**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2011 No. 533 J.R.]**

**BETWEEN**

**ZOLA NANIZAYA**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**RESPONDENT**

**JUDGMENT of Mr. Justice Cross delivered on the 23rd day of March, 2012 Introduction**

1. The applicant is a national of the Democratic Republic of Congo and appears to have arrived in the State in June, 2008. He applied for asylum on the 12th June, 2008, basing his claim on his alleged membership of the Bunda di Congo (BDK) and the risk of persecution on the basis of his return to the DRC.

2. The applicant's application was rejected by the Refugee Applications Commissioner who found that he submitted documents which appeared to be false and the credibility of the applicant was rejected by the ORAC on a large number of grounds.

3. The applicant appealed to the Refugees Appeals Tribunal (RAT) and again his account was disbelieved and rejected as incredible. The RAT also took into account the fact that the applicant claimed to have travelled through France on his way to Ireland but had failed to claim asylum there without explanation.

4. The RAT considered a SPIRASI Medical Report dated the 20th December, 2008, and the Tribunal Member concluded that the inconsistencies and credibility issues arising in the applicant's evidence were such that they were not explained by his medical condition and that the medical report relied upon the applicant's account for the reasons for his difficulties and for its conclusions.

5. The RAT summarised its conclusions by saying:-

> "On examination of the applicant's claim a number of inconsistencies and credibility issues arise which are not properly explained by the applicant and are such that I do not believe that he ever had the difficulties he alleges in his country of origin or has any fear of returning there as he claims."

6. By letter of the 18th May, 2010, the applicant applied for subsidiary protection indicating that all three aspects of "serious harm" as defined by the European Communities (Eligibility for Protection) Regulations (S.I. No. 518 of 2006) applied to him.

7. By decision of the 29th March, 2011, the Minister rejected the application for subsidiary protection and the decision maker specifically relied upon the Tribunal's decision when considering the applicant's personal credibility.

8. Leave for judicial review was granted by order of Birmingham J. dated the 4th July, 2011, and the applicant's objections to the decision were, in essence, very simple:-

> "The applicant submits that in the decision for subsidiary protection unlike the previous decisions of ORAC and the RAT, the Minister is obliged to give consideration, *inter alia*, of whether there are "substantial grounds for believing that the applicant would face a real risk of a serious and individual threat to his life by reason of indiscriminate violence in situations of international or internal armed conflict in his country of origin".

9. It is submitted by the applicant that that he furnished the decision maker with country of origin information in relation to this aspect of his claim. This was country of origin information not furnished to the ORAC or the RAT as it dealt with an aspect of the applicant's claim that did not fall for consideration by either of those two bodies. The applicant further claims that when the Minister gave consideration to the issue of "indiscriminate violence" *etc*, that he referred to one document only, not the COI submitted by the applicant and that this document considered by the Minister was not furnished to the applicant.

10. This, it is submitted, is a breach of the requirement of Article 4(1) of the Council Directive 2004/83/EC, which requires protection decision makers to decide "in co operation with" the applicant in order to assess the relevant elements of the application. It is further submitted that the failure of the respondent to furnish the COI report to the applicant meant that the applicant did not know the information upon which the Minister relied and that there was a breach of fair procedures. The third ground on this point is that the Minister's failure to furnish this document to the applicant is a breach of the principle of "equivalence" in that the RAT is obliged by virtue of s. 16 of the Act to furnish all documents considered to an applicant and if the Minister failed to do this and if there is no requirement on him to do this, then there is a breach of the principle of equivalence.

11. A further ground of complaint by the applicant which is separate from the above is the allegation that the decision maker failed to consider the contents of the applicant's SPIRASI Medical Report which indicated that the applicant had both mental and health problems and physical marks "consistent to highly consistent" with torture. In the premise it is alleged that the Minister failed in his obligation to consider all relevant statements and documents submitted by the applicant in accordance with the mandatory requirements of Regulation 5(1)(b) of the 2006 Regulations.

12. The claim in relation to the medical report is separate and I shall deal with that first and then deal with the other grounds subsequently.

**The Medical Report**

13. The medical report from Dr. Sabrina Vassia, examining physician from the Centre for Care of Survivors of Torture, dated the 20th December, 2008, first of all recounts the history given by the applicant and the symptoms and provides a physical examination which detected multiple scars, only one of which the applicant related to his allegations of torture, being a scar close to his elbow crease measuring 8x2cm with irregular margins which the doctor stated was consistent with an injury associated with damage to the tissue consistent with the applicant's claim that a very tight ligature was forcibly applied to this arm for several hours after this second arrest and during the transfer to another detention centre.

14. The doctor also found a non-specific area of tenderness in his upper back without limitation of movement or signs of muscle atrophy which was non-specific but he stated common in survivors of torture.

15. In relation to the applicant's mental health the doctor diagnosed post-traumatic stress disorder involving signs of intrusive memories, recurrent nightmares, emotional numbing, irritability, outbursts of anger, inability to remember parts of his traumatic experience, loss of trust in people, sense of guilt and shame.

16. The doctor concluded that the findings of the mental state examination "are highly consistent with the history of ill-treatment while in detention, the loss of family members and of the alleged history of prolonged state of fear and worry for his and his family's safety while forced to act as an informer between the two periods of detention". The doctor concluded that it was her professional opinion that "the physical and mental state examination is consistent to highly consistent with the history".

17. On the face of it that is a strong medical report. The difficulty from the applicant's point of view is that the physical examination is stated to be "consistent". It is the mental health. examination that is stated to be "highly consistent".

18. Far greater weight will of course be placed to medical examinations of a physical nature finding that physical marks and signs are highly consistent rather than psychiatric conclusions.

19. 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. It is the task of the fact finder to assess credibility. For physical conditions to be mainly consistent with what is said by an applicant does no more, in the view of the court, than have the effect of not negating the claim- see *Eduardo v. Refugee Appeals Tribunal* (Unreported, High Court, Cooke J., 16th March, 2010). The Istanbul Protocol gives a hierarchy of terms to be used by physicians to indicate the degree of consistency between a lesion or patterns of lesions and the attribution given to it and defines "consistent with" as being "could have been caused by the trauma described, but it is non-specific and there are many other possible causes". The Protocol further describes "highly consistent" as being "could have been caused by the trauma described, and there are a few other possible causes". It is clear that the term "highly consistent" is much stronger than "consistent". However, in this case when one examines the SPIRASI Report the term "highly consistent" is used in respect of the psychiatric complaints of the applicant which is outside the terms of the Protocol. Indeed, the doctor says that they are "highly consistent" with the history of ill-treatment and other matters which she lists *e.g.,* loss of family members *etc, etc*.

20. In any event, because of the conclusions reached by the RAT that the applicant was entirely incredible in the story that he gave, did not give weight to the SPIRASI Report or conclude that it had afforded the applicant the benefit of any doubt.

21. The applicant contends that the decision maker in the subsidiary protection made no reference to the medical situation in his reasoning.

22. It is true that the only reference to the SPIRASI or medical report is in the oblique fashion that the decision maker listed the fact that he had considered all of the documents referred to the RAT for its decision and this would have, of course, included the medical report.

23. In the absence of any evidence that the Minister had not considered the medical report, he is not obliged to specifically list the medical report but it is submitted on behalf of the applicant that the medical report ought to have been considered in view of the provisions of Regulation 5 and, in particular, Regulation 5(2).

24. It is correct that the respondent's submits that specific leave was not granted or sought in respect of Regulation 5(2) but I believe that the applicant is entitled to make the argument in relation to the obligations of the decision maker under Regulation 5(2) as part of the leave that has been granted in respect of the medical report issue. Certainly I would not in this case fault the applicant on any failure to specifically refer to Regulation 5(2) in seeking leave.

25. The decision maker is obliged under Regulation 5(2) to consider whether the fact that:-

> "A protection applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, shall be regarded as a serious indication of the applicant's well founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated but compelling reasons arising out of previous .persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection." (Emphasis added)

26. The difficulty for the applicant is, however, that the nature of the medical report fully considered by the Tribunal did not contain such graphic accounts of specific injuries that would give the applicant the benefit of the doubt.

27. The applicant's account of his past life was rejected on entirely rational and reasonable grounds by the ORAC and the RAT. His credibility was entirely disputed. Accordingly, the case is not equivalent in any way to that of *R.C. v. Sweden* (41827/07) (9th March, 2010) (ECHR) or that of *Mibanga v. Secretary of State for Home Development* [2005] EWCA Civ. 367, but is far more akin to the case of *S. v. Secretary of State for Home Development* [2007] lmm. A.R. 1, as in both the *R.C. v. Sweden* and *Mibanga* cases there was finding of defective reasoning by the decision maker in relation to credibility and ignoring of powerful medical reports. Accordingly, it is not the view of the court that this case falls into any of the above exceptional circumstances in which the decision maker is to be criticised for failing to specifically refer to the medical report,

28. The reasoning of the Minister in his decision is quite clear that there is nothing before him that would alter the conclusions

previously arrived at in the ORAC and RAT that entirely discredited the applicant's credibility. He did not refer to the Report in his decision but in the circumstances of this case given the strong credibility findings, he was not obliged to do so.

29. If that decision was reasonable and rational (which I believe it was), then Regulation 5(2) does not arise at all.

30. As Cooke J. stated in *Pamba v. Refugee Appeals Tribunal* [2007] I 040 J.R. (19th May, 2009):-

> "It does not follow...that the decision when considered the light of the general case law in this jurisdiction on the duty to state reasons must provide a detailed response to every single argument raised on appeal or explain how or why each item of evidence while in contrary to the decision has been discounted or rejected...that duty is satisfied if the addressee can ascertain from the decision why the appeal failed and if the court is placed in a position to exercise its function of judicial review."

31. There is no doubt why the appeal before the Minister failed in this regard and it is that the Minister declined to give the applicant the benefit of the doubt in relation to his story and it followed from that that he declined to give him the benefit of the doubt that he was subjected to the torture from the state agencies as he alleged.

32. Accordingly, I would reject the applicant's grounds of judicial review on this point.

**The Issue of Fair Procedures**
33. In relation to the applicant's contention that he was not given the opportunity to comment upon the COI utilised by the decision maker when coming to his decision in relation to indiscriminate violence, I am of the view that the applicant's submissions can be considered together.

34. In particular I believe that this issue revolves around the issue of fair procedures.

35. In *Victor Nendah v. Minister for Justice and Law Reform & the Refugee Appeals Tribunal* (Cooke J., 16th February, 2012) (2011 No. 95 J.R.), Cooke J. stated:-

> "It cannot, therefore, be said that for the purpose of applying the principle of equivalence an appeal from a first instance of termination of an asylum application in Irish Law is a remedy accorded to the vindication of a comparable right in national law. It is a procedure which affords the remedy required to be accorded by the European Union in the Procedures Directive as applied to asylum applications."

36. Accordingly, no issue of equivalence between the statutory rights to exchange information under s. 16 in the case of the Tribunal and an application for subsidiary protection arises.

37. Indeed, the case of *Nendah* (above) not alone comprehensively rejected arguments based on equivalence but rejected it on the basis of a extensive examination of existing High Court authorities in which a number of different nuances on this point had been explored and rejected.

**Duty for Co-operation/Fair Procedures**
38. In *B.J.S.A. (Akila) v. MJELR & Ors* [2011] IEHC 381, Cooke J. in rejecting the attack upon subsidiary protection decisions as there was no express reiteration of the word "co-operation" in the 2006 Statutory Instrument stated:-

> 20. This is not to say that the Minister as the deciding authority under the 2006 Regulations is wholly relieved of any obligation of co-operation in appropriate cases. Because the State has opted for separate procedures and because in inviting a distinct application following the conclusion of the asylum process the Minister solicits the information, submissions and documentation identified in the formal application appearing in Schedule I to the Regulations, the process of determining the application must conform to the normal rules of fair procedures. These include, obviously, the principle *audi alteram partem*. Accordingly, if in a given case new facts, information or documentation not previously examined in the asylum process are put before the Minister and are material to the claim for subsidiary protection, that principle would require the Minister to afford an applicant an opportunity of comment or rebuttal if the refusal of the application was to be based, for example, upon a finding that the information was untrue or the documents were forged. That, however, is a matter of basic fairness in administrative procedures where individual rights are potentially affected. It is not dependent upon any express reiteration of the word "co-operation" in the 2006 Regulation. Thus, insofar as this reference to "co-operation" is relied upon as requiring the Minister to afford an applicant an opportunity to rebut any proposed adverse finding which is to be based on new information not previously available to the applicant, the entitlement is enshrined in basic principles of administrative law and requires no express implementation in such regulations.
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> 21. It must also be borne in mind that a claim of non-compliance with such a duty of "co-operation" or the principle *audi alteram partem* cannot be made as a purely academic point divorced from specific facts"

39. The applicant contends that the only country of origin report upon which the Minister relied in refusing the application arising for risk of indiscriminate violence (which was not and could not have been considered as part of the refugee protection claim) was only produced many months after the application for subsidiary protection had been made and that accordingly, it was new material only to the claim for subsidiary protection and it is submitted that the applicant could have made a number of points in relation to this report and its reasonableness in finding that there is not a risk of serious harm from indiscriminate violence in the DRC.

40. In asserting this case and the fact that the applicant's own COI documents submitted in relation to indiscriminate violence were not specifically referred to by the decision maker, it should be stated that the Minister has an obligation to consider most recent COI in relation to applications for subsidiary protection. If he failed to do so, he could be criticised. The document considered by the Minister under the heading was in fact an updated version of the main document submitted to the Minister (UN Security Council Documents) and accordingly, it was not new or different documentation. Under the heading of "serious and individual threat to the civilian's life or person, by reason of Indiscriminate Violence in situation of international or internal armed conflict" the applicant submitted a number of human rights reports which indicated serious and ongoing violence which might well be described as indiscriminate violence in the Eastern and Northern regions of Congo. It is always open until the decision maker makes his decision for an applicant for subsidiary protection to furnish new documentation. The applicant indeed has an obligation to prove his case and the decision maker when furnishing his decision sourced the most recent COT from the United Nations Security Council, which indicated that the overall situation in most of the DRC remained "relatively stable'.' however there was conflict in the Eastern part of the country.

41. The Minister concluded, not unreasonably, that "outside of the Eastern regions of the country most of the Democratic Republic of Congo remains free of armed conflict", and after analysing the decision of *Elgafaji v. ML*. concerning what amounted to indiscriminate violence the decision maker concluded that 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 at risk from indiscriminate violence".

42. The decision maker went on then to consider in each case the individual circumstances of the applicant to ascertain whether he personally would be of any real risk of violence and the decision maker concluded that he would not.

43. In *Ahmed v. MJELR* Birmingham J., (24th March, 2011) dealt with a very similar point as now being raised by the applicant and stated:-

> "17. In considering whether it is appropriate to assess such documentation without informing the applicant that this was happening it is necessary to bear in mind that the question of whether the applicant would safe or at serious risk throughout Iraq or individual areas of Iraq was always going to be central to both decisions that were required to be taken. When the decision maker is dealing with the political or security situation within a country, it would seem highly desirable that the most up to date information possible could be assessed...
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> 18. In my view there is no general obligation on the decision maker to return to an applicant and inform him or her what documentation has been sourced. The applicant is aware of the task facing the decision maker and must expect that he or she will prepare themselves by making sure that they are fully up to date. However, I would emphasise that while that may be the general position, one can certainly envisage that there may be particular cases where a document sourced late in the procedure has the capacity to alter radically the entire basis of the application; which would require that contact be made with the applicant. Again one could imagine that if it were the situation that a decision make had access to a stream of information which was not publicly available but was in conflict with publicly available material then different considerations might arise. However, nothing of the sort is in issue here the question of whether the applicant could safely locate in any part of Iraq was always going to an issue and indeed that that was so, was anticipated by the applicant. The documents assessed by the official are publicly available and form part of a series of contrary reports that are referred to constantly, in the course of asylum cases and related cases."

44. Birmingham J. went on to indicate that the arguments being advanced (which are identical to the arguments in this case) in relation to the suggested obligation on the part of the decision maker to inform an applicant that additional country of origin information is being sourced an to furnish a copy of the document closely mirrored arguments rejected by Charleton J. in the case of *F.N & Ors v. The Minister for Justice, Equality and Law Reform* [2009] 1 I.R. 88 at p. 122.

45. Accordingly, the court is not of the view that the decision of Cooke J. in *B.J.S.A. (Akila) v. MJE & Ors* (above) in any way alters the position advanced by Birmingham J. in Ahmed (above). The principle of *audi alteram partem* would apply if the Minister got into his possession private documents or indeed entirely new documents, which radically altered the situation claimed in relation to indiscriminate violence etc, as submitted by the applicant. The document actually referred to by the Minister in his decision is not "new facts, information or documentation not previously examined" but rather is a updating of previous documentation furnished by the applicant. Had the Minister merely examined the applicant's COI information dealing with indiscriminate violence and concluded that there was no basis for indiscriminate violence, then that decision would have been entirely unimpeachable as the COI submitted by the applicant could, and I believe would, have led to the conclusion that apart from the east and parts of the north of the DRC there was equally no basis for any conclusion of indiscriminate violence. What the Minister has in this decision done is gone further and produced up to date versions of the same information which has indicated some improvement in the DRC but is not "new information" that would require in the interests of natural or other justice the applicant to be informed of the documents and required to comment upon them. Accordingly, no issue of want of fair procedure arises in this case.

46. For the above reasons, I am not of the view that the applicant can succeed on any of the points he had made and the application must be dismissed.