minimum that should have been done was to either make further enquiries of the Doctor as regards any perceived shortcomings in the Report or to request the applicant to make such enquiries and to obtain some elaboration from the doctor. Neither was done. We have now made these enquiries of the Doctor and enclose herewith a communication we have received from him as a result of those enquiries dated 5th August, 2011. This is new evidence which helps to corroborate our client's asserted history.*

The Minister's rejection of the s. 17(7) application

14. The Minister rejected the applicant's application pursuant to s. 17(7) of the Refugee Act 1996, in his decision dated 1st September, 2011, and transmitted to the applicant by letter dated 7th September, 2011. The salient part of the Minister's decision is in the following terms:

> *The test to be applied in determining an application for re-admittance into the asylum process is set out by Bingham MR in Singh (Manvinder) v. Secretary of State for the Home Department, 8 December 1995 CA, and adopted by Clarke J in E.M.S. v. Minister for Justice, Equality & Law Reform, High Court, Unreported, 21 December, 2004 which states:*
>
> > *"The acid test must always be whether comparing the new claim with that earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely on the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim."*
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> *Is there a reasonable prospect of a favourable view being taken of a new asylum claim by the applicant despite the unfavourable conclusions reached earlier, having regard to the new information presented by his solicitors? [Emphasis in original.]*

15. Applying this test, the Minister held:

> *The applicant, through her solicitors, submits a medical report from Doctor Donal O'Donovan dated 16th August, 2011. The solicitor purports this to be "new evidence ". It appears that this medical report was based on Doctor O'Donovan's examination of Ms. K. in 2008. Therefore anything relayed in this recent report could reasonably be expected to have been submitted as a part of Ms. K's initial asylum claim. The contents of this document does not amount to new evidence.*

16. The Minister thus concluded:

> *No new convincing evidence has been supplied to indicate that a favourable view might be taken if MK. was re-admitted to the process. Therefore, I recommend that her application for re-admission under Section 17(7) of the Refugee Act 1996, be refused.*

17. The applicant now seeks to challenge the Minister's decision and was granted leave to do so by Clark. J, on the following grounds:

> *1. The examination of the application made on behalf of the applicant for the consent of the respondent to make a subsequent application for a declaration of refugee status pursuant to s. 17(7) of the Refugee Act 1996 (as amended) was flawed by reason of the fact that the respondent made no reference whatsoever to the new statutory test under s. 17(7) set forth in S.I No. 5112011.*
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> *2. No real consideration was given in the review decision to the medical report of Dr. O'Donovan dated 5th August, 2011, clarifying that the applicant's injuries were highly consistent with her claim for refugee status.*

18. It is important to observe that the grounds in this case are very narrowly focused. I propose to consider each ground in turn. Before doing so, however, it is necessary to set out the applicable legislation.

Section 17(7) of the Refugee Act 1996, as amended

19. Section 17(7) of the Refugee Act 1996 was amended by the European Communities (Asylum Procedures) Regulations 2011 (SI No. 51/2011) ("the 2011 Regulations"), which, *inter alia,* inserted additional sub-paragraphs 7A to 7H. The purpose of these amendments was to give effect to certain corresponding provisions of Council Directive 2005/85/EC of 1st December, 2005 ("the Procedures Directive"). The amendments came into force on 1st March, 2011 and had the effect, *inter alia*, of putting the criteria for the exercise of the Minister's discretion under s.17(7) on a statutory basis, and thus of superseding the criteria previously established by way of

case law. The amended s. 17(7) provides as follows:

"(7) A person to whom the Minister has refused to give a declaration may not make a subsequent application for a declaration under this Act without the consent of the Minister.".

"(7A) The consent of the Minister referred to in subsection (7)-

(a) may only be given following a preliminary examination as to whether new elements or findings relating to the examination of whether the person qualifies as a refugee have arisen or been presented by the person, and

(b) shall be given if, following the preliminary examination referred to in paragraph (a), new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee.

(7B) An application for the consent referred to in subsection (7) shall be accompanied by-

(a) a written statement of the reasons why the person concerned considers that the Minister should consent to a subsequent application for a declaration being made,

(b) where the previous application or appeal was withdrawn or deemed to be withdrawn, a written explanation of the circumstances giving rise to the withdrawal or deemed withdrawal of the application or appeal,

(c) all relevant information being relied upon by the person concerned to demonstrate that he or she is entitled to protection in the State, and (d) a written statement drawing to the Ministers attention any new elements or findings relating to the investigation of whether he or she is entitled to protection in the State which have arisen since his or her previous application for a declaration was the subject of a notice under subsection (5).

(7C) The Minister shall, as soon as practicable after receipt by him or her of an application under subsection (7B), give or cause to be given to the person concerned a statement in writing specifying, in a language that the person may reasonably be supposed to understand-

(a) the procedures that are to be followed for the purposes of subsections (7) to (7H),

(b) the entitlement of the person to communicate with the High Commissioner,

(c) the entitlement of the person to make submissions in writing to the Minister,

(d) the duty of the person to co-operate with the Minister and to furnish information relevant to his or her application, and

(e) such other information as the Minister considers necessary to inform the person of the effect of subsections (7) to (7H), and of any other relevant provision of this Act or of the Regulations of 2006.

(7D) Pursuant to an application under subsection (7B), and subject to subsection (7E), the Minister shall consent to a subsequent application for a declaration being made where he or she is satisfied that-

(a) since his or her previous application for a declaration was the subject of a notice under subsection (5), new elements or findings have arisen or have been presented by the person concerned which makes it significantly more likely that the person will be declared to be a refugee, and

(b) the person was, through no fault of the person, incapable of presenting those elements or findings for the purposes of his or her previous application for a declaration (including, as the case may be, any appeal under section 16).

(7E) Pursuant to an application under subsection (7B) by or on behalf of a person who the Minister has, under Regulation 4(5) of the Regulations of 2006, determined not to be a person eligible for subsidiary protection, the Minister shall consent to a subsequent application for a declaration being made where he or she is satisfied that-

(a) since his or her previous application for a declaration was the subject of a notice under subsection (5), new elements or findings have arisen or have been presented by the person concerned which makes it significantly more likely that the person will qualify for protection in the State, and

(b) the person was, through no fault of the person, incapable of presenting those elements or findings for the purposes of his or her previous application for a declaration (including, as the case may be, any appeal under section 16) or, as the case may be, for the purposes of his or her application for subsidiary protection under Regulation 4 of the Regulations of 2006.

(7F) Where the Minister consents to the making of a subsequent application for a declaration, he or she shall, as soon as practicable, notify the person concerned of that fact.

(7G) Where the Minister refuses to consent to the making of a subsequent application for a declaration, he or she shall, as soon as practicable, notify the person concerned of that fact and of the reasons for it and of how a review of that decision may be sought.

(7H) In this section, 'protection' has the same meaning as it has in the Regulations of 2006. ".

20. I now turn to consider the grounds upon which the applicant was granted leave by Clark J. to challenge the Minister's decision.

The First Ground

21. The first ground advanced by the applicant is that the Minister's examination of the applicant's application for consent to make a fresh application for a declaration of refugee status, pursuant to s. 17(7) of the Refugee Act 1996 (as amended), was flawed by reason of the fact that the Minister made no reference whatsoever to the new statutory test under s. 17(7), as set forth in 2011 Regulations. The applicant argues that the Minister failed to have regard to this amendment, which came into effect on 1st March, 2011, which was prior to the Minister making his decision in respect of the applicant's application under s. 17(7).

22. The applicant emphasised that s. 17(7A)(a) states that the Minister's consent "*may only be given following a preliminary examination as to whether new elements or findings relating to the examination of whether the person qualifies as a refugee have arisen or been presented by the person* " The applicant contended that instead of conducting a preliminary examination pursuant to statute, the Minister's examination of the application was largely concerned with excluding material on which the claimant could reasonably have been expected to rely in the earlier claim which, the applicant submitted, was not in compliance with the 2011 Regulations.

23. The applicant submitted that while the Minister made a determination that the contents of Dr. O'Donovan's report of 5th August, 2011, did not amount to "new evidence", he failed to consider the new language of s. 17(7) to determine whether or not the contents of the report amounted to the presentation of "new elements or findings" which could be found to relate "to the examination of whether the person qualifies as a refugee." The applicant argued that it was unavailing for the Minister to state that he had considered the same question in substance, when he simply did not do so in fact.

24. The applicant further submitted that by failing to comply with the procedural provisions of the 2011 Regulations, the Minister caused the applicant to suffer procedural disadvantage in the presentation of her s. 17(7) application and, in particular, with regard to the formulation of grounds which could have met the "new elements or findings" standard introduced by the 2011 Regulations.

25. In reply, counsel for the respondent submitted that the case law on the effect of the amendments to s. 17(7) of the Refugee Act 1996, as amended, states that the new statutory test is the same as that which was in place before. He cited the decision of Hogan J. in *J.K. (Uganda) v. Minister for Justice and Equality* [2011] IEHC 473, where the learned judge held, at para. 9 of his judgment, that the new statutory test was "effectively identical" to the "acid test" endorsed by Clarke J. in *E.M.S. v. Minister for Justice, Equality and Law Reform* [2004] IEHC 398.

26. The respondent submitted that Cooke J. similarly concluded in *Ncube v. Minister for Justice and Equality* [2011] IEHC 436, that the new statutory test corresponded closely to the "acid test". In that case, the new elements relied on by the applicant were her new stated identity and her alleged nationality as a Zimbabwean, rather than a South African. Cooke J. held that since the applicant had herself withheld her true identity and applied for asylum under a false name, it could not be said that it was through no fault of her own that the claim she now proposed to make was not the basis of her previous application.

27. The respondent also opened the decision of Cooke J. in *L.H v. Minister for Justice, Equality and Law Reform* [2011] 3 IR 700, where the learned judge noted, at para. 28:

> *28. Under these provisions the preliminary examination is required where "new elements or findings" arise or are presented and it is not therefore necessary that an entirely new or different claim to refugee status be presented. It is clear from Article 32.1 of the Procedures Directive that the new elements may be presented while the original claim is still being processed and the preliminary examination may be carried out in that process. The first limb of the "acid test" of Onibiyo - a new claim - is therefore superseded in this amendment.*

28. The respondent submitted that Irish law never precluded a person whose asylum claim was under examination from adducing new or additional evidence or broadening the scope of the application during the currency of the application. The respondent therefore submitted that the insertion of s. 17(7D)(a) did not by itself effect a change in the law.

29. The respondent further argued that the new s. 17(7D)(b) raised the height of the hurdle that an applicant under the section had to cross in order to be granted permission to make a fresh application for a declaration of refugee status. The respondent submitted that it is now necessary for the applicant to establish that she was, through no fault of her own, incapable of presenting the new elements or findings for the purposes of the previous asylum application.

30. I am persuaded by the argument advanced on behalf of the respondent. In my view the judgments of Hogan J. in *J.K. (Uganda) v. Minister for Justice and Equality* [2011] IEHC 473 and Cooke J. in *Ncube v. Minister for Justice and Equality* [2011] IEHC 436, which I expressly follow, determine that the new statutory test enacted by the 2011 Regulations is "effectively identical" to the acid test previously established by way of case law. As Cooke J. observed in *L.H. v. Minister for Justice, Equality and Law Reform* [2011] 3 IR 700, with reference to the 2011 amendment:

> *[31] The second limb of the "acid test" of Reg. v. Home Secretary, Ex p. Onibiyo [1996] Q.B. 768 is thus replicated in this amendment. The Minister has no obligation to grant consent to a subsequent application even where new elements or findings are adduced in support of an original claim if he is satisfied that they might have been presented during the course of the processing of the original claim.*
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> *[32] Accordingly, under s. 17 as thus amended the Minister is only compellable to grant his consent to a new asylum application being entertained and determined when two conditions are fulfilled; namely, firstly, that new elements or findings have arisen making it significantly more likely that the new application will be successful; and, secondly, that these new elements or findings could not have been presented for the earlier application through no fault of the asylum seeker. In the judgment of the court, save for the distinction between "new claim" and "new elements or findings", there does not appear to be any practical difference between these criteria and those of the "acid test" of Reg. v. Home Secretary, Ex p. Onibiyo [1996] Q.B. 768, approved by Clarke J. in E.M.S. v. Minister for Justice, Equality and Law Reform [2004] IEHC 398, (Unreported, High Court, Clarke J., 21st December, 2004), and particularly the test as to whether a "realistic prospect of a favourable view could be taken". If anything, the introduction of the requirement that the new elements or findings should "significantly add to the likelihood" of the application being successful raises the threshold the application for consent must overcome. More importantly, contrary to the submission made on behalf of the applicant in the present case in reliance upon the approach adopted by Clark J. in A.A. v. Minister for Justice [2009] IEHC 436,*

> *[2010] 4 JR. 197, as the section now stands, the Minister is not only entitled to have regard to whether those new matters could have been relied upon at an earlier stage, he must be satisfied that it was through no fault of the applicant that they were not in fact presented during the course of the processing of the earlier application, including any appeal to the Refugee Appeals Tribunal.*

31. With regard to the applicant's specific complaint that the Minister's decision is rendered defective by his failure to refer to the new statutory test, I note Cooke J's finding at para. 30 of his decision in *Ncube*:

> *30. It is true that this new statutory test is not referred to as such in the Minister's refusal decision although the conclusions on which the decision is based correspond very closely to its two conditions. However, no purpose would be served by quashing the present refusal because in the new decision on the existing request for consent under s. 17(7) this is the statutory test will have to be applied so that the result must inevitably be the same.*

32. I am similarly of the view that the explicit application of the provisions of the statutory test, which has been found to be in effect identical to the "acid test" applied by the Minister in this instance, would not result in a different outcome. I am fortified in this view by Cooke J.'s conclusion that the statutory test raises the threshold to be overcome in an application for consent. The failure of the Minister expressly to refer to the statutory test does not in the circumstances constitute a legal defect such as would require the Minister's decision to be quashed.

33. Accordingly, this ground must fail.

The Second Ground

34. The second ground upon which the applicant was granted leave by Clark J. to challenge the respondent's decision is that, in the applicant's submission, no real consideration was given in the Minister's review decision to the medical report of Dr. O'Donovan dated 5th August, 2011, clarifying that the applicant's injuries were highly consistent with her claim for refugee status.

35. The applicant submitted that the Minister found that because the "new evidence" was based on Dr. O'Donovan's examination of Ms. K. in 2008, anything relayed in the new report "could reasonably be expected to have been submitted as part of Ms. K's initial asylum claim."

36. The applicant stated that the Minister failed to conduct an examination under the substantive requirements of the statutory test. In this regard, the applicant pointed out that the Minister applied the "acid test" set out by Bingham M.R. in *R. v. The Secretary of State for the Home Department ex parte Onibiyo* (1996) A.E.R. 901, and adopted by Clarke J. in *E.M.S. v. Minister for Justice, Equality and Law Reform* [2004] IEHC 398.

37. The applicant submitted that in *L.H. (Georgia) v. Minister for Justice, Equality and Law Reform* [2011] IEHC 406, Cooke J. examined the statutory test introduced by the 2011 Regulations. The applicant submitted that Cooke J. held that the statutory test replicated the acid test, but with the distinction between what was a "new claim" and the different language of "new elements or findings" employed in the statutory test. The applicant placed reliance on paras. 31-32 of Cooke J's decision, and in particular the learned judge's finding that:

> *"...save for the distinction between "new claim" and "new elements or findings", there does not appear to be any practical difference between these criteria and those of the "acid test" of the Onibiyo case approved by Clarke J. in the E.MS. case... "*

38. The applicant submitted that it is precisely the distinction between a "new claim" and "new elements or findings" with which the applicant is concerned in the present case. The applicant argued that she was denied the opportunity to present her application on the grounds of "new elements or findings" as the respondent did not apply the statutory test. The applicant argued that the "new elements or findings" criterion would have afforded the applicant a broader berth than the "new claim" standard, and includes in its remit the particularised and enhanced review of her injuries as set out in the medical report of Dr. O'Donovan.

39. The applicant submitted that the new elements or findings of the enhanced medical report make it significantly more likely that a positive finding would be made under Regulation 5(2) of the Protection Regulations. The applicant argued that she could not have presented these findings earlier, as there she had no reason to consider that Dr. O'Donovan's original report would have been dismissed as inadequate by the RAT.

40. The applicant asserted that even if the statutory test replicates the "acid test" for all practical purposes, it does not absolve the respondent of its obligation to give proper consideration to every potentially genuine asylum claim even where the applicant has previously made such a claim without success. The applicant submitted that following the reasoning of Clarke J. in *E.M.S.*, the present case presents a reasonable possibility on the facts that the original decision was wrong for failure to consider the impact of the applicant's injuries, and how Dr. O'Donovan's report substantiates the applicant's account of past persecution in support of her claim under Regulation 5(2) of the Protection Regulations.

41. In reply, the respondent submitted that Dr. O'Donovan's second report, dated 5th August, 2011, does not constitute new evidence such as would have entitled the applicant to re-admission to the asylum process. The respondent stated that both the earlier report of 12th November, 2008, and the later report of 5th August, 2011, stated that the applicant's scars were highly consistent with the stated cause of injury, namely, blows with a baton. The respondent submitted that there is no suggestion that Dr. O'Donovan carried out a further examination of the applicant for the purposes of the report of 5th August, 2011, and that this second report merely repeated and slightly amplified the content of the earlier report, and attempted to argue with the conclusions of the RAT. The respondent submitted that, in light of this, the doctor's report could not satisfy the test imposed by s. 17(7D)(b), i.e. that the applicant was "incapable" of presenting those elements or findings for the purpose of her previous application for a declaration of refugee status.

42. The court has accepted, in its consideration of the first ground of challenge, that the application by the Minister of the "acid test", which has been found to be effectively identical to the statutory test, did not amount to an error of law such as to render his decision legally defective. In considering this second ground, however, it is incumbent upon the court to assess whether the respondent's decision is defective because, in the applicant's submission, "new evidence or material" which would make it "significantly more likely" that the applicant would be declared a refugee, was in fact submitted, but the Minister failed to consider it properly.

43. The relevant statutory test is set out in s. 17(7D). For convenience, I set it out it here:

(7D) Pursuant to an application under subsection (7B), and subject to subsection (7E), the Minister shall consent to a subsequent application for a declaration being made where he or she is satisfied that-

(a) since his or her previous application for a declaration was the subject of a notice under subsection (5), new elements or findings have arisen or have been presented by the person concerned which makes it significantly more likely that the person will be declared to be a refugee, and

(b) the person was, through no fault of the person, incapable of presenting those elements or findings for the purposes of his or her previous application for a declaration (including, as the case may be, any appeal under section 16).

44. Accordingly, in order to satisfy this test two conditions must be met: (i) there must be new elements or findings which would make a successful application for asylum significantly more likely; and (ii) the non-presentation of those new elements in the previous application must not be attributable to any fault on the part of the applicant.

45. In determining this issue, it is necessary to have careful regard to Dr O'Donovan's reports. While a copy of the doctor's first report, dated 12th November, 2008, has not been furnished to the court, it seems that it confined itself to listing and describing the applicant's scars, and stated that these were highly consistent with the stated cause of the injury, namely blows with a baton.

46. Dr. O'Donovan's second report, dated 5th August, 2011, states as follows:

"Further to my medical report dated 12/11/2008 in which I listed the injuries I documented on 11/11/2008 and in which I described Ms. K's injuries as being highly consistent with the stated cause of the blows (blows with a baton), I would like to make the following observations... "

47. Dr. O'Donovan then set out the dimensions of the first 7 scars described, and continued as follows:

"What is immediately obvious is the similarity of the dimensions of six of the seven scars as described. This leads me to conclude that at least six of the seven scars were caused by the same process. These scars represent healed lacerations. The similarity in size of these scars indicates that they were all caused by blows with the same object. Forceful blows with a hard object like a baton would certainly cause such injuries. The injuries are highly consistent with the stated cause. These scars do not represent the results of accumulated accidental injuries that one might sustain, for example, falling off a bicycle, being involved in a fight, sports injuries, etc. because those accumulated scars would be of varying shapes and sizes.

"There are few other possible causes of Ms. K's scars. In other words, there are not many other possible causes. The only other possible causes that I can think of are blows inflicted by some other hard blunt object causing lacerations, as distinct from a sharp object like a knife or a long narrow object like a whip.

"Similarly, of the twelve remaining scars documented there, is a similarity of size with eleven of the twelve being described as being less than 1Omm in diameter, indicating that they were caused by one process. You may ask why these scars are smaller than the other scars. It is likely that a lesser degree of force was used when these injuries were sustained, most likely by a different person at a different time to when the other injuries were sustained.

"I feel that to simply dismiss the injuries because they are only highly consistent with the stated cause which is grossly unfair to Ms. K. The fact of the matter is that the scars are there and that someone caused them to be there. The scars are certainly not the result of self inflicted injuries. Neither have I ever seen such scars resulting from the sports injuries. Whatever object was used to inflict the injuries, and I have no reason to doubt that they were inflicted by a baton, Ms. K. will undoubtedly have experienced a lot of pain and the experience was undoubtedly psychologically traumatic."

48. Having considered Dr O'Donovan's report of 5th August, 2011, the Minister observed that it was based on the doctor's examination of Ms. K. in 2008 and that "therefore anything relayed in this recent report could reasonably be expected to have been submitted as a part of Ms. K.'s initial asylum claim." The Minister found that "the contents of this document do not amount to new evidence." He thus concluded:

No new convincing evidence has been supplied to indicate that a favourable view might be taken if MK. was re-admitted to the process. Therefore, I recommend that her application for re-admission under Section 17(7) of the Refugee Act 1996, be refused.

49. It seems to me that these observations by the Minister, which are based on his application of the "acid test", correspond very closely to the elements of the statutory test, such that its explicit application would, inevitably, have led to the same conclusion.

50. Applying the first limb of the statutory test, set out in s. 17(7D)(a), I am satisfied that Dr O'Donovan's second report, dated 5th August, 2011, is an amplification of his previous report, dated 12th November, 2008, and does not constitute new elements or findings such as would make it significantly more likely that the applicant would be declared a refugee.

51. Even if the court had taken the view that the doctor's amplification of his earlier report does constitute "new elements or findings" which make it significantly more likely that the applicant's asylum claim would succeed, the applicant would not, it seems to me, be able to satisfy the second limb of the test, set out in s. 17(7D)(b). This is because the information provided in Dr O'Donovan's second report is not information that the applicant, through no fault of her own, was incapable of presenting for the purposes of her original asylum application. In this regard, the court observes that the second report was prepared on the basis of the same physical examination of the applicant as the original report, and any findings on foot thereof were thus available to the applicant at the time of her original asylum application.

52. I am, therefore, of the view that the Minister did give adequate consideration to Dr. O'Donovan's report dated 5th August, 2011, and that the conclusions he reached on foot thereof, having applied the "acid test", were reasonably open to him in the circumstances. Therefore, I find that the applicant's second ground, that no real consideration was given in the Minister's review decision to the medical report of Dr. O'Donovan dated 5th August, 2011, lacks substance and must be rejected.

53. Accordingly, the applicant's application for judicial review must fail, and the reliefs sought are refused.